

Woodroffe & Ameer Ali's

Law of Evidence

FOURTEENTH EDITION

(In Four Volumes)

Edited and Revised

by

B. R. P. SINGHAL

Addl. Legal Remembrancer

AND

NARAYAN DAS

Dy. Legal Remembrancer

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PREFACE TO THE FOURTEENTH EDITION

We are conscious of the onerous task of revising the monumental work of Woodroffe and Ameer Ali on the Law of Evidence in India. The last edition was published in 1973-74. During the span of 5 years since then, more than 3,000 cases were decided by the various High Courts and the Supreme Court and all these had to be examined and incorporated in this edition. The fact that very few amendments were made in the Evidence Act during the course of more than hundred years, bears testimony to its perfection and simplicity based on commonsense. Whatever scope there was for judicial interpretation seems to have been exhausted. That is why we find that the majority of the new case-law relates to appreciation of evidence in the background of peculiar facts of individual cases. A good number of cases are mere repetition of some principles already enunciated by one court or the other. We have, however noticed all of them, as we consider it our duty to make available to our readers all that has been said on the subject. At the same time, unlike digest makers, the editor of a commentary has to point out the fallacy, if any, in a judicial pronouncement. We have endeavoured to put forward our views with reasons, in such cases.

Errors of omission and commission have been corrected. Obsolescent matter, wherever necessary, has been deleted. Volumes I, II and III will have a thorough and an exhaustive Index separately. Volume IV, will, however contain a comprehensive consolidated Index of all the four volumes. This undoubtedly will facilitate easy and quick reference.

We have sincerely endeavoured to maintain the high standard of erudition, analytical approach and lucid exposition of the law set by the previous editions and as such we would feel amply rewarded if the legal sphere finds it useful.

Republic day, 1979

**BRIJ RAJ PRAKASH SINGHAL
NARAYAN DAS**

PREFACE TO THE THIRTEENTH EDITION

The publication of the Thirteenth Edition of Woodroffe and Ameer Ali : Law of Evidence has, so to speak, coincided with the centenary of that masterpiece of codification, the Indian Evidence Act, 1872 (I of 1872). The occasion also marks the completion of more than sixty years since the monumental work of Woodroffe and Ameer Ali first saw the light of day. Max Beer-bohm said : "Good books and good pictures are monuments which, once made, are always there and may take fresh garlands". In that arbitrary cycle of peaks and troughs into which the reputations of all great writers are propelled immediately after their death, it is gratifying to note that the reputation of Woodroffe and Ameer Ali on the Law of Evidence has always stood at the peak. Every page of Woodroffe and Ameer Ali's work bears witness to the authors' erudition and deep study.

Lord Mansfield said long ago : "The rules of evidence are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life." It is not surprising therefore that time has not sapped the vitality of those Rules.

The great work of Woodroffe and Ameer Ali has been ably served by a succession of learned editors who set their sights high and maintained the excellence and quality of the original. The present editor, in his turn, has tried to tread the same path.

In preparing the Thirteenth Edition, every word in the book has been read and repetitious matter, wherever it occurred, removed. The case-law has been brought up to date. No pains have been spared to correct errors of omission or commission, if any.

The exponential growth of case-law poses a threat to any one writing on a law subject. The multiplication of All India and State Journals with the rapidity of the prophet's gourd has resulted in a flood of cases amid which the writer must stay afloat as best he can. The present editor has valiantly struggled not to leave even one case untouched. A feature of the work is the inclusion of cases from State Journals. Proximity has been avoided and the attempt has been made to dehydrate a tide of cases to a drop of principle. The pages of the book are porcupine-quilled with cases. It may be observed that as in the original, so in the editions, much interesting matter is tucked away in the footnotes for the benefit of the interested and busy reader. A carefully prepared Index is provided at the end to enable the reader quickly to obtain reference on any point engaging his immediate attention. A full Table of Cases has also been appended.

28th February, 1973

E. S. SUBRAHMANYAN

PREFACE TO THE TWELFTH EDITION

Sir James Fitzjames Stephen, the distinguished author of the Indian Evidence Act I of 1872 (hereinafter called the Act), achieved the remarkable feat of condensing a great mass of the principles and rules of evidence into 167 sections. The Act will soon be a century old and during this long period it has not suffered any major legislative bombardment by way of amendment, a tribute to the excellence and thoroughness of the enactment. It is, therefore, just to regard the Act as a classic of consummate draftsmanship. When the distinguished authors, Woodroffe and Ameer Ali, blended their radiances in one beam and produced their monumental work, Law of Evidence, it was hailed by discerning readers as a classic upon a classic, just as Coke on Littleton's Tenures. The work was first published in 1898 and each new edition has endeavoured to maintain the unique qualities of the original. The edition now being issued is the Twelfth.

The general object of Sir James Fitzjames Stephen, the author of the Act, was to produce something from which a student might derive a clear, comprehensive and distinctive knowledge of the subject. Although the Act is, in the main, drawn on the lines of the English Law of Evidence, it is not intended to be a servile copy of it and does in certain respects differ from English Law. The undoubted original character of sections 5-16 dealing with the relevancy of facts goes against judicial dicta to the contrary.

The Act is a complete Code of the Law of Evidence in India. It is regarded as containing the scheme of the law, the principles and the application of these principles to the cases of frequent occurrence in India. It is acknowledged generally with some exceptions that the Act consolidates the English Law of Evidence. In the case of doubt or ambiguity over the interpretations of any of the sections of the Act, it is profitable to look to the relevant English Common Law for ascertaining the true meaning.

Each editor of Woodroffe and Ameer Ali's work has approached his task with the reverence due to a classic. The original plan of the authors is still retained in the Twelfth Edition. Great care has been taken to make it up to date both as to statutory and case-law, Indian and English. Errors of omission or commission have been corrected. Wherever necessary, obsolescent matter has been removed. New passages have been added and old ones re-written to make the work abreast of the law. A thorough and exhaustive index will enable the reader to obtain the reference he needs, quickly.

It is, therefore, hoped that the Twelfth Edition will deserve the approbation of the Bench, the Bar and all readers of the work and maintain its reputation for profound scholarship, penetrating analysis and clear exposition of the law, making it unrivalled in its utility to the practising lawyer as well as the student of the Law of Evidence.

New Year's Day, 1968

J. P. SINGHAL

PREFACE TO THE NINTH EDITION

In the preparation of this Commentary on the Indian Evidence Act the Authors, as they stated in the First Edition of the work in 1899, have striven to meet the wants both of the profession and of students, believing that a work framed merely for the use of one of these classes will prove unsuited to the needs of the other. Much that must be set out for those who have little or no knowledge of the subject, is superfluous to the professional reader; while the close and elaborate detail which the practising lawyer requires, is not only useless, but often a source of confusion, to the beginner. The novel scheme of this work, which is designed to satisfy the wants of both classes of readers, demands a few words of explanation.

A Bibliography of works on the Law of Evidence (the only one, we believe, of its kind) revised to date, is followed by an Introduction on the Act. We have acquired the copyright of the Introduction to the Evidence Act of the late Sir James Fitzjames Stephen and have incorporated it in our own. The critical portion of the latter has been expanded chiefly in two particulars. A full statement has been given of Mr. Whitworth's criticism of Sir J. Stephen's theory of relevancy as embodied in the Act. Some apology may appear needed for the extensive citations we have made. If so, excuse will be found both in the instructive character of the criticism in Mr. Whitworth's pamphlet as also in the fact that it has been out-of-print for many years past. We have also thought it better to give, for the most part, the criticism in the Author's own words rather than, as before, a summary of such criticism of our own.

The Act is divided into three Parts and eleven Chapters. Each Part and Chapter is preceded by an Introduction dealing with its subject-matter. The Introduction prefixed to the Parts or main divisions of the Act are more general in character and broader in treatment than those which precede the chapters, while these again exhibit less detail than is found in the notes appended to the sections. Elementary notions are explained and a general, and sometimes historical, survey of the subject of the sections is given in the several Introductions which also contain references to matters akin to, but not part of, the actual material of the Act. While these Introductions will, as the Authors hope, be of aid to students, the separation of the subject-matter from the commentary to which alone the profession will, in general, refer, should spare the practitioner in search of decisions bearing directly upon the meaning of the sections unnecessary reading. A short paragraph immediately follows each section presenting with all possible brevity the principle upon which it

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is founded and has been enacted. This paragraph is succeeded by a note of cognate sections, which in turn is followed by a collection of references to standard English, American or Indian text-books dealing with the material of the section. The Authors are indebted in part for the idea of this arrangement to Mr. S. L. Phipson's work on the Law of Evidence. Next comes the Commentary proper on the section which elucidates its important words and phrases by the aid of the case-law and text-books.

The work as thus finished departs in many respects from the original and advertised plan of its Authors. At the outset they proposed to write a short Commentary for the use of the profession only and to collect therein the provisions of all other Acts on the Indian Statute-book which touch upon this branch of the law. They, however, realised in the course of their task that though a book so planned might be of assistance to members of the profession practising in the Presidency towns with large libraries available for reference, it would yet be of little use to others in the mofussil. The attempt to serve a wider circle of readers has entailed a large increase in the bulk of the work beyond the limits originally proposed, while the length of time consumed in its preparation in its modified form has prevented the inclusion of that complete collection of provisions of other Acts bearing upon this branch of the law to which allusion has been made. The more important of these provisions (taken from more than a hundred Acts and Regulations) will, however, be found in the Commentary. We have retained and revised the former Appendices relating to the places to which the Act has been applied, the Law Commissioners' Report and Proceedings in Council. But we have omitted the former Appendices on Stamps, Registrations, Oaths and Banker's Books, as separate treatises exist on, at any rate, the first three subjects and it is necessary to make room for added matter in the Ninth Edition of a book already bulky. The Proceedings in Council prior to the passing of the Bill, have, we think, been generally considered useful as they and the Introduction of Sir James F. Stephen, here reprinted, form a complete explanation of the Act by its chief framer and others who approved of, and were responsible for it.

The Authors desire to acknowledge the assistance they have derived from the standard works on the Law of Evidence: published in India, in England, and in America. In special, much aid has been gained from the American text-books, amongst which are perhaps the most valuable and scientific works on this branch of the law. Amongst the text-books laid under contribution we wish particularly to indicate the work of Professor J. H. Wigmore (Treatise on Evidence: An Encyclopaedia of Statutes and cases up to March, 1904, 4 Vols., Canadian Edition, containing English cases, a valuable and exhaustive book written in an original and modern spirit and thus free of what Bentham calls

PREFACE TO THE ELEVENTH EDITION

We have been entrusted with the responsible task of editing the Eleventh Edition of this Indian Classic. In discharging our responsibilities, we have borne in mind three objectives : to preserve intact the scheme and contents which have made this Law of Evidence justly popular; to amplify and supplement those topics which have assumed importance in recent years and come up for consideration in the day-to-day work of our Courts; and to bring the case law up to date.

The illuminating XIV Report of the Law Commission of India has posed problems arising in the Law of Evidence and suggested changes. There can be no doubt that lawyers and Courts and even laymen must acquaint themselves with these highly informative discussions and coming changes. We have therefore incorporated the relevant material wherever appropriate.

Subsequent to the establishment of the Supreme Court, both the Supreme Court and the High Courts in India have expounded various aspects of the Law of Evidence which has assumed importance. Full advantage has been taken of these authoritative expositions by incorporation of these relevant materials in appropriate places. To mention one instance, the monumental judgment of the Allahabad High Court in *Asharfi v. State* (A. I. R. 1961 All. 153) has dealt comprehensively within a convenient compass every problem relating to the law of identification, which has come to assume such a prominent place in the criminal administration of justice. The reproduction of those materials in the very words of the judges has the added advantage of being readily citable, since our Courts insist upon an authority for every proposition advanced.

20th October, 1962

P. N. RAMASWAMI
S. RAJAGOPALAN

PREFACE TO THE TENTH EDITION

The classical work on the Law of Evidence by Woodroffe and Ameer Ali needs no introduction. Even since it was first published it has enjoyed the reputation of being the one authoritative text-book on the Law of Evidence in India. It passed through several editions, the ninth of which was published in 1930. Further editions were not brought out for over quarter of a century. There was thus a void which could not be filled in by other books on the subject. Messrs. Law Book Company naturally deserve all praise for their indefatigable enterprise in this their effort to bring out the Tenth Edition.

The Publishers have entrusted the task to us and we have taken it up in the full consciousness of the difficulties that beset us. On the one hand, in view of the fact that the Treatise had attained to the position of *locus classicus*, having been quoted by the highest judicial tribunals of India and England, it would with much reason, be considered vandalistic to disturb its basic plan and offer, in its name, something different; on the other hand, it was necessary to bring the book up to date in the light of the latest decisions.

We have kept both these aspects in mind and have, therefore, left the views and the expositions of the learned authors intact when they are unaffected by subsequent decisions or legislation, and have merely added the subsequent decisions as additional authorities. But portions that have been affected by later decisions or by legislation have been re-written.

Since the basic principles of the Indian Evidence Act have their root in the English Law, any book on the subject that lays claim to comprehensiveness has necessarily to refer to and discuss English decisions and we have profusely given references to up-to-date English case-law and to standard English Treatises.

The legal profession will find here noticed (and discussed, when needed) all the Indian decisions bearing on the different points of law, and in this respect we have left nothing to be desired. In order to facilitate reference by the busy lawyer, the style of the modern Law Publications has been adopted, and under every section, the topics that arise for treatment have been classified under headings and sub-headings and the same given in a Synopsis at the head of the commentary. In every citation we have taken care to give cross-references to all extant Law Reports, thereby making the book readily useful to all members of the learned profession whatever Law Reports they possess.

In bringing out this Edition we are indebted to the numerous authors that have preceded us, who have been referred to and acknowledged in the appropriate places. We think it proper to specifically refer to "The Hearsay Rule" by R. W. Baker and "Essays on the Law of Evidence" by Zelman Cowen and P. B. Carter, the two recent works from which we have derived great help.

15th March, 1957

B. MALIK

S. S. SASTRY

PREFACE TO THE NINTH EDITION

"grimgribber nonsensical reasons" for the rules of evidence. The Law of Evidence, as it obtains in the courts of the United States, is founded upon the English law and is in nearly every respect identical with the law which prevails in England and in India; and though it is not of binding authority upon Indian Judges, yet the decisions of those Courts are, as Lord Chief Justice Cockburn said in England (*Scaramanga v. Stamp*, L.R. 5 C.P.D., 295, 303), and Sir Lawrence Peel observed in India (*Braddon v. Abbot*, *Tailor and Bell's Reports*, 342, 359, 360; *Malcolm v. Smith*, *ib.*, 283, 288), of great value to a correct determination of questions for which our own or the English law offers no solution. Any unnecessary and therefore excessive citation of this foreign law is to be deprecated (see *Missouri Steamship Co.*, 42 Ch. D., 321, 330, 331). The Indian case-law has been examined and incorporated in the text up to June, 1929. Some cases after that date have been noted in the Addenda. The Appendices have been revised to date and the Bibliography, which, so far as I know, is the only one of its kind, has been both revised and considerably enlarged. A recent helpful work for the practising lawyer is A.S. Osborn's "Problem of Proof." It is instructive in this connection to note how few are the cases of evidence in the English Law Reports of recent years as compared with the past. This circumstance is due to free growing sense of the inutility of many objections to evidence and to a desire to free all judicial enquiry of anything which, without sound and certain justification, may baulk or hinder it. The dictum of the Judicial Committee in *Ameeroonissa Khatoon v. Abedoonissa Khatoon*, 23 W.R. 208, 209, now represents also the views of other English Courts. It may, however, be necessary to add that a proper interpretation and liberal application of the law is not the same thing as the abrogation of it. In order, however, to find grist for the mills of the numerous Indian Journals a considerable number of cases are the subject of report which have not the importance which calls for it. This observation, however, applies to all branches of the law.

I wish to thank Mr. Tapanmohan Chatterji, Barrister-at-Law for help rendered in the preparation of this Ninth Edition, and for the correction of the proofs.

30th September, 1930

J. W.

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THE LAW OF EVIDENCE

Volume I

GENERAL INTRODUCTION

CHAPTER I

PRELIMINARY

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1. Evidence, a branch of adjective law. The substantive law defines the rights, duties and liabilities, the ascertainment of which is the purpose of every judicial proceeding. The Criminal branch of that law is contained in the Indian Penal Code, as also in various special and local laws dealing with the subject. The substantive Civil law of India has not yet been fully codified.¹ Generally speaking, it is to be found in various Acts of the Indian Legislature, in the decisions of the Courts applying principles of English law, and in the personal law of the Hindus and Mussalmans. In cases for which no special provision exists, the Courts are enjoined to act according to rules of equity, justice and good conscience. Adjective law defines the pleading and procedure by which the substantive law is applied in practice. It is the machinery by which that law is set and kept in motion. The rules relating

¹ It has in recent years been almost fully codified.

to pleading and procedure are contained in the Civil and Criminal Procedure Codes. The remaining branch of adjective law, logically defined, is the sufficient reason for assenting to a proposition as true.² Practically considered, it is the establishment of facts in issue (ascertained in each particular case by the pleadings and settlement of issues) by proper legal means to the satisfaction of the Court.³ This is done by the production of evidence, the law relating to which is to all legal practice what logic is to all reasoning, whatever subject it may be concerned about. Accurately speaking, the terms "proof" and "evidence" are distinguished in this: that proof is the effect or result of evidence, while evidence is the medium of proof.⁴ The facts out of which the rights and liabilities arise must be determined correctly. Facts which come in question in Courts of Justice are enquired into and determined in precisely the same way as doubtful or disputed facts are enquired into and determined by men in general, except so far as positive law has interposed with rules to secure impartiality and accuracy of decision or to exclude collateral mischief likely to result from the investigation.⁵ Some portions of the Law of Evidence, such as those which deal with the relevancy of facts, are intimately connected with the whole theory of human knowledge and with logic, as applied to human conduct.⁶ Other rules are of a technical character designed to secure the objects mentioned, or are based on principles of general policy.

2. Meaning of the term "Evidence". The ambiguity of the word "evidence" has given rise to varying definitions. Bentham used it in its broadest sense, when he defined it as "any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact."⁷ It is, however, clear that the term as used in municipal law must have very much more limited meaning. It is manifest that every fact, some having, it may be, but the very slightest bearing on the issue, cannot be adduced. Courts are so organized that there must be some limit to the facts which may be given in evidence, as there must be an end of litigation.⁸ The great bulk, therefore, of the English Law of Evidence consists of negative rules declaring what as the expression runs, "is not evidence."⁹ In its legal and most general acceptance, "evidence" has been defined to include all the means, exclusive of mere argument, by which any alleged matter of fact, the truth of which is submitted to investigation, tends, to be or would be established or disproved to the satisfaction of the Court.¹⁰ According to Wigmore, the term "evidence" represents "any know-

2. Wharton, *Ev.*, s. 1, *Cr. Ev.*, s. 2.

3. Best, *Ev.*, s. 10.

4. Best, *Ev.*, s. 10.

5. *Ib.*, s. 2; Whether all these rules are effective for the purpose for which they were enacted or are necessary is, of course, another question.

6. Steph. *Introd.*, 1, 2. The same learned author (*Dig.* xi) stated that Chief Baron Gilbert's work on the Law of Evidence (1756), the first of the recognised English text-books on the subject, is founded on Locke's *Essay*, much as his own work is founded on Mill's *Logic*.

7. Benth., *Jud. Ev.*, 17.

8. Bur. Jones, *Ev.*, s. 1.

9. Steph. *Introd.*: these rules are closely connected with the institution of trial by jury: see Thayer's *Cases on Evidence*, 4; and Thayer's *Preliminary Treatise on Evidence at the Common Law: Part I, Development of Trial by Jury*, and per Lord Mansfield in the *Berkley Peerage case*, 4 *Camp.*, 1414.

10. Greenleaf, *Ev.*, s. 1, Best, *Ev.*, s. 11, p. 19; Steph. *Introd.*, 7; as to the definition of the word as used in the Act, see Notes to s. 3, post. See also Steph. *Dig.*, Art. 1; Taylor, *Ev.*, s. 1 and the definition given by Prof. Thayer in his *Cases on Evidence*, p. 2.

able fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked."¹¹ According to the concise definition of the California Code "Judicial evidence is the means sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."¹²

Judicial evidence is thus a species of the genus "evidence", and is for the most part nothing more than natural evidence, restrained or modified by rules of positive law.¹³ "A law of evidence, properly constructed would be nothing less than an application of the practical experience acquired in Courts of law to the problem of enquiring into the truth as to controverted questions of fact."¹⁴

3. What the Law of Evidence determines. The law of evidence, which is contained mainly¹⁵ in Act I of 1872, determines how the parties are to convince the Court of the existence of that state of facts which, according to the provisions of the substantive law, would establish the existence of the right or liability which they allege to exist.¹⁶ This law, in so far as it is concerned with what is receivable or not, is founded, in the words of Rolfe, B.¹⁷ "on a compound consideration of what, abstractedly considered, is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps, if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters, which could by possibility affect it, were severally gone into: and enquiries carried on, from month to month, as to the truth of everything connected with it. I do not say how that would be; but such a course is found to be impossible at present."¹⁸ Rules respecting judicial evidence may be generally divided into those relating to the *quid probandum*, or thing to be proved, and those relating to the *modus probandi*, or mode of proving.¹⁹ It has been said that there is but one general rule of evidence, the best that the nature of the case will admit.²⁰ This rule does not require the production of the greatest possible

11. Wigmore, 3rd Ed., Vol. I, p. 3.

12. California Code, s. 1825. See observations on the definitions given in the California Code (which are said to express and typify the judicial sentiment of the American Judiciary) in Rice's General Principles of the Law of Evidence, p. 9.

13. Best, Ev., s. 34, 79.

14. Speech in Council of the Hon. Mr. Stephen, Gazette of India, 18th April, 1871, p. 42 (Extra-Supplement).

15. Other Acts also contain provisions relating to evidence: as to this see s. 2 post.

16. Steph. Introd., 10.

17. In the Attorney-General v. Hitchcock, (1847) 1 Exch. 91, 105.

18. See also R. v. Prabhudas, (1874) 11 B. H. C. R. 91, per West, J.: "One of the objects of a law of evidence, is to restrict the investi-

gations made by Courts within the bounds prescribed by general convenience." As to the utility of the rules, see Best, Ev., s. 35, et seq.; Field, Ev., 13 et seq.; sanctions, Best, Ev., 16, et seq.; securities for insuring veracity and completeness of evidence ib., s. 54, et seq., 100.

19. Best, Ev., s. 111; Mr. Stephen said (18th April, 1871) in his above-mentioned speech: "The main feature of the Bill consists in distinction drawn by it, between the relevancy of facts and the mode of proving relevant facts."

20. Per Lord Hardwicke, in Onychund v. Barker, 1 Atk. 21, 49. See Ramalakshmi v. Shivanantha, (1872) 14 M. I. A., 570, 588; 1A Sup. 1; 12 B. L. R. (P.C.) 396; 17 W. R. (P.C.) 552; 2 Suth. 603; Bodhnarain v. Omrao, (1870) 13 M. I. A.

quantity of evidence, but is framed to prevent the introduction of any evidence which raises the supposition that there is *better* evidence behind, in the possession, or under the control, of the party by which he might prove the same fact. The two chief applications of this principle are as follows :

(a) With regard to the *quid probandum*, the law requires as a condition to the *admissibility* of evidence (either direct or circumstantial) an open and visible connection between the principal and evidentiary facts.²¹ If the belief in the principal fact which is to be ascertained is to be, after all, an inference from other facts, those facts must, at all events, be closely connected with the principal fact in some of certain specific modes.²² This connection must be reasonable and proximate, not conjectural and remote. This, which is the theory of relevancy, is dealt with in the first Part of the Evidence Act.²³ The first question, therefore, which the law of evidence should decide is: what facts are relevant and may be proved?

(b) With regard to the *modus probandi*, the law rejects derivative evidence, such as the so-called "hearsay evidence"²⁴ and exacts original evidence, prescribing that no evidence shall be received which shows, on its face, that it only derives its force from some other which is withheld.²⁵ In other words, the *best evidence* must be given. If a fact is proved by oral evidence, it must be direct, that is to say, things seen must be deposed to by someone who says he saw them with his own eyes: things heard by someone who says he heard them with his own ears,¹ and original documents must be produced or accounted for before any other evidence can be given of their contents.² In addition to the abovementioned rules, English text-writers treat, as a portion of the law of evidence, the rules that the evidence must correspond with the allegations, but it will be sufficient if the substance of the issues be proved. The rights of parties litigating must be determined *secundum allegata et probata*, (according to what is averred and proved). This rule has not been incorporated in the Act, as it is one, strictly speaking, rather of the law of procedure proper than of evidence.³

The law of evidence thus determines :

(a) The relevancy of facts,⁴ or what sort of facts may be proved in order to establish the existence of the right, duty, or liability defined by substantive law.

(b) The proof of facts,⁵ that is, what sort of proof is to be given of those facts.

519, 527: 6 B. L. R. 509 (P.C.): 6 W. R. (P.C.) 1: 2 Sar. 607: 2 Suther 371; Gunga Prasad v. Inderjit, (1875) 23 W. R. 390 (P.C.); Moheema v. Poorno, (1869) 11 W. R. 165, 167; Dinomoyi Devi v. Luchmiput, (1879) 7 I. A. 8: 4 Sar. 112: 6 C. L. R. 101 (P.C.). As to the meaning of the rule, see North, Ev., 69; Best, Ev., pp. 70—73, 87, 88, 91—93, 96, 215, 216, 89, 431, 434, 416, 489, 251, 252; Steph. Introd., 3, 7.

21. Best, Ev., ss. 90, 38.

22. Gazette of India, 18th April, 1871, *supra*.

23. v. post, Introduction to Chap. II.

24. See Steph. Introd., 4, 6; Best Ev., ss. 495, 112.

25. Best, Ev., s. 9: Doe d. Welsh v. Langfield, (1847) 16 M. & W. 497; Doe d. Gilbert v. Ross, (1840) 7 M. & W. 102, 106; Macdonnell v. Evans, 11 C. B. 930, 942.

1. v. ss. 59, 60, post.

2. ss. 59, 61, 64, post.

3. See cases cited in Field Ev., 357—369.

4. Evidence Act, Part I: v. post, s. 3, and Introduction to Chap. II.

5. Evidence Act, Part II: v. post and Introduction to Part II.

(c) The production of proof of relevant facts,⁶ that is, who is to give it and how it is to be given; and the effect of improper admission or rejection of evidence.⁷

4. Sufficiency of evidence distinguished from its competency. The sufficiency of evidence must be distinguished from its competency. By competent evidence is meant that which the very nature of thing to be proved requires as the fit and appropriate proof in the particular case, such as the production of a writing where its contents are the subject of enquiry. By satisfactory, or, as it is also called sufficient, evidence is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind of an ordinary man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests.⁸ The effect of evidence considered from the point of view of the weight which should be attached to it, cannot be regulated by precise rules, as the admissibility of evidence may be.⁹

For these reasons considerations upon the sufficiency of evidence have no place in the Act.

5. Weight of evidence. (a) *General.* The weight of evidence cannot be regulated by precise rules, as the admissibility of evidence may be,¹⁰ it depends on rules of commonsense,¹¹ and the weight of the aggregate of many such pieces of evidence, taken together, is very much greater than the sum of the weight of each such piece of evidence, taken separately.¹² The Draft Bill contained the following section, which though it was not thought necessary to retain it in the Act, must still be borne in mind: "when any fact is hereinafter declared to be relevant it is not intended to indicate in any way the *weight*, if any which the Court shall attach to it, this being a matter solely for the discretion of the Court." So also, the Law Commissioners in the second paragraph of their Draft Bill, said: "Whenever any evidence is said to be admissible, it is not meant that it is to be regarded as conclusive, but only that

6. Evidence Act, Part III: see Introduction to this Part, post.

7. *Supra*, Intro. II (see post).

8. *Greenleaf, Ev.*, s. 2.

9. See *Farquharson v. Dwarkanath*, (1871) 8 B. L. R. 504, 508; 16 W. R. (P. C.) 29; 14 M. I. A. 259; *Lord Advocate v. Blantyre*, (1874) L. R. 4 App. Cas. 770, 792; *R. v. Madhub Giri*, (1874) 21 W. R. Cr. 15, 19; *Townsend v. Strangroom*, 6 Ves. 333, 334; *O'Rourke v. Bolingbroke*, L. R. 2 H. L. 837; *Best, Ev.* s. 81.

10. *Farquharson v. Dwarkanath*, (1871) 8 B. L. R. 504, 508, *Best, Ev.*, s. 81.

11. *Lord Advocate v. Blantyre*, (1874) L. R. 4 App. Cas. 770, 792, per Lord Blackburn: "For weighing evidence and drawing inferences from it there can be no canon.

Each case presents its own peculiarities, and commonsense and shrewdness must be brought to bear upon the facts elicited in every case which a Judge of fact in this country, discharging the functions of a jury in England, has to weigh and decide upon." *R. v. Madhub Giri*, (1874) 21 W. R. Cr. 15, 19. "This convenience", says Lord Eldon in *Townsend v. Strangroom* (6 Ves., 333, 334) "belongs to the administration of justice, that the minds of different men will differ upon the result of the evidence which may lead to different decisions upon the same case." See also remarks of Lord Blackburn in *O'Rourke v. Bolingbroke*, (1877) L. R. 2 App. Cas. 814.

12. *Lord Advocate v. Blantyre*, L. R. (1874) 4 App. Cas. 770, 792.

the weight, if any, which the deciding authority may consider due, shall be allowed to it." In this connection a few dicta of general application may be here cited. When one witness deposes to a certain fact having occurred and another witness, stating that he was present at the same time, denies that any such fact took place, greater weight, other things being equal, is to be attached to the witness alleging the affirmative.¹³

(b) *Affirmative and negative evidence.* "Upon general principles affirmative is better than negative evidence. A person deposing to a fact which he states he saw, must either speak truly, or must have invented his story, or it must be sheer delusion. Not so with respect to negative evidence: a fact may have taken place in the very sight of a person who may not have observed it; and if he did observe may have forgotten it."¹⁴

As a general rule, witnesses should be weighed, not numbered.¹⁵ More weight should be attached to the evidence given of men's acts than of their alleged words which are so easily mistaken or misrepresented.¹⁶ A judge, however, cannot properly weigh evidence, who starts with an assumption of the general bad character of the prisoners.¹⁷

6. Judicial discretion. The Act, in many of its sections, leaves matter dealt with thereby to the discretion of the Court.¹⁸ "Discretion, when applied to a Court of law means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague and fanciful but legal and regular."¹⁹ In using a judicial discretion, the Courts have to bear in mind not only the Statutes, but also the great rules and maxims of the law, such, for example, as those of logic or evidence or public policy. The right discretion is not *scire quid sit justum* but *scire per legem*; as Cook insisted.²⁰

7. The English system. The English system of judicial evidence is comparatively of very modern date.²¹ Its progress is marked by the discarding of those restrictions of scholastic jurisprudence which firstly compelled much that was material to be excluded from the issue and then, when the issue was thus arbitrarily narrowed, shut out much evidence that was relevant, and attached to the evidence received certain arbitrary valuations which the Courts were required to apply.²² The progress has, as in all cases of legal reform,

13. *Prasad v. Dewlut Singh*, 1884, 3 M. L. J. 347, 357, Wilks, Circ. Ev., 290.

14. The passage between inverted commas is per Sir H. James in *Chambers v. The Queen's Proctor*, (1840) 2 Curt. 415, 434; see also *Wilks v. Wilks*, 1871, 1 Curt. 597.

15. See notes to Sec. 134, post.

16. *McL. v. Smith v. Beeby*, 1881, 5 W. R. (P. C.) 26; 1 M. L. J. 19; 1 Suther 46; 1 Sar. 89.

17. *R. v. Kalu Mal*, (1867) 7 W. R. Cr. 103, see further notes to s. 165, post.

18. See ss. 32, 33, 39, 58, 60, 66, 73, 86-88, 90, 114, 118, 135, 136, 142, 148, 150, 151, 154, 156, 159, 162, 164-166.

19. Per Lord Mansfield in *Wilke's case*, 4 Burr. 2539, cited in *Harbuns v. Bhairo*, (1874) 5 C. 259, 265.

20. *R. v. Chagan Daya Ram*, (1890) 14 B. 331, 334, 352, per Jardine, J.; Best, Ev., s. 86.

21. Best, Ev., ss. 109, 110. See Phillimore's *History and Principles of the Law of Evidence* (1850), pp. 122, et seq.

22. *Wharton, Ev.*, s. 5.

been a slow one.²³ But it has been said in England, where the traditional theories still possess some strength, that *artificial rules upon matters of evidence are better avoided as much as possible*²⁴ and that the law now is that, with a few exceptions on the ground of public policy, *all which can throw light on the disputed transaction is admissible*.²⁵ The Evidence Act may be regarded as being itself an application of these principles. "Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances, which under other systems might operate to exclude, are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted.¹ Accordingly, where a Judge is in doubt as to the admissibility of a particular piece of evidence, he should declare in favour of admissibility rather than of non-admissibility.² The principle of exclusion enacted by the fifth section of this Act should not be so applied as to shut out matters which may be essential for the ascertainment of truth.³ The Privy Council in *Ameeroonissa Khatoon v. Abedoonissa Khatoon*,⁴ said: "Objections made with the view of excluding evidence are not received with much favour at this Board." But it must not be assumed either that all technical rules are unnecessary or that all the rules of evidence are technical. It may be safely asserted that the enforcement of most of such technical rules as are contained in this Act is necessary, and that many other rules possess no element of technicality whatever. Thus, as the Judicial Committee has also observed: "It is a cardinal rule of evidence, not one of technicality but of substance, that *where written documents exist, they shall be produced as being the best evidence of their own contents*."⁵ And other instances might be adduced than those covered by what is technically known as "the best evidence" rule. The Act would have been better had it not attempted to define what is Evidence and had limited itself to a declaration of what is not admissible. In that case all that was probative would go in without discussion, unless the objector could show that it was forbidden by the provisions of the Act.

8. History of the Law of Evidence in this country. The history of the law of evidence in this country in ancient Hindu India and Muslim India may now be briefly set out as History is philosophy, teaching by example.

23. See remarks of Lord Coleridge, C. J., in *Blake v. Albion Life Insurance Co.*, (1878) L. R. 4 C. P. D. 109: "In any but an English Court and to the mind of any but an English lawyer the controversy whether this evidence is or is not evidence which a Court of Justice should receive would seem, I think, supremely ridiculous because everyone would say that the evidence was most cogent and material to the plaintiff's claim."

24. Per Wills J. in *Hennessy v. Wright*, (1888) L. R. 21 Q. B. D. 518.

25. Per Lord Coleridge, C. J., in *Blake v. Albion Life Insurance Co.*, (1878) L. R. 4 C. P. D. 109 adding: "Not of course matters of mere pre-judice nor anything open to real moral or sensible objection but all things which fairly throw light on the case."

1. *R. v. Mona*, (1892) 16 B. 661, 667, per Jardine, J., citing Romesh Chunder Mitter and Field, JJ., and see cases cited post.

2. *The Collector of Gorakhpur v. Palakdhar Singh*, (1889) 12 A. 1, 26 (F.B.).

3. *R. v. Abdullah*, (1885) 7 A. 385, 401; (1885) 5 A. W. N. 78. See observations of the Hon. Mr. Maine in moving the reference of the Evidence Bill to Committee: "Anything like a capricious administration of the law of evidence was an evil but it would be an equal, or perhaps even a greater evil that such strict rules of evidence should be enforced as practically to leave the Court without the materials for decision."

4. (1875) 23 W. R. 208, 209 (P.C.).

5. *Dinomoyi Devi v. Luchmiput*, (1879) 7 I. A. 8, 15; 6 C. L. R. 101 (P.C.); 4 Sar. 112.

(a) *In Hindu India.* The source of information for the law of evidence prevailing in Hindu India is the Dharma Shastras, and in this account we shall confine ourselves to the Law of Evidence as it became fully developed in later years. Those desirous of studying fully the subject may usefully consult Radhakumud Mukherjee's "Endowment Lectures on Hindu Judicial System" delivered by Sir S. Varadachariar and published by the Lucknow University, the Tagore Law Lectures, 1950, on Evolution of Ancient Hindu Law, delivered by Dr. N. C. Sen Gupta, and the monumental work of Dr. P. V. Kane's History of Dharma Shastras Vol. III.

It has always been recognised by the Dharma Shastras that the purpose of a trial is the desire to ascertain the truth. They emphasise that a judge by his skill should extricate from a case the decent, as a physician takes out from the body the iron dart by means of surgical instruments. A text of Yagnavalkya declares, "discarding what is fraudulent the king should give decision in accordance with true facts." The early lawgivers recognised from the beginning that a proceeding in a court of law often involved suppression of facts and suggestion of falsehoods. Therefore, Hindu Evidence Law procedure took every possible precaution, consistently with the conditions or knowledge of the time, to secure the discovery of truth.

The *Sastrakartas* often enjoined that even after coming into court the parties may be prevailed on to admit the truth; the court was accordingly asked to make such an attempt, because, according to Mitakshara a decision on evidence may sometimes be wrong. It was only when no agreement was possible that a trial had to proceed. Manus says, the king presiding over the tribunal shall ascertain the truth and determine the correctness of the allegations regarding the subject of the suit, the correctness of the testimonies of the witnesses, the description, time and place of the transaction or incident giving rise to the case as well as the usages of the country and pronounce a true judgment.

Four kinds of proof were generally recognised, namely, (a) Documents (*Lekhya*), (b) Witnesses (*Sakshi*), (c) Possession (*Bhukti*) and (d) Ordeals (*Divya*).

(i) *Documents (Lekhya).* Documentary evidence was classified under three heads; namely, (1) documents which were executed in the king's court by the king's clerk and attested by the hand of the presiding officer (*Rajasaksika*); (2) purely private ones written by anyone but attested in their own hands by witnesses (*Sasaksika*), and (3) documents which were admissible being written entirely in the hands of the party itself (*Akshika*).

In the Hindu Law of Evidence, in the beginning documentary evidence was preferred to oral evidence as in the present day, but the Hindu lawgivers were alive to the weaknesses of the documentary evidence and were fully aware that already forgers were at work. The portions dealing with documentary evidence in Dharma Shastras in later times came to contain elaborate rules, classifying them into public and private, ancient and modern, indicating the relative strength of various kinds of documents and the methods of proving them. The attestation of a document was considered vitiated, if the attestation was by a witness who was guilty of having done evil things, or it was written by a scribe of bad character. So too were documents made by women, children, dependants, lunatics, inebriates, or persons under fear, as well as

documents which were against the usage of the country. A document was said to be admissible, if it was clear and in accordance with law and contained no erasures of letters. The provision made in the Dharma Shastras about examination and proof of questioned or suspected document is strikingly modern. There were rules for testing the genuineness of document by comparison of handwriting, in question, particularly in cases of writers who were dead. The law-givers emphasised the necessity of attestation by witnesses. Some texts according to Sri S. Varadachari seem to refer to some kind of notarial system apparently to safeguard the genuineness of documents. *Benami* deeds were not unknown.

(ii) *Witnesses (Sakshi)*. The adduction of oral evidence was an important feature of the Hindu Law of Evidence. The Dharma Sastras go into great details as to the time at which and the ways in which witnesses are to be examined and how they are to be tested. The law-givers lay down that, in disputed case, the truth shall be established by means of witnesses. But there was a sharp distinction between the adduction of oral evidence, in civil matters and criminal offences. "Ancient Hindu Law" as pointed out by the late Mr. B. Gururaja Rao in his little book-let 'Ancient Hindu Judicature' insisted on high moral qualifications in a witness in civil matters and did not permit any one being picked up from streets or from the court premises and made to depose as is very often done in the modern Indian courts. One common qualification mentioned is that the witnesses should be as many as possible, 'faultless as regards performance of their duties, worthy to be trusted by the court, and free from affection for or hatred against either party.' It was carried to such an extreme limit that witnesses whose credibility alone would, according to modern law, be questioned, were barred as legally incompetent witnesses. The tendency of ancient legislation in all countries was to regulate the competency of witnesses by artificial rules of exclusion, while the trend of modern jurisprudence is to widen the scope of oral testimony, leaving the determination of the credibility to the discretion of the tribunals. The ancient law-givers wisely relaxed these restrictions in the case of witnesses of criminal offences: because they recognised crimes might happen in forests and secluded places and could only be spoken to by witnesses who happened to be there irrespective of their qualifications. The corresponding Latin maxim is, that 'if a murder happens in a brothel only strumpets can be witnesses.' The law-givers therefore state, witnesses should not be so tested in *Sahasra*, *Serisamgrahana* and *Pratyaya*. In order to create an atmosphere for speaking the truth, the whole truth and nothing but the truth by the witnesses, our ancients invested great solemnity to the holding of courts and enjoined that the courts should be decorated with flowers, statues, paintings, idols of Gods. Judges wore distinctive robes and sat on high canesets. The courts were held in the mornings and did not work on full moon and new moon days. Before giving evidence the witnesses had to perform ablutions, make a brief *sankalpa*, face an auspicious direction and then witnesses were exhorted to speak the truth in most solemn appeals to their strongest religious motives. They were ordered to speak the truth on pain of incurring the sin of all degrading crimes.

The method of examining witnesses set out in Manu is insistence on examination in court and in the presence of parties. There are indications, however, that witnesses were also examined on commission. According to

Hindu practice, it was the Judges who put questions to witnesses. They were directed to watch the behaviour of the witnesses and decide upon their reliability. Vishnu states, "a false witness may be known by his altered looks, by his countenance changing colour and by his talk wandering from the subject." Yagnavalkya states "he who shifts from place to place, licks his lips, whose forehead perspires, whose countenance changes colour, who with a dry tongue and stumbling speech talks much and incoherently, who does not heed the speech or sight of another, who bites his lips, who by mental, vocal and bodily acts falls into a sickly state, is considered a tainted person, whether he be a complainant or a witness." But, as Mitakshara shrewdly comments, this is laid down to show the possibility of falsity but not its certainty. The same tests obtain now. But these artificial rules of evidence are substantially governed by Yagnavalkya's general rule: "Having discarded that which has only an appearance of reality, the king should decide in conformity with the nature of things, for even an honest claim, if not properly pleaded, is liable to be defeated by the adverse party merely satisfying the legal formalities" or in other words, as Lord Justice Duparcy says, "we must not overvalue the forms of procedure at the expense of the substance of the right."

Certain rules relating to the examination of witnesses may be referred to. It was open to the opponent to bring to the notice of the court circumstances disqualifying or discrediting a witness. But this was to be done when the witness was giving evidence. Then the Judge would elicit witness's answer to the objections. It has been pointed out by Mr. Kane that witnesses were not permitted to be examined to discredit another witness. In examining witnesses, it was enjoined that the presiding officer of the court should treat them gently and persistently. It is shrewdly remarked that if the witness is harshly treated, he might take fright and thus lose the thread of his narrative and become unable to remember material details and unfold the entire narrative in its logical sequence. Therefore severe penalty was enacted for a Judge, in the Arthashastra who threatens, browbeats or unjustly silences witnesses, or abuses or detains or asks questions which ought not to be asked, or makes unnecessary delay and thus tires parties or helps witnesses by giving them clues. The respectable treatment, says Mr. B. Gururaja Rao,⁶ which seems to have been accorded to witnesses in ancient times, must have been sufficient inducement to call forth disinterested witnesses. It is well admitted by everybody acquainted with the working of the present Indian courts that respectable witnesses try to avoid the witness box, because courts do not pay heed to Sections 146 and 151 of the Indian Evidence Act, which embodies the Hindu principles for examination of witnesses.

(iii) *Possession (Bhukta)*. The law regarding possession was well recognised, and in fact disputes regarding possession must have constituted the bulk of litigation in an agricultural economy, like that in ancient Hindu India. It was recognised under two aspects, namely, evidentiary and prescriptive, possession as evidence of right and title as one mode of proof along with documents and witnesses. (Ch. 20 (iii)) *Lakshnam saksino bhukthi pramanam trividham smritam—(Ch. XI I)*. Dr. Sen Gupta summarises the evolution of ancient Hindu Law, regarding possession in ancient India, at an age beyond the Dharma Shastras, as that just possession constituted the sole title and that the rule of prescription was a subsequent development.

(iv) *Ordeals (Dīva)*. The history of ordeals (*Dīva*) as a mode of proof in India has been summarised by Dr. Sen Gupta as follows:—As documentary and oral evidence rose in importance, and practical rules for testing such evidence were evolved, the use of divine testimony receded to the background; from being an ordinary method of proof at first, it became more and more exceptional, in addition to becoming more humane and practicable. In other words, *Dīva* tended to be limited to more or less exceptional cases of a serious nature where the other normal modes of evidence would not be forthcoming, and instead of ordeals by fire or lethal poison or by drawing of forms of tests which could successfully be undergone without a human life like the ordeal *Khosa*, came to be substituted.

It is not possible to say anything definite as to the existence of a legal profession in ancient India.⁷ But though there were no professional lawyers who took up cases on behalf of clients in the manner of professional lawyers today in India, or even in classical Rome, or the *advocates* of Muslim India, men who had made a study of the law existed in India and the kings, princes and assisted with their opinions in the kings' *Sabha*. We cannot say anything positive, because we have no authentic descriptions of trials except traditions like *Mṛcchakatika* and a mythical trial preserved in a drama, *Śakuntala*, written in the time of Kulotunga II, viz. Sekkilar's *Purāṇa*.

(v) *Conclusion*. To conclude, the Hindu Law of Evidence, as framed by the time of the later Dharma Shastras, a considerable degree of perfection and embodied many modern concepts. The importance of physical or documentary evidence was fully recognised, and documents had come to be classified elaborately into public and private, ancient and modern, and attestation was insisted upon. These law-givers were not unaware of the weaknesses of documentary evidence, and laid down several rules for ascertaining the genuineness of documents. In this connection an interesting rule may be referred to, namely, that when a pre-appointed witness to a transaction was about to go or who was going abroad, he might inform another person of what he knew about the transaction and authorise him to testify to the same if and when occasion arose. But the principal form of evidence remained oral, and our ancients have enacted many wise rules relating thereto. In civil matters impartial witnesses were insisted upon, and after coming to court they were respectably treated and an atmosphere was created for clear, frank, and coherent testimony. The law-givers enjoined that suspicion, malice, and aspirations did not constitute truth and that there must be corroborative evidence for guilt. The burden of proof laid down by the *Śastras* et al. was of a remarkable resemblance to many of our modern concepts. In the civil as well as in criminal cases conclusive proof of guilt was demanded, and the initial burden of proving the offence was cast upon the prosecuting party, though in criminal cases the burden of exculpating himself lay upon the accused. Both witnesses and the accused were protected to this extent by the rules, that a witness should not be compelled to make a statement which might incriminate him, and that in the investigation of criminal cases there was no use of torture to obtain proofs. The modern conception that a negative cannot be expected to be proved found a place in the Hindu Law of Evidence. Similarly, as the term '*Sākshi*' itself connotes, witnesses could only speak to what they had themselves seen or had heard. In their endeavour to find out the truth, witnesses were the object of all

7. See discussion in 19 M. L. J., p. 153, et seq.

and by circumstantial evidence, though admitted, is cautioned against by the wise injunction that appearances might be deceptive. Referring to injury appearing on the body of complainant, Yagnavalkya warns that they might be sometimes self-inflicted. Similarly, Narada laying down rules based on the principle of *res ipsa loquitur*, where no evidence is required, cautions by saying that someone might make a mark upon the body of the complainant or to injure an enemy. In such cases, it is not the appearance of the injury, but the reasoning to ascertain the fact of the offence. In short, the law-givers enjoin that evidence must principally be cogent and not couched.

This brief account is, however, not meant to imply that there were no weak points in Hindu contemporary procedure judged by modern standards. Vite, solemn exhortations to witnesses to speak the truth, it is somewhat disconcerting to find that perjury from a pious motive is extenuated in certain cases. Wherever a death sentence of one of the four classes would result by a declaration of the truth, a falsehood may be spoken, for such falsehood is stated to be preferable to truth. Such witnesses might expiate the guilt by certain penances. This seems to be based upon the extraordinary sanctity attached to human life by the Hindus from the earliest times with the result that even now it is difficult to make respectable witnesses stick to truthful inculpatory evidence in cases involving capital punishment.

The key to the many riddles, which puzzle a reader of ancient Hindu Law constituting imperfections and unreasonableness from our modern standards, is that the social order of the Hindus was founded not upon the comparatively modern democratic principle of equality, but upon the conception of a social hierarchy based upon caste and sanctioned by religion. Though the Hindus attached the greatest importance to the virtues of justice and impartiality, their conceptions were deeply permeated by the notion of inequality among the *varnas* and *sexes*. The only way in which the social fabric might be maintained was by making every individual know his place in the social order and keep it. The *varnas* and ascendency of the higher classes could only be maintained by a differential treatment to the fourth class. Thus, we find distinctions were made both in civil and criminal law between castes and sexes, and the general principle adopted was that rights, duties and liabilities varied with caste or sex, and naturally evidentiary procedure reflected these discriminations.

(b) *Law of Evidence in Muslim India.* (i) *General.* Rules of evidence in Muslim India may next be dealt with. Often there is no true conception especially in the South, of the highly developed Muslim rules of evidence, and prejudice prevails. To promote understanding and cultivate a balanced outlook concerning evidence may now be briefly referred to. These can be gathered from the *Encyclopaedia* on the subject, viz., Sir Abdur Rahim's *Muslim Jurisprudence*, Wahab Husain's *Administration of Justice during the Muslim Rule in India* (University of Calcutta Publication) and M. B. Ahmad, I.C.S. on *Administration of Justice in Medieval India* (Aligarh Historical Research Institute Publication). The *Alqanum* lays great stress on justice. It holds that the creation is founded on justice and that one of the excellent attributes of God is "just". Consequently, the conception of justice in Islam is that the administration of justice is a divine dispensation. Therefore, the rules of evidence are advanced and modern.

The Muhammadan law-givers deal with evidence under the heads of oral and documentary, the former being sub-divided into direct and hearsay. There

was a further classification of evidence in the following order of merit, viz., full corroboration, testimony of a single individual and admission including confession.

Though documents duly executed and books kept in the course of business were accepted as evidence, oral evidence appears to have been preferred to documentary. When documents were produced, courts insisted upon examining the party which produced them.

In regard to oral evidence, the Quran enjoins truthfulness. It says :

"O true believers, observe justice when you appear as witnesses before God and let not hatred towards any induce you to do wrong ; but at justice ; this will approach nearer unto piety, and fear God, for God is fully acquainted with what you do." (Quran 5: 8).

"O you who believe, be maintainers of justice when you bear witness for God's sake, although it be against yourselves, or your parents, or your near relations ; whether the party be rich or poor, for God is most competent to deal with them both, therefore do not follow your low desire in bearing testimony, so that you may swerve from justice, and if you swerve or turn aside, then surely God is aware of what you do." (Quran 4: 135).

Great attention was paid to the demeanour of the parties, and a case is mentioned where a Hindu scribe sued a Moghal soldier for enticing away his wife. The wife denied that the complainant was her husband, but Emperor Shah Jehan, who was hearing the case, observing the demeanour of the wife in the witness-box, was not satisfied with her statement. Therefore, he suddenly ordered her to fill the court inkpot with ink. The woman did the work most dexterously, and the Emperor concluded that she was the wife of the Hindu scribe and granted him a decree.

Witnesses were examined and cross-examined separately out of the hearing of the other witnesses. Leading questions were not allowed on the ground that this would lead to the suspicion that the court was trying to help one party to the prejudice of the other ; but if a witness was frightened or got confused, the judge could put such questions so as to remove the confusion, though they may be leading questions. It was enjoined that these questions should be put in such a manner as not to make the judge liable to the charge of partiality and that he was putting questions in order to get answers to facts which should be proved by the witness. Certain classes of witnesses were held to be incompetent witnesses, viz., very close relatives in favour of their own kith and kin, or of a partner in favour of another partner. Certain classes of men, such as professional singers and mourners, drunkards, gamblers, infants or idiots, or blind persons in matters to be proved by ocular testimony were regarded as unfit for giving evidence.

(a) *Circumstantial evidence* Circumstantial evidence was freely admitted and inferences were allowed to be drawn, if the facts and circumstances led to the proof of a conclusive nature. One of the illustrations given is, that if a person was seen coming out from an unoccupied house in fear and anxiety

with a knife covered with blood in his hand and in the house a dead body was found with its throat cut, these facts could be regarded as proof that the person coming out of the house murdered the person found dead. Muslim jurists preferred evidence described as "full corroboration". They insisted on corroboration of evidence, in criminal cases by the evidence of two men, but in the case of adultery of four men. But the court could accept the evidence of one witness, provided it was convincing and unimpeachable.

(iii) *Admissions and confessions.* Decrees could be given on admission, provided it was unconditional and not made in jest or under coercion. In criminal cases a confession was admissible in evidence, but there are indications that the confession of one co-accused was held to be inconclusive against the other co-accused, though it was admissible. Courts were not bound to accept confessions, and indeed they were enjoined to look for further evidence. In one case Emperor Aurangzeb remanding a complaint directed that the Qazi and the Amin should make a thorough enquiry and not decide the case on a mere admission or denial. If an accused confessed his guilt and then retracted and the case was proved, the sentence was to be less severe.

(iv) *Supplementary details.* This brief account may be concluded with a few supplementary details. Courts had to see that the identification of property and of the accused by witnesses was exact and explicit. Where witnesses differed, the accused was given the benefit of doubt. Evidence could be taken on commission; oaths were administered to witnesses; the Muslims said "By God", the Hindus swore on the cow; and the Christians on the Bible.

(v) *History of the Law of Evidence in India.* A brief history of the law of evidence in India before the passing of the Evidence Act will show the object and necessity for the enactment of a codified law of evidence in this country. Before the introduction of the Indian Evidence Act, there was no systematic treatment on this subject. The English Rules of Evidence were always followed in the courts established by Royal Charter in the Presidency towns of Calcutta, Madras and Bombay. Such of those rules, as were contained in the Common Law and Statute law which prevailed in England before 1726 were introduced in the Presidency towns by the Charter.⁸ Outside the Presidency towns there were no fixed rules of evidence. The law was vague and indefinite and bore an greater authority than the use of custom. The *motassils* were not to be guided by occasional directions and a few rules relating to evidence and procedure contained in the old regulations made between 1793 and 1801. In a Full Bench decision of the Calcutta High Court, *R. v. The regent*,⁹ decided in 1806 Peacock, C. J. held that the English Law of Evidence was not the law of the *motassil* and that the rules of evidence contained in the Hindu and Muhammadan Laws were also not applicable to those courts. The same was held in Bombay in 1809 in *R. v. Rimasani*.¹⁰ Thus, there being no definite and fixed rules of evidence, the administration of the law of evidence in *motassil* was far from satisfactory.

The earliest Act of the Governor General in Council which dealt with evidence strictly speaking was Act X of 1835 which applied to all courts in

8. *Bunwaree v. Het Narain*, 7 M. I. A. 148.

9. 6 W. R. (Cr.) 21.
10. 6 B. H. C. R. 47-49.

British India which dealt with the proof under the Acts of the Governor-General in Council¹¹. Between 1835 and 1853 a series of Acts were passed by the Indian Legislature introducing some reforms for the improvement of the law of evidence. These Acts embodied with some additions many of the reforms which were advocated by Bentham and introduced in England by Lords Brougham and Denman. A few of those English Acts may be noted here¹², which swept away the restrictions as to interested witnesses; Lord Denman's Act¹³ which declared that no witness should be excluded from giving evidence either in person or by deposition by reason 'of incapacity for crime interest',¹⁴ which declared the parties to the proceedings, their wives and all other persons competent as witnesses in the county courts. Lord Brougham's Act of 1851,¹⁵ which declared the parties and the person on whose behalf any suit, action or proceedings may be brought or defended, competent and compellable to give evidence in any court of justice; Lord Brougham's Act of 1853¹⁶ which made the husbands and wives of parties to the record competent and compellable witnesses. Similar reforms were effected by the Acts passed by the Indian Legislature e.g., Act XIX of 1837 abolished incompetency by reason of a conviction for criminal offences; Section 1 of Act IX of 1840 extended the provisions of 3 and 4 Will. IV c. 92; Act VII of 1844 introduced provisions similar to that of 6 and 7 Vic. c. 85 Presidency towns, Act XV of 1852 contained provisions similar to that of 9 and 10 Vic. c. 95 and 4 and 15 Vic. c. 95. By Act XIX of 1853 many of these reforms were extended to Civil Courts of the East India Co. in the Bengal Presidency.

In 1855, Act II of 1855 was passed for further improvement of the law of evidence. This contained many valuable provisions. It was made applicable to all the courts in British India. As to this Act, see *R. v. Gopal Dass*.¹⁷ It did not contain a complete body of rules. The Act reproduced with some additions all the reforms advocated by Bentham and carried out in England by Lords Denman and Brougham. But nearly all these provisions presupposed the existence of that body of law upon which these reforms were engrafted. Still it was authoritatively laid down that the English Law of Evidence was not the law in mofussil.

The following Acts were subsequently passed: Act X of 1855 (attendance of witnesses); Act VIII of 1859 (Civil Procedure containing the present Code, provisions as to witnesses) and Act XXV of 1861 (Criminal Procedure containing provisions as to witnesses, confession, police diaries, examination of accused and civil surgeons, reports of chemical officers and dying declarations, which had been reenacted in the present Act and in the present Code) and Act XV of 1869 (evidence of prisoners).¹⁸

From what has been said above, two conclusions follow, first that the courts of the Presidency towns usually followed English rules of evidence notwithstanding the fact that the entire English Law on the subject was never

11. Whitley Stokes's Anglo-Indian Codes Vol. II, p. 890.

12. 3 and 4 Will. IV, c. 92.

13. 6 and 7 Vic. c. 85 of 1843.

14. 9 and 10 Vic. c. 95.

15. 14 and 15 Vic. c. 95.

16. 16 and 17 Vic. c. 85.

17. 3 M., 271 at 282.

18. See *Ganga Lal v. Faich Lal*, 6 Cal. 171, *Unide v. Pemmasamy*, 7 M. L. A. 128 at 136, *Ajoodya v. Omrao*, (1870) 13 M. L. A. 519; 15 W. R. 1, C. 6 B. L. R. 509; 2 Sar. 607; *Hurrehur v. Majhee*, (1874) 22 W. R. 355 and 356.

declared to be applicable to India by any statute. Only portions of it were, from time to time, introduced by the Acts mentioned above; Act II of 1855 being the most important, and embodying many of the reforms introduced in England. Secondly there were no complete rules of evidence in the mofussil courts except the Acts XIX of 1853 and II of 1855. Some customary laws prevailed in different parts of the country. They were mostly vague and indefinite. The English Law was not the law in mofussil courts except those portions that were introduced by the Acts referred to above. But they were not departed from following the English Law, where they regarded it as the most equitable. This led to laxity of evidentiary procedure in the mofussil.

This unsatisfactory state of the law was commented upon by the judges in the judgments¹⁹. The whole of the Indian Law of Evidence, says Field, might then be divided into three portions, viz., (1) one portion settled by the express enactments of the Legislature; (2) a second portion settled by judicial decisions; and (3) a third unsettled portion and this by far the largest of the three—remains to be incorporated with either of the preceding portion.

Thus, the need was felt for codification of the Law of Evidence in this country. What was needed was the introduction in this country of the English Law of Evidence, which was the outcome and experience and wisdom of age with such modifications as were rendered necessary by the peculiar circumstances of India.

In 1868, the Indian Law Commissioners prepared a draft Bill which was circulated to local governments for opinion. Mr. Maine afterwards Sir Henry Sumner Maine, in introducing the draft Bill said:

"No doubt much evidence is received by the mofussil courts, which the English courts would not strictly regard as admissible. But I would appeal to the members of the Council, who have had more experience of the mofussil than myself, whether the judges of those courts do not as a matter of fact believe that it is their duty to administer the English Law of Evidence as modified by the Evidence Acts. In particular, I am informed that when a case is argued by a barrister before the mofussil judge and when English rules of evidence are pressed on the attention, he does practically accept those rules and admits or rejects evidence according to his construction of them. I cannot help regarding this state of things as eminently unsatisfactory. I entirely agree with the Commissioners that there are parts of the English Law of Evidence which are wholly unsuited to this country. We have heard much of the laxity with which evidence is admitted in the mofussil courts, but the truth is that this laxity is to a considerable extent justifiable. The evil, it appears to me, lies in admitting evidence which under strict rules of admissibility would be rejected than admitting or rejecting evidence without fixed rules to govern admission and rejection. Anything like a capricious administration of law of evidence was an evil, but it would be an equal evil or perhaps even a greater evil, when such strict rules of evidence should be in force as practically to leave the court without materials for a decision."

19. See Whitley Stokes, p. 817.

The Bill did not proceed beyond the first reading. It was pronounced by every legal authority consulted as unsuitable for the wants of the country. Sir James Fitzjames Stephen criticised the Bill as not sufficiently elementary and being incomplete in every respect and that if it became law it would not supersede the necessity under which judicial officers in this country were then placed of acquainting themselves by means of English Handbooks with the English Law upon the subject. There was every room for apprehension that Taylor on Evidence might come to be regarded as a special depository of the Law of India. In his speech on presenting the report of the Select Committee in March, 1872, Sir James emphasised that the Commissioners' draft would be hardly intelligible to a person who did not enter upon the study of it with considerable knowledge of English Law.

Two years later it fell to Sir James Stephen to prepare a new Bill, which was finally passed into law as Act I of 1872. The general object kept in view, says the author of the Act, in framing it, was to produce something from which a student might derive a clear, comprehensive and distinct knowledge of the subject. The second section which made away with all rules not imposed by positive enactment, was the pivotal feature of the Act. It overcame finally the objections of officers of experience like Sir George Campbell, who were inclined to deprecate systematic rules of evidence as theoretical and to coquette with the notion that the best Evidence Act would consist of a sentence abolishing all rules of evidence. The exclusion of evidence not authorised by the Act was insisted upon by the Privy Council in *Lekraj Kuar v. Mehpal Singh*²⁰ and when Mahmud, J. in *R. v. Abdullah*²¹ sought to introduce a refinement that while the principle of the exclusion adopted by the Act was the safest guide yet it should not be so applied as to exclude matters which may be essential for the ascertainment of truth, this dictum was disapproved by the Privy Council in *Maharaja Sri Chandri Nandy v. R. Thakur*.²² By Act I of 1938, a statute law revision measure, Section 2 of the Indian Evidence Act has been repealed. But it is not thought that this has revived or re-introduced any new principle of evidence.²³

Act I of 1872 has been amended by Acts XVIII of 1872, III of 1887, III of 1891, V of 1899, XVIII of 1919, XXXI of 1926, X of 1927, XXXV of 1934, XL of 1949 and III of 1951. It was repealed in part by Acts 44 and 45 Vic. c. 58, X of 1897, XII of 1927 and I of 1938, and repealed in part and amended by Act X of 1914.

The cognate Acts and provisions are reproduced in the Appendices to the Fourth Volume.

The Central Acts from 1841 to 1961 in which provisions relating to evidence are chronologically arranged and the relevant sections themselves will be found set out as an Appendix to the Fourth Volume.

20. 1879 L. R. 7 L. A. 63, 70; 5 C. 741; 6 C. 1. R. 593; 4 S. 93.

21. (1885) L. L. R. 7 All. 385; (1885) 3 A. W. N. 78.

22. A. L. R. 1941 P. C. 16; 1911 J. L. E. 2.

R. 68 L. A. 34; 193 I. C. 220, although their Lordships did not expressly refer to this case.

23. Rt. Hon'ble Sir George Rankin 'Background to Indian Law, p. 115.

It has been said that, with some few exceptions, the Indian Evidence Act was intended to, and did, in fact, consolidate the English law of evidence;¹ that the Act itself is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India;² and that it was drawn up chiefly from 'Taylor on Evidence'. It is true that although the Code is, in the main, drawn on the lines of English law of evidence, there is no reason to suppose that it was intended to be a servile copy of it³ and indeed, as already stated, it does, in certain respects, differ from English law. Moreover, these dicta do not recognise the undoubted original character of Sections (5-16) dealing with the relevancy of facts.

9. Authority of English and American decisions. Although as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions cannot be regarded as binding authorities, they may still serve as valuable guides; though, of course, English authorities upon the meaning of particular words are of little or no assistance when those words are very different from the one to be considered.⁴

Even where a matter has been expressly provided for by the Act, recourse may be had to English or American decisions, if, as is not infrequently the case, the particular provision be of doubtful import owing to the obscurity or incompleteness of the language in which it has been enacted. Authority abounds for the use of the extraneous sources to which reference has been made in cases such as these.⁴ As was observed by Edge, C. J., in *The Collector of Gorakhpur v. Palakdhari Singh*,⁵ "No doubt, cases frequently occur in

24. *Gujju Lal v. Fattch Lal* (1880) 6 C. 171, 188, Per Garth, C. J.

25. *Smith v. Ludha*, (1892) 17 B. 129, 141; Per Bayley, C. J., adopting the words of Sir James Stephen, *Introd., Ev. Act* 2.

1. *Munchershaw v. New Dhurmsey*, (1880) 4 B. 576, 581, Per West, J.; see remarks of Jackson, J., in *R. v. Ashootosh*, (1878) 4 C. 483, 491; Taylor on Ev., referred to in *R. v. Pyari*, 4 C. L. R. 508, 509; *Gujju Lal v. Fattch Lal*, (1880) 6 C. 171, 179; *R. v. Rama Birapa*, (1878) 3 B. 12, 17; *R. v. Fakirappa*, (1890) 15 B. 491, 502; *Framji v. Mohansingh*, (1893) 18 B. 279 and numerous other cases, Mr. Norton, however, at p. iv of the Preface to his Edition of the Act, says that in his opinion "it is a mere figure of speech to assert that the 167 sections of the Act contain all that is applicable in India of the two volumes of "Taylor on Evidence" and that a great mass of the principles and rules which Mr. Taylor's work contains will have to be written back between the lines of the Code.

2. *Ranchoddas v. Bapu*, (1886) 10 B. 439, 442, per Sargent, C. J.; see the

Collector of Gorakhpur v. Palakdhari Singh, (1889) 12 A., 1, 37 (F.B.); *R. v. Abdullah*, (1885) 7 A. 385, 401; (1885) 5 A. W. N. 78; *R. v. Pyari*, 4 C. L. R. 504, 509; *R. v. Ghulei*, (1884) 7 A. 44; English cases irrelevant when Indian Legislature has not followed English law.

4. See *R. v. Vajiram*, (1892) 16 B. 414, 433; and the cases cited, post. (1889) 12 A. 1 at 12 (F.B.) and see also remarks of Straight, J., at pp. 19, 20 *ibid.*; *Framji v. Mohan*, (1893) 18 B. 263, 290 (reference to American case-law); *R. v. Elahi*, 1886 B. 1 R. Sup. Vol. F. B. 439; English American and Scotch Law); *R. v. Chatterdhan Singh*, 5 W. R. (Cr.) 59; (Best, Ev., Gilbert on Ev., Chitty's Criminal Law); *Karva Lal v. Rooha Charan*, 7 W. R. 38 (F.B. Civil Law, Austin Jur. Goodve, Ev.); *R. v. Kalla Chand*, 11 W. R. (Cr.) 21 (Roscoe, Ev.); *R. v. Hedger*, (1852) P. 132 (Starkie on Ev.) and 144 (Paley); *R. v. Budhu*, 1 B. 475; 11 B. H. C. 93 (Russell on Crimes); *R. v. Chagan Daya Ram* (1890) 14 B. 331, 335 (Phillip's Ev.); 581 (Gres-

India in which considerable assistance is derived from the consideration of the law of England and of other countries. In such cases we have to see how far such law was founded on commonsense and on the principles of justice between man and man and may safely afford guidance to us here.' In a Full Bench case of the Allahabad High Court, *Parbhoo v. Emperor*,⁸ a majority of four Judges against three held that, even though a matter has been expressly provided for by the Evidence Act, recourse may be had to English decisions in order to interpret the particular provisions of the Act when they are of doubtful import owing to the obscurity of the language in which they have been enacted. But, since the Indian Evidence Act, 1872, is not an exact reproduction of the English law and the latter has never been codified and judicial decisions may well have developed or expanded some of its principles since 1872, the Federal Court held that caution was necessary in the application of English authorities on the subject in an Indian Court.⁷

10. Act, a Code. It must not, however, be forgotten that the Indian Evidence Act is a Code which not only defines and amends but also consolidates the Law of Evidence, repealing all rules other than those saved by the last portion of its second section.⁸

11. Construction. The method of construction to be adopted in the case of a Code has been expounded by Lord Herschell,⁹ in terms which have been adopted by the Privy Council,¹⁰ and cited and applied in other cases in this country.¹¹

A similar rule had been previously laid down in this country with reference to the construction of this Act. In the case of *R. v. Astoolosh Chuckerbutty*,¹² it was said that instead of assuming the English Law of Evidence, and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the scheme of the law the principles and the application of these principles to the cases of most frequent occurrence but in respect of matters expressly provided for in the Act one must start from the Act and not deal with it as a mere modification of the Law of Evidence prevailing in England. But in the case of *In re Budgett*,¹³ Chitty, J. distinguished the rule indicated by Lord Herschell and observed:

"I have here not to deal with an Act of Parliament codifying the Law, but with an Act, * to amend and consolidate the law and therefore I say, those

ley on Ev.); B. L. R., F.B. Sup. Vol. p. 422; Norton on Ev.; and other cases too numerous to mention. Cf. *Chatterji v. Chatterji*, 10 B.L.R. 101, to be given to American decisions see remarks of Cockburn, L. C. J., in *Scaramanga v. Stamp*, 5 C. P. D., 295, 303.

6. 191; All 402; T. T. R. 1941 All 844; 197 I. C. 525; 1941 A. L. J. 619.

7. *Niharendu Dutt Majumdar v. Emperor*, 1942 F. C. 22; 200 I. C. 289; 44 Bom. L. R. 782; 46 C. W. N. 9.

8. *The Collector of Gorakhpur v. Pankajbhau Singh*, 1886 12 A. L. J. 35 and see notes under s. 2 post.

9. *Bank of England v. Vagliano Brothers*, L. R. (1891) App. Cas. 107 (at pp. 144, 145).

10. *Narinder v. Kamalbasini*, (1896) 23 I. A. 18, 26; 23 Cal. 563, 565; *Gokul Mandar v. Pudmanand Singh*, (1902) 29 I. A. 196 at 202; 29 Cal. 707 (P.C.).

11. *Dighe v. Pancham*, (1892) 17 B. 375, 382; *Damodar v. The Secretary of State*, (1894) 18 M. 88, 91; 4 M. L. J. 205; *Kondayya v. Narasimulu*, (1869) 20 M. 97, 103; *Suraj Prasad v. Golab*, (1901) 28 C. 517.

12. (1878) 4 C. 483, per Jackson, J.

13. 824, 2 C.R. 50 at pp. 561, 562.

14. *Bankruptcy Act*, (1883) 46-47 Vict., c. 52.

observations of Lord Herschell, L. C., in *Bank of England v. Vagliano Bros.*¹⁵ do not apply, and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature."

Similarly in *Secretary of State v. Mask and Co.*,¹⁶ where the question arose as to the construction of Section 188 of the Sea Customs Act, 1878 (now Section 128 of the Customs Act, 1962), which was passed "to consolidate and amend" the law relating to the levy of Sea Customs duties, their Lordships of the Privy Council observed :

"If there were any doubt as to the proper construction of Section 188 of the 1878 Act, it would be legitimate to consider the previous law which it was consolidating and amending."

Questions, however, may arise as regards matters not expressly provided for in the Act. It has been held that the second section¹⁷ in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself,¹⁸ and that a person tendering evidence must show that it is admissible under someone or other of the provisions of this Act.¹⁹ It is to be regretted that the Act was not so framed as to admit other rules of evidence on points not specifically dealt with by it, as was in effect done by the Commissioners in the second section of their Draft. In that case whenever omissions occur (and some do in fact occur) in the Act, recourse might be had to the present or previous law on the point existing in England or the previous rules, if any, in this country.

15. 11 L. R. (1891) App. Cas. 107, 114.

16. 1940 P. C. 105; 67 L. A. 222; 1 L. R. 1940 Mad. 599; 1940 A. W. R. 132; 42 Bom. L. R. 767; 43 C. W. N. 709; 1940, 2 M. L. J. 140; 1940 O. W. N. 679.

17. Repealed by the Repealing Act, 1938 (1 of 1938), section 2 and Sch.

18. *R. v. Abdullah*, (1885) 1 L. R. 7 A. 885, 899; *Muhammad Allahdad Khan v. Muhammad Ismail Khan*, (1886) 10 A. 289, 327; *R. v. Pitamber Jina*, (1876) 2 B. 61, 64 and in next note.

19. *Tekraj v. Mahpal*, 1879, S. C. 744 (P.C.) 7 L. A. 70; *Collector of*

Gorakhpur v. Palakdhar Singh, (1889) 12 A. 1, 12, 19, 20, 34, 35, 43; *Maharaja Sri Chandra Nandy v. Rakhalananda*, 1941 P. C. 19; 1941 L. R. 68 L. A. 31; 193 L. C. 230; *B. N. Kashyap v. Emperor*, 1945 Lah. 23; 1 L. R. 1944 L. 408; 217 L. C. 284; 46 C. L. J. 296 (F.B.) *Though in R. v. Ashootosh*, (1878) 4 C. 483 (F.B.) 491, it was said that where a case arises for which no positive solution can be found in the Act itself recourse may be had to the English rules, if any, on the point,

CHAPTER II²⁰

GENERAL DISTRIBUTION OF THE SUBJECT

SYNOPSIS

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|---|---|
| 1. Technical and general elements of law. | 10. Rules as to best evidence. |
| 2. Relation of Evidence Act to English Law of Evidence. | 11. Ambiguity of the word 'evidence'. |
| 3. English Law of Evidence. | 12. Effects of this ambiguity. |
| 4. Its want of arrangement. | 13. Merits of English Law of Evidence. |
| 5. Difficulties of amending it. | 14. Natural distribution of the subject |
| 6. Fundamental rules of English Law of Evidence. | 15. Illustration. |
| 7. Ambiguity of the rule as to confining evidence to issue. | 16. Relevancy of facts: |
| 8. Ambiguity of the rule excluding hearsay. | (1) Facts in issue. |
| | (2) Relevant facts. |
| | 17. Proof of relevant facts. |
| | 18. Judicial notice. Oral evidence, Documentary evidence. |
| | 19. Production of proof. |

1. Technical and general elements of law. Almost every branch of law is composed of rules of which some are grounded upon practical convenience and the experience of actual litigation, whilst others are closely connected with the constitution of human nature and society. Thus, the criminal law contains many provisions of no general interest, such as those which relate to the various forms in which dishonest persons tamper with or imitate coin; but it also contains provisions, such as those which relate to the effect of madness on responsibility, which depend on several of the most interesting branches of moral and physical learning. This is perhaps more conspicuously true of the law of evidence than of any other branch of the law. Many of its provisions, however useful and necessary, are technical; and the enactments in which they are contained can claim no other merit than those of completeness and perspicuity. The whole subject of documentary evidence is of this nature. Other branches of the subject, such as the relevancy of facts, are intimately connected with the whole theory of human knowledge and with logic, as applied to human conduct. The object of this production is to illustrate these parts of the subject, by stating the theory on which they depend and on which the provisions of the Act proceed. As to more technical matters, the **Act speaks for itself.**

2. Relation of Evidence Act to English Law of Evidence. The Indian Evidence Act is a little more than an attempt to reduce the English Law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.

3. English Law of Evidence. Like almost every other part of English law, the English Law of Evidence was formed by degrees. No part of the law

20. Chapter I to Chapter IV are Sir James Fitzjames Stephen's Introduc-

tion to the Evidence Act.

has been left so entirely to the discretion of successive generations of judges. The Legislature till very recently interfered but little with the matter, and since it began to interfere, it has done so principally by repealing particular rules, such as that which related to the disqualification of witnesses by interest, and that which excluded the testimony of the parties, but it has not attempted to deal with the main principle of the subject.

4. Its want of arrangement. It is natural that a body of law thus formed by degrees and with reference to particular cases should be destitute of arrangement, and in particular that its leading terms should never have been defined by authority; that general rules should have been laid down with reference rather to particular circumstances than to general principles, and it should have been found necessary to qualify them by exceptions inconsistent with the principles on which they proceed.

5. Difficulties of amending it. When this confusion had once been introduced into the subject it was hardly capable of being remedied either by Courts of Law, or by writers of text-books. The Courts of Law could only decide the cases which came before them according to the rules in force. The writers of text-books could only collect the results of such decisions. The Legislature might, no doubt, have remedied the evil, but comprehensive legislation upon abstract questions of law has never yet been attempted by Parliament in any one instance, though it has in several well-known cases been attempted to **with signal success in India.**

6. Fundamental rules of English Law of Evidence. That part of the English Law of Evidence which professes to be founded upon anything in the nature of a theory on the subject may be reduced to the following rules:

- (1) Evidence must be confined to the matters in issue.
- (2) Hearsay evidence is not to be admitted.
- (3) In all cases the best evidence must be given.

Each of these rules is very loosely expressed. The word 'evidence' which is the leading term of each, is undefined and ambiguous.

It sometimes means the words uttered and things exhibited by witnesses before a court of justice. At other times, it means the fact proved to exist by these words or things, and regarded as the groundwork of inferences as to other facts not so proved. Again, it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry.

The word 'issue' is ambiguous. In many cases, it is used with reference to the strict rules of English special pleading, the main object of which is to define, with great accuracy, the precise matter which is affirmed by the one party to a suit, and denied by the other. In other cases it is used as embracing generally the whole subject under inquiry.

Again, the word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person

declines on information given by someone else ; sometimes it is treated as being **nearly synonymous with 'irrelevant'**.

7. **Ambiguity of the rule as to confining evidence to issue.** If the rule that evidence must be confined to the matters in issue were construed strictly, it would require that no facts shall ever depose to any fact, except those facts which themselves are in issue and are proved on the same issue and depend on the same facts. But the rule would obviously not extend to the whole of the evidence, and it would exclude evidence of decisive facts. To quote an example, a man B owes A a promissory note. B denies that he made the note, and A produces from B it which he admits that he made the note and produced to A. The question could not be proved if the rule referred to were strictly construed, since the issue is, whether B made the note, and not whether he admitted having made it.

If the rule is construed as excluding the word 'fact', it is meaning not testimony, but facts, from which any other fact may be inferred. Thus interpreted, the rule of evidence must be confined to matters in issue with this result. No facts are allowed to exist, except facts in issue or facts from which the matters in issue can be inferred. But if the rules are thus interpreted, the rule is so vague as to be of little use for the question naturally arises, what sort of facts may the existence of other facts be inferred from. The law of England gives no explicit answer at all though it has been discussed in answer to facts of it may be inferred from some of the exceptions to the rules which exclude hearsay.

It is a rule of evidence from which it may be inferred that evidence may be given of facts from which another fact may be inferred, although the fact from which the inference to be founded is a crime, and although the fact from which the inference is also a crime for which the person against whom the evidence is to be given is on his trial.

The rule of evidence to the question 'what facts are relevant' which is the most important of all the questions that can be asked about the law of evidence, has thus to be interpreted as to the extent to which it extends, together with the various exceptions to it, and it is not even given.

8. **Ambiguity of the word 'hearsay'.** The word 'hearsay' is used in many different senses, and it is sometimes treated as the true meaning of the word 'hearsay' in an affirmative manner, its meaning is to be inferred from the context, and these exceptions of which there are a number as to what it can imply at least three different meanings of the word 'hearsay'.

Thus, it is a rule that evidence may be given of statements which are not in issue, and which are not in issue. As no rule of evidence is a rule of evidence, but as the rule is a rule, it makes that hearsay means that a man is heard to say, and this is the meaning of hearsay, and it includes it would mean that 'No witness shall ever be allowed to depose any thing which he has heard said by any one else.' The result of this would be

that no verbal contract could ever be proved, and that no one could ever be convicted of using threats with intent to extort money, or of defamation by words spoken, except in virtue of exceptions which stultify the rule.

Most of the exceptions indicate that the meaning of the word 'hearsay' is that which a person reports on the information of someone else, and not upon the evidence of his own senses. This, with certain exceptions, is no doubt a valuable rule, but it is not the natural meaning of the words 'hearsay is no evidence' and it is in practice almost impossible to divest words of their natural meaning.

The rule that documents which support ancient possession may be admitted as between persons who are not parties to them is treated as an exception to the rule excluding hearsay. This implies that the word 'hearsay' is nearly if not quite equivalent to the word 'irrelevant'. But the English law contains nothing which approaches to a definition of relevancy.

9. Rules as to best evidence. The rule which requires that the best evidence of which a fact is susceptible should be given, is the most distinct of the three rules referred to above, and it is certainly one of the most useful. It is simply an amplification of the obvious maxim that if a man wishes to know all that he can know about a matter his own senses are to him the highest possible authority. If a hundred witnesses of unimpeachable character were all to swear to the contents of a sealed letter, and if the person who heard them swear opened the letter and found that its contents were different, he would conclude, without the intervention of any conscious process of reasoning at all, that they had sworn what was not true.

10. Ambiguity of the word 'evidence'. The ambiguity of the word 'evidence' is the cause of a great deal of obscurity apart from that which it gives to the rules above mentioned. In scientific inquiries, and for popular and general purposes, it is no doubt convenient to have one word which includes—

- (1) the testimony on which a given fact is believed,
- (2) the facts so believed, and
- (3) the arguments founded upon them.

For instance, in the title of "Paley's Evidences of Christianity," the word is used in this sense. The nature of the work was not such as to give much importance to the distinction which the word overlooks. So, in scientific inquiries, it is seldom necessary to lay stress upon the difference between the testimony on which a fact is believed, and the fact itself. In judicial inquiries, however, the distinction between the relevancy of facts and the mode of proving them is most important, and the neglect to observe it has thrown the whole subject into confusion by causing English lawyers to overlook the leading distinction which ought to form the principle on which the whole law should be classified.

11. Effects of this ambiguity. The use of the one name 'evidence' for the fact to be proved, and the means by which it is to be proved, 'has given a double meaning to every phrase in which the word occurs.' Thus,

for instance, the phrase 'primary evidence' sometimes means a relevant fact, and sometimes the original of a document as opposed to a copy. 'Circumstantial evidence' is opposed to 'direct evidence.' But 'circumstantial evidence' usually means a fact, from which some other fact is inferred, whereas 'direct evidence' means testimony given by a man as to what he has himself perceived by his own senses. It would thus be correct to say that circumstantial evidence must be proved by direct evidence—a clumsy mode of expression which is in itself a mark of confusion of thought. The evil, however, goes beyond mere clumsiness of expression. People have naturally enough supposed that circumstantial and direct evidence admit of being contrasted in respect of their cogency, and that different canons can be laid down, as to the conditions which they ought to satisfy before the Court is convinced by them. This confuses the theory of proof, and is an error due entirely to the ambiguity of the word 'evidence'.

12. Merits of English Law of Evidence. It would be a mistake to infer from the unsystematic character and absence of arrangement which belongs to the English Law of Evidence that the substance of the law itself is bad. On the contrary, it possesses, in the highest degree, the characteristic merits of English case law. English case law, as it is, is what it ought to be, and might be, if it were properly arranged: what the ordinary conversation of very clever man on all sorts of subjects written down as he uttered it, and as passing circumstances furnished him with a text would be to the matured and systematic statement of his deliberate opinions. It is full of the most vigorous sense, and is the result of great sagacity applied to past and varied experience.

13. Natural distribution of the subject. The manner in which the law of evidence is related to the general theories which give it its interest, can be understood only by reference to the natural distribution of the subject, which appears to be as follows:

- (1) All rights and liabilities are dependent upon and arise out of facts.
- (2) Every judicial proceeding whatever has, for its purpose, to ascertain some right or liability. If the proceeding is criminal, the object is to ascertain the liability to punishment of the person accused. If the proceeding is civil, the object is to ascertain some right of property or of status, or the right of one party, and the liability of the other, to some form of relief.

In order to effect this result, provision must be made by law for the following objects: First, the legal effect of particular classes of facts in establishing rights and liabilities must be determined. This is the province of what has been called substantive law. Secondly, a course of procedure must be laid down by which persons interested may apply the substantive law to particular cases.

The law of procedure includes, amongst others, two main branches:

- (1) the law of pleading which determines what in particular cases are the questions in dispute between the parties, and
- (2) the law of evidence, which determines how the parties are to convince the Court of the existence of that state of facts which, according

to the provisions of substantive law, would establish the existence of the right or liability which they allege to exist.

14. Illustration. The following is a simple illustration: A sues B on a bond for Rs. 1,000. B says that the execution of the bond was procured by coercion.

The substantive law is that a bond executed under coercion cannot be enforced.

The law of procedure lays down the method according to which A is to establish his right to the payment of the sum secured by the bond. One of its provisions determines the manner in which the question between the parties is to be stated. The question stated under that provision is whether the execution of the bond was procured by coercion.

The law of evidence determines—

- (1) What sort of facts may be proved in order to establish the existence of that which is defined by the substantive law as coercion?
- (2) What sort of proof is to be given of those facts?
- (3) Who is to give it?
- (4) How it is to be given?

Thus, before the law of evidence can be understood or applied to any particular case, it is necessary to know so much of the substantive law as determines what, under given state of facts, would be the rights of the parties, and so much of the law of procedure as is sufficient to determine what question it is open to them to raise in the particular proceeding.

Thus, in general terms, the law of evidence consists of provision upon the following subjects:

- (1) The relevancy of facts.
- (2) The proof of facts.
- (3) The production of proof of relevant facts.

The foregoing observations show that this account of the matter is exhaustive. For, if we assume that a fact is known to be relevant, and that its existence is duly proved, the Court is in a position to go to say how it affects the existence, nature, or extent of the right or liability, the ascertainment of which is the ultimate object of the enquiry, and this is all that Court has to do.

The matter must, however, be carried further. The three general heads may be distributed more particularly.

15. Relevancy of facts. Facts may be related to rights and liabilities in one of two ways:

(1) *Facts in issue.* They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B, there arises, of necessity, the inference that A is,

by the Law of England, the heir-at-law of B, and that he has such rights as that status involves. From the fact that A caused the death of B under certain circumstances, and with a certain intention or knowledge, there arises, of necessity the inference that A murdered B and is liable to the punishment **provided by law for murder.**

Facts thus related to a proceeding may be called facts in issue, unless their **existence is undisputed.**

(2) *Relevant facts.* Facts, which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue, and be used as the foundation of inferences respecting them; such facts are described in the Evidence Act as relevant facts.

All the facts with which it can, in any event, be necessary for Courts of Justice to concern themselves are included in these two classes.

The first great question, therefore, which the law of evidence should decide is, what facts are relevant. The answer to this question is to be learnt from the general theory of judicial evidence.

What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, civil or criminal.

16. Proof of relevant facts. Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist; and it is obvious that the belief of the Court in existence of a given fact ought to proceed upon grounds, altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. Thus, for instance, the question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by B. It may supply proof of an *alibi* in favour of A. It may be an admission or a confession of crime; but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means. If the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the **fact to the proceeding.**

17. Judicial notice. Oral evidence. Documentary evidence. Some facts are too notorious to require any proof at all, and of these the Court will take judicial notice; but, if a fact does require proof, the instrument by which the Court must be convinced of it is evidence; which means the actual words uttered, or documents, or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents. Evidence, in this sense of the word, must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done, but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that, in many cases, the existence of the latter

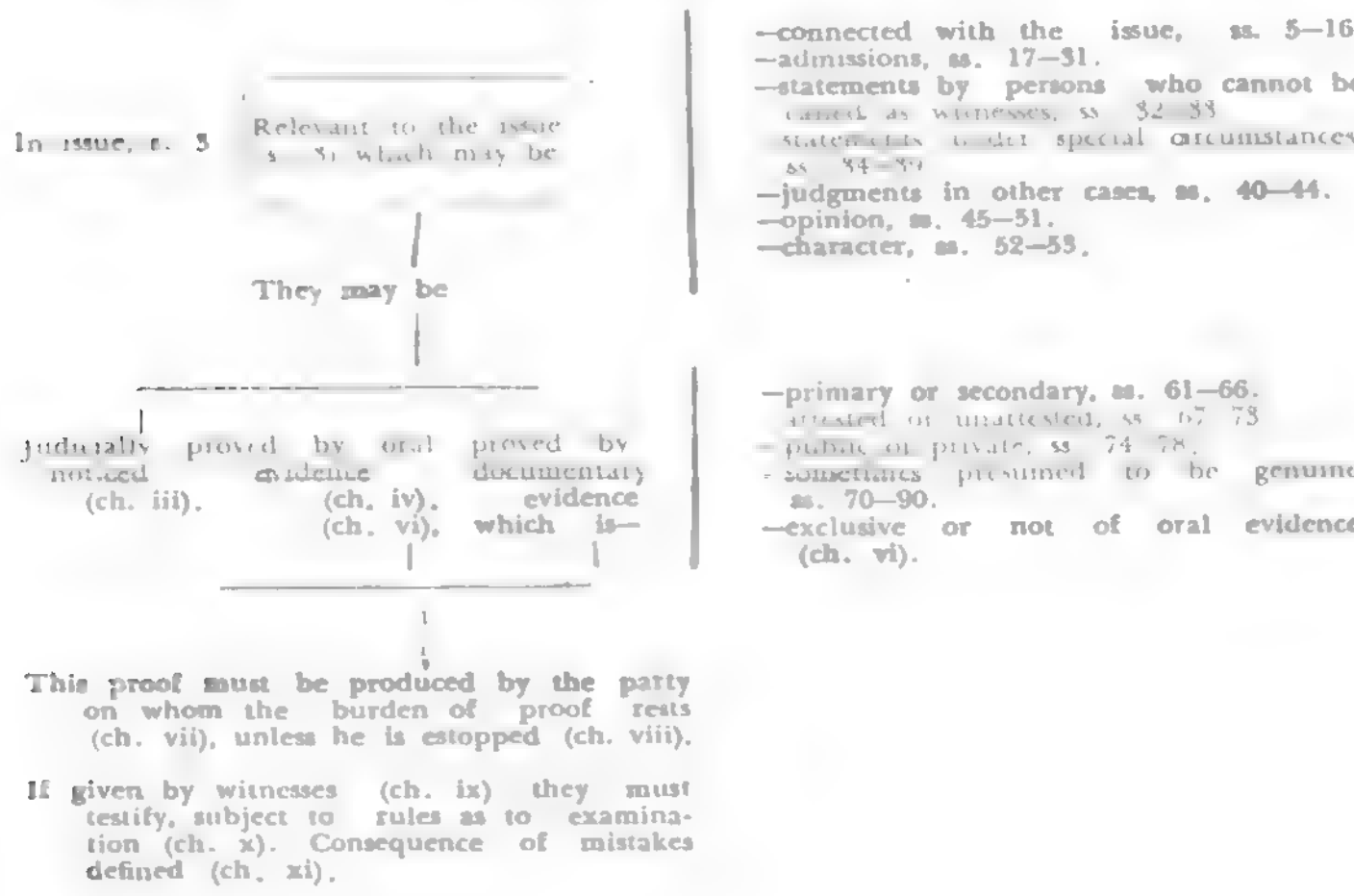
excludes the employment of the former ; but the condition of material things, other than documents, is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence.

It may be said that in strictness all evidence is oral, as documents or other material things must be identified by oral evidence before the Court can take notice of them. It is unnecessary to discuss the justice of this criticism, as the phrase 'documentary evidence' is not ambiguous, and is convenient and in common use. The only reason for avoiding the use of word 'evidence' in the general sense in which most writers use it, is that it leads, in practice, to confusion, as has been already pointed out.

18. Production of proof. This includes the subject of the burden of proof : the rules upon which to answer the question, by whom is proof to be given ; the subject of witnesses : the rules upon which to answer the question who is to give evidence and under what conditions ; the subject of the examination of witnesses : the rules upon which to answer the question : how are the witnesses to be examined, and how is their evidence to be tested : and lastly, the effect upon the subsequent proceedings of mistakes in the reception and rejection of evidence, may be included under this head.

The following tabular scheme of the subject may be of assistance to the reader. The figures refer to the sections of the Act which treat of the matter referred to :

The object of legal proceedings is the determination of rights and liabilities which depend on facts (s. 5).



CHAPTER III

A Statement of the Principles of Induction and Deduction, and a Comparison of their Application to Scientific and Judicial Inquiries.

SYNOPSIS

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| <p>1. General.</p> <p>2. Mr. Huxley on physical science and judicial inquiries.</p> <p>2A. Application of his remarks to Law of Evidence.</p> <p>3. General object of evidence.</p> <p>4. Facts.</p> <p>5. External facts.</p> <p>6. Internal facts.</p> <p>7. Definition of facts in Evidence Act.</p> <p>8. Propositions.</p> <p>9. Illustrations.</p> <p>10. True propositions.</p> <p>11. How true propositions are to be framed.</p> <p>12. Facts must be correctly observed and properly recorded.</p> <p>13. Mr. Mill's theory of logic: a fixed order prevails in the world.</p> <p>14. Induction and deduction.</p> <p>15. Mere observation of facts insufficient.</p> <p>16. Proceeding of induction.</p> <p>17. Methods of agreement and difference.</p> <p>18. Difficulties—Several causes producing the same effect—results as to method of agreement.</p> <p>19. Weakness of the method of agreement—how cured.</p> <p>20. Intermixture of effects and interference of causes with each other.</p> <p>21. Deductive method.</p> <p>22. Illustration.</p> <p>23. Judicial and scientific enquiries compared—resemblances.</p> <p>24. Differences.</p> <p>25. First difference as to amount of evidence.</p> <p>26. In scientific inquiries unlimited.</p> <p>27. In judicial inquiries limited.</p> <p>28. It cannot be increased.</p> <p>29. Object of scientific inquiries.</p> <p>30. Object of judicial inquiries.</p> <p>31. Evidence in scientific inquiries trustworthy.</p> <p>32. Evidence in judicial inquiries less trustworthy.</p> <p>33. Advantages of judicial over scientific inquiries.</p> <p>34. Maxims more easily appreciated.</p> <p>35. Their limitations easily perceived.</p> | <p>36. Judicial problems are simpler than scientific problems.</p> <p>37. Illustrations.</p> <p>38. In judicial inquiries parties interested have opportunities to be heard.</p> <p>39. Summary of results.</p> <p>40. Judicial inquiries usually produce only a very high degree of probability.</p> <p>41. Degrees of probability—moral certainty.</p> <p>42. Moral certainty is a question of prudence.</p> <p>43. Principle of estimating probabilities is that of Mr. Mill's methods of difference.</p> <p>44. Illustration.</p> <p>45. Judicial inquiries involve two classes of inferences.</p> <p>46. Direct and circumstantial evidence.</p> <p>47. Illustration.</p> <p>48. Identity of this process with Mr. Mill's theory.</p> <p>49. Inference from assertion to matter asserted.</p> <p>50. Its difficulties.</p> <p>51. Cannot be affected by rules of evidence.</p> <p>52. Grounds for believing and disbelieving a witness:</p> <p style="padding-left: 20px;">(a) Power.</p> <p style="padding-left: 20px;">(b) Will.</p> <p style="padding-left: 20px;">(c) Probability of statement.</p> <p>53. Experience is the only guide on the subject.</p> <p>54. Illustration.</p> <p>55. Inference from facts proved to facts not otherwise proved.</p> <p>56. Inference from assertion to truth sometimes really easy.</p> <p>57. Such inference comparatively easy.</p> <p>58. Facts must fulfil test of Method of Difference.</p> <p>59. Converging probabilities.</p> <p>60. Illustration.</p> <p>61. Rules as to <i>corpus delicti</i>.</p> <p>62. Illustrations.</p> <p>63. Existence of <i>corpus delicti</i> sometimes wrongly inferred.</p> <p>64. Summary of conclusions.</p> |
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1. General. The general analysis given in the last chapter of the subjects to which the law of evidence must relate, sufficiently explains the general arrangement of the Indian Evidence Act. To understand the substance of the Act, it is necessary to have some acquaintance with the general theory of judicial evidence. The object of the present chapter is to explain this theory and to compare its application to physical science with its application to judicial inquiries.

2. Mr. Huxley on physical science and judicial inquiries. Mr. Huxley remarks in one of his latest works 'The vast results obtained by science are won by no physical faculties, by no mental processes, other than those which are practised by everyone of us in the humblest and meanest affairs of life. A detective policeman discovers a burglar from the marks made by his shoe, by a mental process identical with that by which Cuvier restored the extinct animals of Montmartree from fragments of their bones; nor does that process of induction and deduction, by which a lady finding a stain of a particular kind upon her dress, concludes that somebody has upset the inkstand thereon, differ in any way from that by which Adams and Leverrier discovered a new planet. The man of science, in fact, simply uses, with scrupulous exactness, the methods which we all habitually and at every moment use carelessly."²¹

2A. Application of his remarks to Law of Evidence. These observations are capable of an inverse application. If we wish to apply the methods in question to the investigation of matters of every day occurrence, with a greater degree of exactness than is commonly needed, it is necessary to know something of the theory on which they rest. This is specially important when, as in judicial proceedings, it is necessary to impose conditions by positive law upon such investigations. On the other hand, when such conditions have been imposed, it is difficult to understand their importance or their true significance, unless the theory on which they are based is understood. It appears necessary for these reasons to enter, to a certain extent, upon the general subject of the investigation of the truth as to matters of fact, before attempting to explain and discuss that particular branch of it which relates to judicial proceedings.

3. General object of evidence. First, then, what is the general problem of science? It is to discover, collect and arrange true propositions about facts. Since as the phrase appears it is necessary to enter upon some illustration of its terms, namely,

- (1) facts,
- (2) propositions,
- (3) the truth of propositions.

4. Facts. First, then, what are facts? During the whole of our waking life we are in a state of perception. Indeed, consciousness and perception are two names for one thing, according as we regard it from the passive

or active point of view. We are conscious of everything that we perceive, and we perceive whatever we are conscious of. Moreover, our perceptions are distinct from each other, some both in space and time, as is the case with all our perceptions of the external world; others, in time only, as is the case with our perceptions of the thoughts and feelings of our own minds.

5. External facts. Whatever may be the objects of our perceptions, they make up collectively the whole sum of our thoughts and feelings. They constitute, in short, the world with which we are acquainted, for without entering upon the question of the existence of the external world, it may be asserted with confidence that our knowledge of it is composed, first, of our perceptions; and, secondly, of the inferences which we draw from them as to what we should perceive if we were favourably situated for that purpose. The human body supplies an illustration of this. No one doubts that his own body is composed not only of the external organs which he perceives by his senses, but of numerous internal organs, most of which it is highly improbable that either he or any one else will ever see or touch, and some of which he never can, from the nature of things, see or touch as long as he lives. When he affirms the existence of these organs, say the brain or the heart, what he means is that he is led to believe from what he has been told by other persons about human bodies, or observed himself in other human bodies, that if his skull and chest were laid open, those organs would be perceived by the senses of persons who might direct their senses towards them.

6. Internal facts. There is another class of perceptions, transient in their duration, and not perceived by the five best marked senses, which are nevertheless distinctly perceptible and of the utmost importance. These are thoughts and feelings, love, hatred, anger, intention, will, wish, knowledge, opinion, are all perceived by the person who feels them. When it is affirmed that a man is angry, that he intends to sell an estate, that he knows the meaning of a word, that he struck a blow voluntarily and not by accident, each proposition relates to a matter capable of being as directly perceived as a noise or flash of light. The only difference between the two classes of propositions is this: When it is affirmed that a man has a given intention, the matter affirmed is one which he, and he only, can perceive; when it is affirmed that a man is sitting or standing the matter affirmed is one which may be perceived not only by the man himself, but by any other person able to see, and favourably situated for the purpose. But the circumstances that either event is regarded as being, or as having been capable of being, perceived by someone or other, is what we mean, and all that we mean, when, we say that it exists or existed, or when we denote the same thing by calling it a fact. The word 'fact' is sometimes opposed to theory, sometimes to opinion, sometimes to feeling, but all these modes of using it are more or less rhetorical. When it is used with any degree of accuracy, it implies something which exists, and it is as difficult to attach any meaning to the assertion that a thing exists which neither is, nor under any conceivable circumstances could be, perceived by any sentient being as to attach any meaning to the assertion that anything which can be so perceived does not, or at the time of perception did not, exist.

7. Definition of facts in Evidence Act. It is with reference to this that the word 'fact' is defined in the Evidence Act (Section 3) as meaning and including—

- (1) Anything, state of things, or relation of things capable of being perceived by the senses; and
- (2) Any mental condition of which any person is conscious.

It is important to remember with respect to facts, that as all thought and language contain a certain element of generality, it is always possible to describe the same facts with greater or less minuteness, and to decompose every fact with which we are concerned into a number of subordinate facts. Thus we might speak of the presence of several persons in a room at one time as a fact, but if the fact were doubted or if other circumstances rendered it desirable, their respective positions, their occupations, the position of the furniture and many other particulars might have to be specified.

8. Propositions. Such being the nature of facts, what is the meaning of a proposition? A proposition is a collection of words so related as to raise in the minds of those who understand them a corresponding group of images or thoughts.

The characteristic by which words are distinguished from other sounds is their power of producing corresponding thoughts or images: I say thoughts or images, because though most words raise what may be intelligibly called images in the mind, this is true principally of those which relate to visible objects. Such words as 'hard', 'soft', 'taste', 'smell', call up sufficiently definite thoughts, but they can hardly be described as images, and the same is still more true of words which qualify others, like 'although,' 'whereas' and other adverbs, prepositions and conjunctions.

9. Illustrations. The statement that a proposition, in order to be entitled to the name, must raise in the mind a distinct group of thoughts or images, may be explained by two illustrations. The words 'that horse is niger' form a proposition to every one who knows that niger means black, but to no one else. The words 'I see a sound' form a proposition to no one unless some signification is attached to the word 'sound' (for instance, an arm of the sea), which would make the words intelligible.

10. True propositions. Such being a proposition, what is true proposition? A true proposition is one which excites in the mind, thoughts or images, corresponding to those which would be excited in the mind of a person so situated as to be able to perceive the facts to which the proposition relates. The words 'a man is riding down the road on a white horse' form a proposition because they raise in the mind a distinct group of images. The proposition is true, if all persons favourably situated for purposes of observation did actually perceive a corresponding group of facts.

11. How true propositions are to be framed. The next question is: How are we to proceed in order to ascertain whether any given proposition about facts is true, and in order to frame true propositions about facts? This, as already observed, is the general problem of science which is only another name for knowledge so arranged as to be easily understood and remembered.

12. Facts must be correctly observed and properly recorded. The facts, in the first place, must be correctly observed. The observations made must, in the next place, be recorded in apt language, and each of these operations is one of far greater delicacy and difficulty than is usually supposed; for it is almost impossible to discriminate between observation and inference, or to make language a bare record of our perceptions instead of being a running commentary upon them. To go into these and some kindred points would

extend this inquiry beyond all reasonable bounds, and I accordingly pass them over with this slight reference to their existence. Assuming then the existence of observation and language sufficiently correct for common purposes, how are they to be applied to inquiries into matters of fact?

13. Mr. Mill's theory of logic: a fixed order prevails in the world.

An answer to these questions, sufficient for the present purpose, will be supplied by giving a short account of what is said on the subject by Mr. Mill in his treatise on logic. The substance of that part of it which bears upon the present subject is as follows: The first great lesson learnt from the observation of the world in which we live, is that a fixed order prevails amongst the various facts of which it is composed. Under given conditions, fire always burns wood, lead always sinks in water, day always follows night and night day, and so on. By degrees we are able to learn what the conditions are under which these and other such events happen. We learnt, for instance, that the presence of a certain quantity of air is a condition of combustion, that the presence of the force of gravitation, the absence of any equal or great force acting in an opposite direction, and the maintenance by the water of its properties as a fluid are conditions necessary to the sinking of lead in water, that the maintenance by the heavenly bodies of their respective positions, and the persistency of the various forces by which their paths are determined are the conditions under which day and night succeed each other.

14. Induction and deduction. The great problem is to find out what particular antecedents and consequents are thus connected together, and what are the conditions of their connection? For this purpose two processes are employed, namely, induction and deduction. Deduction assumes and rests upon previous inductions, and derives a great part at least of its value from the means which affords of carrying on the process of thought from the point at which induction stops. The questions What is the ultimate foundation of induction? Why are we justified in believing that all men will die because we have reason to believe that all men hitherto have died? Or that every particle of matter whatever will continue to attract every other particle of matter with a force bearing a certain fixed proportion to its mass and its distance, because other particles of matter have hitherto been observed to do so are questions which lie beyond the limits of the present inquiry. For practical purposes, it is enough to assume that such inferences are valid, and will be found by experience to yield true results in the shape of general propositions from which we can argue downwards to particular cases according to the rules of verbal logic.

15. Mere observation of facts insufficient. The general propositions, however, cannot be executed directly from the observation of nature or of human conduct, as every fact which we can observe, however apparently simple, is in reality so intricate that it would give us little or no information unless it were connected with and checked by other facts. What, for instance, can appear more natural and simple than the following facts? A tree is cut down. It falls to the ground. Several birds which were perched upon it fly away. Its fall raises a cloud of dust which is dispersed by the wind and splashes up some of the water in a pond. Natural and simple as this seems, it raises the following questions at least. Why did the tree fall at all? The tree falling, why did not the birds fall too, and how came they to fly away? What became of the

dust, and why did it disappear in the air, whereas the water fell back into the pond from which it was splashed? To see in all these facts so many illustrations of the rules by which we can calculate the force of gravity, and the action of fluids on bodies immersed in them, is the problem of science in general, and of induction and deduction in particular.

16. Proceeding of induction. Generally speaking, this problem is solved by comparing together different groups of facts resembling each other in some particulars, and differing in others and the different inductive methods described by Mr. Mill are in reality no more than rules for arranging these comparisons. The methods which he enumerates are five,²² but the last three are little more than special applications of the other two—the method of agreement and the method of difference. Indeed the method of agreement is inconclusive, unless it is applied upon such a scale as to make it equivalent to the method of difference.

The nature of these methods is as follows:

All events may be regarded as effects of antecedent causes

17. Methods of agreement and difference. Every effect is preceded by a group of events, one or more of which are its true cause or causes, and all of which are possible causes.

The problem is to discriminate between the possible and the true causes.

If whenever the effect occurs one possible cause occurs, the other possible causes varying, the possible cause which is constant is probably the true cause and the strength of this probability is measured by the persistency with which the one possible cause recurs, and the extent to which the other possible causes vary. Arguments founded on such a state of things are arguments on the **method of agreement.**

If the effect occurs when a particular set of possible causes precedes its occurrence, and does not occur when the same set of possible causes co-exist, one only being absent, the possible cause which was present when the effect was produced, and was absent when it was not produced, is the true cause of the effect. Arguments founded on such a state of things are arguments on the **method of difference.**

The following illustration makes the matter plain: Various materials are mixed together on several occasions. In each case soap is produced and in each case oil and alkali are two of the materials so mixed. It is probable from this that oil and alkali are the causes of the soap, and the degree of the probability is measured by the number of the experiments, and the variety of the ingredients other than oil and alkali. This is the method of agreement

22 (1) The method of agreement.
 (2) The method of difference.
 (3) The joint method of agreement and difference.

(4) The method of residues.
 (5) The method of concomitant variations.

Various materials, of which oil and alkali are two, are mixed and soap is produced. The same materials, with exception of the oil and alkali, are mixed and soap is not produced. The mixture of the oil and alkali is the cause of the soap. This is the method of difference. The case would obviously be the same if oil and alkali only were mixed. Soap was unknown, and upon the mixture being made, other things being unchanged, soap came into existence.

18. Difficulties—Several causes producing the same effects—results as to method of agreement. These are the most important of the rules of induction, but induction is only one step towards the solution of the problems which nature presents. In the statement of the rules of induction, it is assumed for the sake of simplicity that all the causes and all the effects under examination are separate and independent facts, and that each cause is connected with some one single effect. This, however, is not the case. A given effect may be produced by any one of several causes. Various causes may contribute to the production of a single effect. This is peculiarly important in reference to the method of agreement. If that method is applied to a small number of instances its value is small. For instance, other substances might produce soap by their combination besides oil and alkali, say, for instance, that the combination of A and B, and that of C and D would do so. Then, if there were two experiments as follows:

(1) oil and alkali, A and B, produce soap;

(2) oil and alkali, C and D, produce soap;

soap would be produced in each case, but whether by the combination of oil and alkali, or by the combination of A and B, or by that of C and D or by the combination of oil and alkali, with A, B, C, or D, would be altogether uncertain.

A watch is stolen from a place to which A, B and C only had access. Another watch is stolen from another place to which A, D and E only had access.

In each instance, A is one of the three persons, one of whom must have stolen the watch, but this is consistent with its having been stolen by any of the other persons mentioned.

19. Weakness of the method of agreement—how cured. This weakness of the method of agreement can be cured only by so great a multiplication of instances as to make it highly improbable that any other antecedent than the one present in every instance could have caused the effect present in every instance.

For the statement of the theory of chances and its bearing on the probability of events, those who wish to pursue the subject must refer to the many works which have been written upon it, but its general validity will be inferred by every one from the common observation of the life. If it was certain that either A or B, A or C, A or D, and so forth, up to A or Z, had committed one of a large number of successive thefts of the same kind, no one could doubt that A was the thief.

It is extremely difficult, in practice, to apply such a test as this, and the test when applied is peculiarly liable to error, as each separate alternative requires distinct proof. In the case supposed, for instance, it would be necessary to ascertain separately in each of the cases relied upon, first, that a theft had been committed, then that one of two persons must have committed it, and lastly, that in each case the evidence bore with equal weight upon each of them.

20. Intermixture of effects and interference of causes with each other. The intermixture of effects and the interference of causes with each other is a matter of much greater intricacy and difficulty.

It may take place in one of two ways, viz.—

(1) "In the one, which is exemplified by the joint operation of different forces in mechanics, the separate effects of all the causes continue to be produced, but are compounded together, and disappear in one total."

(2) "In the other, illustrated by the case of chemical action, the separate effects cease entirely and are succeeded by phenomena altogether different and governed by different laws."

In the second case, the inductive methods already stated may be applied, though it has difficulties of its own.

In the first case, i.e., where an effect is not the result of any one cause, but the result of several causes modifying each other's operation, the results cease to be separately discernible. Some cancel each other. Others merge in one sum, and in this case there is often an insurmountable difficulty in tracing by observation any fixed relation whatever between the causes and the effects. A body, for instance, is at rest. This may be the effect of the action of two opposite forces exactly counteracting each other, but how are such causes to be inferred from such an effect?

A balloon ascends into the air. This appears, if it is treated as an isolated phenomenon, to form an exception to the theory of gravitation. It is in reality an illustration of that theory, though several concomitant facts and independent theories must be understood and combined together before this can be ascertained.

The difficulty of applying the inductive methods to such cases arises from the fact that they assume the absence of the state of things supposed. The subsequent and antecedent phenomena must be assumed to be capable of separate and separate observation before it can be asserted that a given fact invariably follows another given fact, or that two sets of possible causes resemble each other in every particular with a single exception.

21. Deductive method. It is necessary for this reason to resort to the deductive method, the nature of which is as follows: A general proposition established by induction is used as a premiss from which consequences are drawn according to the rules of logic, as to what must follow under particular circumstances. The inference so drawn is compared with the facts

observed, and if the result observed agrees with the deduction from the inductive premiss, the inference is that the phenomenon is explained. The complete method, inductive and deductive, thus involves three steps,—

- (1) Establishing the premiss by induction, or what, in practice, comes to the same thing, by a previous deduction resting ultimately upon **induction** ;
- (2) Reasoning according to the rules of logic to a conclusion ;
- (3) Verification of the conclusion by observation.

22. Illustration. The whole process is illustrated by the discovery and proof of the identity of the central force of the solar system with the force of gravity as known on the earth's surface. The steps in it were as follows :

(1) It was proved by deductions resting ultimately upon inductions that the earth attracts the moon with a force varying inversely as the square of the distance.

This is the first step, the establishment of the premiss by a process resting **ultimately upon induction**.

(2) The moon's distance from the earth, and the actual amount of her deflexion from the tangent being known, it was ascertained with what rapidity the earth's attraction would cause the moon to fall if she were no further off and no more acted upon by extraneous forces than terrestrial bodies are.

This is the second step, the reasoning regulated by the rules of logic.

(3) Finally, this calculated velocity being compared with the observed velocity with which all heavy bodies fall by mere gravity towards the surface of the earth (sixteen feet in the first second, forty-eight in the second, and so forth in the ratio of the odd numbers), the two quantities are found **to agree**.

This is the verification. The facts observed agree with the facts calculated, therefore the true principle of calculation has been taken.

This paraphrase for it is no more of Mr. Mill, is sufficient to show, in general, the nature of scientific investigation and the manner in which it aims at framing true propositions about matters of fact. It would be foreign to the present purpose to follow the subject further. Enough has been said to illustrate the general meaning of such words as "proof" and "evidence" in their application to scientific inquiry. Before inquiring into the application of these principles to judicial investigations, it will be convenient to compare the conditions under which judicial and scientific investigations are carried on.

23. Judicial and scientific inquiries compared—resemblances. In some essential points they resemble each other. Inquiries into matters of fact, of whatever kind and with whatever object, are, in all cases whatever, inquiries from the known to the unknown, from our present perceptions or our present recollection (which is in itself a present perception), of past perceptions, to

what we might perceive, or might have perceived, if we now were, or formerly had been, or hereafter should be favourably situated, for that purpose. They proceed upon the supposition that there is a general uniformity both in natural events and in human conduct; that all events are connected together as cause and effect; and that the process of applying this principle to particular cases and of specifying the manner in which it works, though a difficult and delicate operation, can be performed.

24. Differences. There are, however, several great differences between inquiries which are commonly called scientific inquiries, that is into the order and course of nature, and inquiries into isolated matters of fact, whether for judicial or historical purpose, or for the purposes of every day life. These differences must be carefully observed before we can undertake with much advantage the task of applying to the one subject the principles which appear to be true.

25. First Difference as to amount of evidence. The first difference is, that, in reference to isolated events, we can never, or very seldom, perform experiments but are tied down to a fixed number of relevant facts which can never be increased.

26. In scientific inquiries unlimited. The great object of physical science is to invent general formulas (perhaps unfortunately called laws) which, when ascertained, sum up and enable us to understand the present, and predict the future course of nature. These laws are ultimately deduced by the method already described from individual facts; but any one fact of an infinite number will serve the purpose of a scientific inquirer as well as any other, and in many, perhaps in most, cases it is possible to arrange facts for the purpose. In order, for instance, to ascertain the force of terrestrial gravity, it was necessary to measure the time occupied by different bodies in falling through given spaces, and every such observation was an isolated fact. If, however, one experiment failed, or was interfered with, if an observation was inaccurate, or if a disturbing cause, as for instance, the resistance of the atmosphere had not been allowed for, nothing could be easier than to repeat the process; and inferences drawn from any one set of experiments were obviously as much to be trusted as inferences drawn from any other set. Thus, with regard to inquiries into physical nature, relevant facts can be multiplied to a practically unlimited extent, and it may, by the way, be observed that the case with which this has been assumed in all ages is a strong argument that the course of nature does impress mankind as being uniform under superficial variations. For many centuries before the modern discoveries in astronomy were made, the motions of the heavenly bodies were carefully observed and inferences as to their future course were founded upon those observations. Such observations would have been useless and unmeaning, but for the tacit assumption that what they had done in times past, they would continue to do for the future.

27. In judicial inquiries limited. In inquiries into isolated events, this great resource is not available. Where the object is to decide what happened on a particular occasion, we can hardly ever draw inferences of any value from what happened on similar occasions, because the groups of events which form the subject of historical or judicial inquiry are so intricate that it can scarcely ever be assumed that they will repeat, or that they have repeated,

themselves. If we wish to know what happened two thousand years ago, when specific quantities of oxygen and hydrogen were combined, under given circumstances, we can obtain complete certainty by repeating the experiment; but the whole course of human history must recur before we could witness a second **assassination of Julius Caesar.**

28. It cannot be increased. With reference to such events, we are tied down inexorably to certain limited amount of evidence. We know so much of the assassination of Caesar as has been told us by the historians, who are to us ultimate authorities and we know no more. Their testimony must be taken subject to all the deductions which experience shows to be necessary in receiving as true, statement made by historical writers on subjects which interest their feelings, and upon the authority of materials which are no longer extant and therefore cannot be weighed or criticised. Unless, by some unforeseen accident, new materials on the subject should come to light, a few pages of general history will for ever comprise the whole amount of human knowledge upon this subject, and any doubts about it, whether they rise from inherent improbabilities in the story itself from differences of detail in the **different narratives, or from general considerations** as to the untrustworthy character of historians writing on hearsay, and at a considerable distance of time from the events which they relate, are and must remain for ever, unsolved and insoluble.

29. Object of scientific inquiries. Besides this difference as to the quantity of evidence accessible in scientific and historical inquiries, there is a great difference as to the objects to which the inquiries are directed. The object of inquiries into the course of nature is twofold, the satisfaction of a form of curiosity, which to those who feel it at all, is one of the most powerful and which happens also to be one of the most generally useful elements of human nature; and the attainment of practical results of very various kinds. Neither of these ends can be attained unless and until the problems stated by nature have been solved; partially, it may be but at all events truly as far as the solution goes. On the other hand, there is no pressing or immediate necessity for their solution. Every scientific question is always open and the answer to it may be discovered after vain attempts to discover it have been made for thousands of years or an answer long accepted may be rejected and replaced by a better answer after an equally long period. In short, in scientific inquiries absolute truth or as near an approach to it as can be made is the one thing needful, and is the constant object of pursuit. **So long as any part** of his proof remains incomplete, so long as any one ascertained fact does not fit into and exemplify his theory, the scientific inquirer neither is nor ought to be, satisfied. Until he has succeeded in excluding the possibility of error, he is bound, to the extent, at least of that possibility, to suspend his judgment.

30. Object of judicial inquiries. In judicial inquiries the case is different. It is necessary for urgent practical purposes to arrive at a decision which, after a definite process has been gone through, becomes final and irreversible. It is obvious that, under these circumstances, the patient suspension of judgment, and the high standard of certainty required by scientific inquiries, cannot be expected. Judicial decisions must proceed upon imperfect materials and must be made at the risk of error.

31. Evidence in scientific inquiries trustworthy. Finally, inquiries into physical science have an additional advantage over those who conduct judicial inquiries, in the fact that the evidence before them, in so far as they have to depend upon oral evidence, is infinitely more trustworthy than that which is brought forward in Courts of Justice. The reasons of this are manifold. In the first place, the facts which a scientific observer has to report do not affect his passions. In the second place, his evidence about them is not taken at all unless his powers of observation have been more or less trained and can be depended upon. In the third place, he can hardly know what will be the inference from the fact which he observes until his observations have been combined with those of other persons, so that if he were otherwise disposed to misstate them, he would not know what misstatement would serve his purpose. In the fourth place, he knows that his observations will be confronted with others, so that if he is careless or inaccurate, and *a fortiori*, if he should be dishonest, he would be found out. In the fifth place, the class of facts which he observes are, generally speaking, simple, and he is usually provided with means specially arranged for the purpose of securing accurate observations, and a careful record of its results.

32. Evidence in judicial inquiries less trustworthy. The very opposite of all this is true as regards witnesses in a Court of Justice. The facts to which they testify are, as a rule, facts in which they are more or less interested, and which in many cases excite their strongest passions to the highest degree. The witnesses are very seldom trained to observe any facts or to express themselves with accuracy upon any subject. They know what the point at issue is, and how their evidence bears upon it, so that they can shape it according to the effect which they wish to produce. They are generally so situated that a large part, at least, of what they say is secure from contradiction, and the facts which they have to observe being in most instances portions of human conduct, are so intricate that even with the best intention on the part of the witness to speak the truth, he will generally be inaccurate and almost always incomplete, in his account of what occurred.

33. Advantages of judicial over scientific inquiries. So far it appears that our opportunities for investigating and proving the existence of isolated facts are much inferior to our opportunities for investigating and proving the formulas which are commonly called the laws of nature. There is, however, something to be said on the other side. Though the evidence available in judicial and historical inquiries is often scanty, and is always fixed in amount, and though the facts which form the subject of such inquiries are far more intricate than those which attract the inquirer into physical nature, though the judge and the historian can derive no light from experiments; though in a word, their apparatus for ascertaining the truth is far inferior to that of which physical inquirers dispose of the task which they have to perform is proportionally easier and less ambitious. It is attended moreover, by some special facilities which are great helps in performing it satisfactorily.

34. Maxims more easily appreciated. The question whether it is in the nature of things possible that general formulas should ever be devised by the aid of which human conduct can be explained and predicted in the short specific manner in which physical phenomena are explained and predicted has been the subject of great discussion, and is not yet decided; but no one

doubts that approximate rules have been framed which are sufficiently precise to be of great service in estimating the probability of particular events. Whether or not any proposition as to human conduct can ever be enunciated, approaching in generality and accuracy to the proposition that the force of gravity varies inversely as the square of the distance, and one would feel disposed to deny that a recent possessor of stolen property who does not explain his possession is probably either the thief or a receiver, or that if a man refuses to produce a document in his possession, the contents of the document are probably unfavourable to him. In inquiries into isolated facts for practical purposes, such rules as these are nearly as useful as rules of greater generality and exactness, though they are of little service when the object is to interpret a series of facts either for practical or theoretical purposes. If, for instance, the question is whether a particular person committed a crime in the course of which he made use of water, knowledge of the facts that there was a pump in his garden, and that water can be drawn from a well by working the pump handle, is as useful as the most perfect knowledge of hydrostatics. But if the question were as to the means by which water could be supplied for a house and field during the year, considerable knowledge of the theory and practice of hydrostatics and of various other subjects might be necessary, and the more extensive the undertaking might be, the wider would be the knowledge required.

35. Their limitations easily perceived. To this it must be added that the approximate rules which relate to human conduct are warranted principally by each man's own experience of what passes in his own mind, corroborated by his observation of the conduct of other persons which every one is obliged to interpret upon the hypothesis that their mental processes are substantially similar to his own. Experience appears to show that the results given by this process are correct within narrower limits of error than might have been supposed, though the limits are wide enough to leave room for the exercise of a great amount of individual skill and judgment.

This circumstance invests the rules relating to human conduct with a very peculiar character. They are usually expressed with little precision, and stand in need of many exemptions and qualifications, but they are of greater practical use than rough generalisations of the same kind about physical nature, because the personal experience of those by whom they are used readily supplies the qualifications and exceptions which they require. Compare two such rules, as these: 'he who hoaxes will fall to the ground'; 'the recent possessor of stolen goods is the thief'. The rise of a balloon into the air would constitute an unexpected exception to the first of these rules, which might throw doubt upon it, but it would be hard to doubt the second by the fact that a thief who had hoaxed would be hard on his tell stolen coins shortly after they had been stolen, and thus being stolen them. Every one would see at once that such a case would be one of the many unstated exceptions to the rule. The reason why we know extended nature only by observation of a neutral un-sympathetic world, is that every man knows more of human nature than any general rule on the subject can ever tell him.

36. Judicial problems are simpler than scientific problems. To these considerations must be added that to inquire whether an isolated fact exists,

is a far simpler problem than to ascertain and prove the rule according to which facts of a given class happen. The enquiry falls within a smaller compass. The process is generally deductive. The deductions depend upon previous inductions, of which the truth is generally recognised, and which (at least in judicial inquiries) generally share in the advantage just noticed of appealing directly to the personal experience and sympathy of the Judge. The deductions, too, are, as a rule, of various kinds and so cross and check each other, and thus supply each other's deficiencies.

37. Illustrations. For instance, from one series of facts it may be inferred that A had a strong motive to commit a crime, say the murder of B. From an independent set of facts, it may be inferred that B died of poison, and from another independent set of facts that A administered the poison of which B died. The question is whether A falls within the small class of murderers by poison. If he does various propositions about him must be true, no two of which have any necessary connection, except upon the hypothesis that he is a murderer. In this case three such propositions are supposed to be true viz. (1) the death of B by poison, (2) the administration of it by A, and (3) the motive for its administration. Each separate proposition, as it is established, narrows the number of possible hypotheses upon the subject. When it is established that B died of poison, innumerable hypotheses which would explain the fact of his death consistently with A's innocence are excluded, when it is proved that A administered the poison of which B died, every supposition consistent with A's innocence, except those of accident, justification, and the like, are excluded: when it is shown that A had a motive for administering the poison, the difficulty of establishing any one of these hypotheses, e.g., accident, largely increases, and the number of suppositions consistent with innocence is narrowed in a corresponding degree.

38. In judicial inquiries parties interested have opportunities to be heard. This suggests another remark of the highest importance in estimating real weight of judicial inquiries. It is that such inquiries in all civilised countries are, or at least ought to be, conducted in such a manner as to give every person interested in the result the fullest possible opportunity of establishing the conclusion which he wishes to establish. In the illustration just given A would have at once the strongest motive to explain the fact that he had administered the poison to B and every opportunity to do so. Hence, if he failed to do it, he would either be a murderer or else a member of that infinitesimally small class of persons who, having a motive to commit murder, and having administered poison to the person whom they have a motive to murder, are unable to suggest any probable reason for supposing that they did administer it innocently.

39. Summary of results. The results of the foregoing inquiry may be shortly summed up as follows:

I. The problem of discovering the truth in relation to matters which are judicially investigated is a part of the general problem of science the discovery of true propositions as to matters of fact.

II. The general solution of this problem is contained in the rule of induction and deduction stated by Mr. Mill and generally employed for

the purpose of conducting and testing the results of inquiries into physical nature.

III By the due application of these rules facts may be exhibited as standing towards each other in the relation of cause and effect and we are able to argue from the cause to the effect and from the effect to the cause with a degree of certainty and precision proportionate to the completeness with which the relevant facts have been observed or are accessible.

IV The leading differences between judicial investigation and inquiries into physical nature are as follows:

1. In physical inquiries the number of relevant facts is generally unlimited, and is capable of indefinite increase by experiments.

In judicial investigations the number of relevant facts is limited by circumstances, and is incapable of being increased.

2. Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached, and when a conclusion has been reached, it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at.

In judicial investigation it is necessary to arrive at a definite result in limited time and when that result is arrived at it is final and irrevocable with exceptions too rare to require notice.

3. In physical inquiries the relevant facts are usually established by testimony open to no doubt, because they relate to simple facts which do not affect the persons, which are observed by trained observers who are exposed to detection if they make mistakes, and who could not fail to detect the effect of misrepresentation, if they were disposed to be fraudulent.

In judicial inquiries the relevant facts are generally complex. They affect the passions in the highest degree. They are testified to by untrained observers who are generally not open to contradiction, and are aware of the bearing of the facts which they allege upon the conclusion to be established.

4. On the other hand, approximate generalizations are more useful in judicial than they are in scientific inquiries, because in the case of judicial inquiries every man's individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific inquiries.

5. Judicial inquiries being limited in extent, the process of reaching as good a conclusion as is to be got of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory.

40. Judicial inquiries usually produce only a very high degree of probability. It follows from what precedes that the utmost result that can, in any case, be produced by judicial evidence is a very high degree of probability.

iv. Whether ~~any~~ any subject whatever more than this is possible, whether the highest form of scientific proof amounts to more than an assertion that a certain order in nature has hitherto been observed to take place, and that if that order continues to take place such and such events will happen, are questions which have been much discussed¹ but which lie beyond the sphere of the present inquiry. However this may be, the reasons given above show why Courts of Justice have to be contented with a lower degree of probability than is rightly demanded in scientific investigation. The lowest probability at which a Court of Justice can venture upon a verdict is a true one is the probability that a witness or a set of witnesses affirming the existence of a fact which they say they perceived by their own senses, and upon which they could not be mistaken, tell the truth. It is difficult to measure the value of such a probability against those which the theories of physical inquiries produce, nor would it serve any practical purpose to attempt to do so. It is enough to say that the process by which a comparatively low degree of probability is shown to exist in the one case is identical in principle with that by which a much higher degree of probability is shown to exist in the other case.

41. Degrees of probability—moral certainty. The degrees of probability attainable in scientific and in judicial inquiries are infinite, and do not admit of exact measurement or description. Cases might easily be mentioned in which the degree of probability obtained in either is so high, that if there is any degree of knowledge higher in kind than the knowledge of probabilities, it is impossible for any practical purpose to distinguish between the two. Whether any higher degree of assurance is conceivable than that which may easily be obtained of the facts that the earth revolves round the sun, and that Delhi was besieged and taken by the English in 1857, is a question which does not belong to this inquiry. For all practical purposes, such conclusions as these may be described as absolutely certain. From these down to the faintest guess about the inhabitants of the stars, and the faintest suspicion that a particular person has committed a crime, there is a descending scale of probabilities which does not admit of any but a very rough measurement for practical purposes. The only point in it worth noticing is what is commonly called moral certainty, and this means simply such a degree of probability as a prudent man would act upon under the circumstances in which he happens to be placed in reference to the matter of which he is said to be morally certain.

42. Moral certainty is a question of prudence. What constitutes moral certainty is thus a question of prudence, and not a question of calculation. It is commonly said in reference to judicial inquiries that in criminal cases guilt ought to be proved "beyond all reasonable doubt," and that in civil cases the decision ought to be in favour of the side which is most probably right. To the latter part of this rule there is no objection, though it should be added that it cannot be applied absolutely without reserve. For instance, a civil case in which character is at stake partakes more or less of the nature of a criminal proceeding, but the first part of the rule means nothing more than that in most cases the punishment of an innocent man is a great evil and ought to be carefully avoided; but that, on the other hand, it is often impossible to eliminate an appreciable though undefinable degree of uncertainty from the decision that a man is guilty. The danger of punishing the innocent is marked by the use of the expression "no doubt," the necessity of running some degree of risk of doing so in certain cases is intimated by the word "rea-

sonable. The question what sort of doubt is "reasonable" in Criminal cases is a question of prudence. Hardly any case ever occurs in which it is not possible for an ingenious person to suggest hypotheses consistent with the prisoner's innocence. The hypotheses of falsehood on the part of the witnesses can never be said to be more than highly improbable.

43. Principle of estimating probabilities is that of Mr. Mill's methods of difference. Though it is impossible to invent any rules by which different probabilities can be precisely valued, it is always possible to say whether or not they fulfil the conditions of what Mr. Mill describes as the method of difference, and if not, how nearly they approach to fulfilling it. The principle is precisely the same in all cases, however complicated or obscure the problem, and whether the nature of the enquiry is scientific or judicial. In all cases the known facts must be arranged and classified with reference to the different hypotheses, or unknown or suspected facts, by which the existence of the known facts can be accounted for. If every hypothesis except one is inconsistent with one or more of the known facts, that one hypothesis is proved. If more than one hypothesis is consistent with the known facts, but one only is reasonably probable—that is to say, if one only is in accordance with the common course of events—that one in judicial inquiries may be said to be proved "beyond all reasonable doubt." The word "reasonable" in this sentence denotes a fluctuating and uncertain quantity of probability (if the expression may be allowed), and shows that the ultimate question in judicial proceedings is and must be in most cases a question of prudence.

44. Illustration. Let the question be whether A did a certain act; the circumstances are such that the act must have been done by somebody, but it can have been done only by A or by B. If A and B are equally likely to have done the act, the matter cannot be carried further and the question—Who did it?—must remain undecided. But if the act must have been done by one person, if it required great physical strength, and if A is an exceedingly powerful man and B a child, it may be said to be proved that A did it. If A is stronger than B, but the disproportion between their strength is less, it is probable that A did it, but not impossible that B may have done it, and so on. In such a case as this a nearer approach than usual to a definite statement of the probability is possible, but no complete and definite statement on the subject can be made.

45. Judicial inquiries involve two classes of inferences. From the general nature of the object towards which judicial inquiries are directed, and the general nature of the process by which they are carried on, it will be well to examine the chief forms of that process somewhat more particularly.

It will be found upon examination that the inferences employed in judicial inquiries fall under two heads:

- (1) Inferences from an assertion, whether oral or documentary, to the truth of the matter asserted.
- (2) Inferences from facts which, upon the strength of such assertions, are believed to exist to facts of which the existence has not been so asserted.

For the sake of simplicity, I do not here distinguish various subordinate classes of inferences such as inferences from the manner in which assertions are made, from silence, from the absence of assertion, and from the conduct of the parties. They may be regarded as so many forms of assertion, and may therefore be classed under the general head of inferences from an assertion to the truth of the matter asserted.

46. Direct and circumstantial evidence. This is the distinction usually expressed by saying that all evidence is either direct or circumstantial. I avoid the use of this expression, partly because as I have already observed, direct evidence means direct assertion, whereas circumstantial evidence means a fact on which an inference is to be founded, and partly for the more important reason that the use of the expression favours an unimportant notion that the properties on which the two classes of inference depend are different, and that they have different degrees of cogency, which admit of comparison. The truth is that each inference depends upon precisely the same general theory, though somewhat different considerations apply to the investigation of cases in which the facts testified to are many, and to cases in which the facts testified to are few.

Nothing need theory has been already stated. In every case the question is, are the known facts inconsistent with any other than the conclusion suggested? The known facts are every case whatever are the evidence, in the narrower sense of the word. The Judge hears with his own ear the statements of the witnesses and sees with his own eyes the documents produced in Court. His task is to infer from what he thus sees and hears the existence of facts which he neither sees nor hears.

47. Illustration. Let the question be whether a will was executed. Three witnesses, entirely above suspicion, come and testify that they witnessed its execution. These assertions are facts which the Judge hears to himself. Now there are three possible suppositions, and no more, which the Judge has to consider in proceeding from the known fact, the assertion of the witnesses that they saw the will executed, to the fact to be proved—the actual execution of the will:

- (1) The witnesses may be speaking the truth.
- (2) The witnesses may be mistaken.
- (3) The witnesses may be telling a falsehood.

The first instances may be such as to render suppositions (2) and (3) improbable, in the largest degree, and generally speaking they would be so. In such a case the first hypothesis, i.e. that the will really was executed as alleged, would be proved. The facts before the Judge would be inconsistent with any other reasonable hypothesis except that of the execution of the will. He would be commonly called a case of direct evidence.

48. Identity of this process with Mr. Mill's theory. Let this question be whether A committed a crime. The facts which the Judge actually knows

are that certain witnesses made before him a variety of statements which he believes to be true. The result of these statements is to establish certain facts which show that either A or B or C must have committed the crime, and that neither B nor C did commit it. In this case the facts before the Judge would be inconsistent with any other reasonable hypothesis except that A committed the crime. This would be commonly called a case of circumstantial evidence; yet it is obvious that the principle on which the investigation proceeds is in the last case identically the same. The only difference is in the number of inferences, but no new principle is introduced.

It is also clear that each case is identical in principle with the method of difference as explained by Mr. Mill.

Mr. Mill's illustration of the application of that method to the motions of the planets is as follows. The planets with a central force give areas proportional to the times. The planets without a central force give a different set of motions, but areas proportional to the times are observed. Therefore there is a central force.

Similarly in the cases suggested, the assertions of the witnesses give the execution of a will, i.e. no other cause can account for those assertions having been made. If the will had not been executed these assertions would not have been made. But the assertions were made. Therefore the will was executed.

Though inferences from an assertion to its truth, and inferences from facts taken as true to other facts not asserted to be true rest upon the same principle, each inference has its peculiarities.

49. Inference from assertion to matter asserted. The inference from the assertion to the truth of the matter asserted is usually regarded as an easy matter calling for little remark.

Though in particular cases it is really easy, and though in a certain sense it is always easy to deal with it rightly is by far the most difficult task which falls to the lot of a Judge and misdoings of justice are almost invariably caused by dealing with it wrongly. This requires full explanation.

To infer from an assertion the truth of the matter asserted is in one sense the easiest thing in the world. The intellectual process consists of only one step, and that is a step which gives no trouble, and is taken in most cases unconsciously. But to draw the inference in those cases only in which it is true is a matter of the utmost difficulty. If we were able to affirm the proposition 'All men on all occasions speak the truth' the remaining proposition 'This man says so and so' 'Therefore this man would speak the truth' would present no difficulty. The major premise, however, is subject to well-known errors which are not forced upon the Judge's attention. Moreover if they were the Judge has often no means of ascertaining whether or not and to what extent they apply to any particular case.

50. Its difficulties. How is it possible to tell how far the powers of observation and memory of a man seen once for a few minutes enable him,

and how far the innumerable motives by any one or more of which he may be actuated dispose him to tell the truth upon the matter on which he testifies? Cross-examination supplies a test to a certain extent, but those who have seen most of its application will be disposed to trust it least as a proof that a man not shaken by it on fit to be believed. A cool, steady liar who happens not to be open to contradiction will baffle the most skilful cross-examiner in the absence of accidents which are not so common in practice as persons who take their notions on the subject from anecdotes or fiction would suppose.

51. Cannot be affected by rules of evidence. No rules of evidence which the legislator can enact can perceptibly affect this difficulty. Judges must deal with it as well as they can by the use of their natural faculties and acquired experience, and the miscarriages of justice in which they will be involved by reason of it must be set down to the imperfection of our means of arriving at truth. The natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying is by far the most important of all a Judge's qualifications, infinitely more important than any acquaintance with law or with rules of evidence. No trial can come in which the exercise of this faculty is not required, but it is only in exceptional cases that questions arise which present any real difficulty or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish. This pre-eminently important power for a Judge is not to be learnt out of books. In so far as it can be acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a Judge is by no means peculiarly favourable. People come before him with their cases ready prepared, and give the evidence which they have determined to give. Unless he knows them in their unrestrained and familiar moments he will have great difficulty in finding any good reason for believing one man rather than another. The rules of evidence may provide tests, the value of which have been proved by long experience, by which Judges may be satisfied that the quality of the grounds upon which their judgements are to proceed is not open to certain obvious objections, but they do not profess to enable the Judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular act. The correctness with which this is done must depend upon the natural sagacity, the logical power and the practical experience of the Judge, not upon his acquaintance with the law of evidence.

52. Grounds for believing and disbelieving a witness. The grounds for believing or disbelieving particular statements made by particular people under particular circumstances may be brought under three heads—those which affect the power of the witness to speak the truth, those which affect his will to do so, and those which arise from the nature of the statement itself and from surrounding circumstances.

(a) Power. A man's power to speak the truth depends upon his knowledge and his power of expression. This knowledge depends partly on his senses, on observation, partly on his memory, partly on his presence of mind, his power of expression depends upon an infinite number of circumstances and varies in relation to the subject of which he has to speak.

(b) Will. A man's will to speak the truth depends upon his education, his character, his courage, his sense of duty, his relation to the particular facts

as to which he is to testify, his humour for the moment, and a thousand other circumstances as to the presence or absence of which in any particular case it is often difficult to form a true opinion.

(c) *Probability of statement.* The third set of reasons are those which depend upon the probability of the statement.

Many discussions have taken place on the effect of the improbability of a statement upon its credibility in cases which can never fall under judicial consideration. It is unnecessary to enter upon that subject here. Looking at the matter merely in relation to judicial inquiries, it is sufficient to observe that whilst the improbability of a statement is always a reason, and may be, in practice, a conclusive reason, for disbelieving it, its probability is a poor reason for believing it if it rests upon uncorroborated testimony. Probable falsehoods are those which an artful liar naturally tells; and the fact that a good opportunity for telling such a falsehood occurs is the commonest of all reasons for its being told.

53. Experience is the only guide on the subject. Upon the whole it must be admitted that little, that is really serviceable, can be said upon the inference from an assertion to the truth of the matter asserted. The observations of which the matter admits are either generalities too vague to be of much practical use, or they are so narrow and special that they can be learnt only by personal observations and practical experience. Such observations are seldom, if ever, thrown by those who make them into the form of express proposition. Indeed, for obvious reasons, it would be impossible to do so. The most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood and if he did, his observations would probably be of little use to others. Everyone must learn matter of this sort for himself, and though no sort of knowledge is so important to a Judge, no rules can be laid for its acquisition.²³

23. I may give a few anecdotes which have no particular value in themselves but which show what I mean. "I always used to look at the witnesses' toes when I was cross-examining them," said a friend of mine who had practised it the bar in Ceylon. "As soon as they began to lie they always fidgeted about with them." I know a Judge who formed the opinion that a letter had been forged because the expression "that woman" which it concerned appeared to him to be one which a woman and not a man would use, and the question was whether the letter in question had been forged by a woman. In the life of Lord Keeper Guilford it is said that he always acted on the principle that a man was to be believed in what he said when he was in a passion. The common places

about the evidence of policemen, children, women, and the natives of particular countries belongs to this subject. The only remark I feel inclined to add to what is commonly said on it is that according to my observation the power to tell the truth, which implies accurate observation, knowledge of the relative importance of facts and power of description, properly proportioned to each other, is much less common than people usually suppose it to be. It is extremely difficult for an untrained person not to mix up inference and assertion. It is also difficult for such a person to distinguish between what they themselves saw and heard, and what they were told by others, unless their attention is specially directed to the distinction.

54. Illustration. If the opinion here advanced appears strange, I would invite attention to the following illustration: Is there any class of cases in which it is in practice so difficult to come to a satisfactory decision as those which depend upon the explicit, direct testimony of a single witness uncorroborated, and by the nature of the case, incapable of corroboration? For instance, a man and a woman are travelling alone in a railway carriage. The train stops at a station and the woman charges the man with indecent conduct which he denies. Nothing particular is known about the character of previous history, or other. The woman is not betrayed on cross-examination into any inconsistency. There are no cases in which the difficulty of arriving at a satisfactory decision is anything like so great. It is easy to decide them as it is easy to make a bet, but it is easier to deal satisfactorily with the most complicated and lengthy chain of inference.

The uncertainty of inferences from an assertion to the truth of the matter asserted may be shown by stating them logically. They may be considered as being the conclusion of syllogisms in this form:

All men situated in such and such a manner speak the truth or speak falsely (as the case may be).

A B, situated in such and such a manner, says so and so.

Therefore, in saying so and so, he speaks truly or falsely (as the case may be).

This is a deduction resting on a previous induction, and it is obvious that the induction which furnishes the minor premiss must always be more or less imperfect, and that the truth of the major premiss, which is asserted in the deduction, is always more or less conjectural.

55. Inference from facts proved to facts not otherwise proved. In many cases the defects of inferences of the first kind may be incidentally remedied by inference of the second kind, namely inferences from facts which are asserted and, on the ground of such assertion, believed by the Court to exist, to facts not asserted to exist.

56. Inference from assertion to truth sometimes really easy. The inference from an assertion to the truth of the matter asserted is as easy as it always appears to be. In very many instances, which it is much easier to recognise when they occur than to reduce to rule, a direct assertion, even by a single witness of whom little is known, is entitled to great weight. Suppose for instance, that the matter asserted is of a character inherently in itself and upon whose verities is, or for aught he can tell may be open to contradiction. A single assertion of this sort may outweigh a mass of artfully combined falsehood. Suppose for instance, that a number of witnesses have been called to prove on a day and that they all say that on a given day they were all present together with the person on behalf of whom the day is to be proved at a fair held at a certain place. If the Magistrate of the district, whose duty it was to superintend the fair, were to depose that it did not begin to be held till a day subsequent to the one in question, no one would doubt that the witnesses had conspired together to give false evidence by the familiar

trick of changing the day. In this case one direct assertion would outweigh many direct assertions. Why? Because the Magistrate of the district would be a man of character and position; because he would (we must assume) be quite independent of the particular case in issue; because he would be deposing to a fact of which it would be his official duty to be cognizant and on which he could hardly be mislead; and lastly, because the fact would be known to a vast number of people and he would be open to contradiction, detection, and ruin if he spoke falsely. Change in these circumstances and the equally explicit testimony of very same man might be worthless. Suppose, for instance, that he was asked whether he had committed adultery? His denial would carry but very little weight in any conceivable case, inasmuch as the charge is one which a guilty man would always deny, and an innocent man could do no more. In other words, since the course of conduct supposed is one which a man would certainly take whether he were innocent or not, the fact of his taking it would afford no criterion as to his guilt or innocence.

Now in almost all judicial proceedings a certain number of facts are established by direct assertions made under such circumstances that no one would seriously doubt their truth. Others are rendered probable in various degrees and thus the judge is furnished with facts which he may use as a basis for his inference as to the existence of other facts which are either not asserted to exist, or are asserted to exist by unsatisfactory witnesses.

57. Such inference comparatively easy. These inferences are generally considered to be more difficult to draw than the inference from an assertion to the matter asserted. In fact it is far easier to combine materials supposed to be sound than to ascertain that they are sound. In the one case no rules for the Judge's guidance can be laid down. No process is gone through, the correctness of which can afterwards be independently tested. The Judge has nothing to trust to but his own natural and acquired sagacity. In the other case, all that is required is to go through a process with which, as Mr. Huxley remarks, everyone has a general superficial acquaintance tested by every day practice, and the theory of which it is easy to understand and interesting to follow out and apply.

58. Facts must fulfil test of Method of Difference. The facts supposed to be true must ultimately fulfil the criterion of the Method of Difference, but they may be combined by any of the recognized logical methods or by a combination of them all. The object, indeed, at which they are all directed is the same, though they reach it by different ways. A few illustrations will make this plain. The question is whether A has embezzled a small sum of money, say a particular rupee which he received on account of his employer and did not enter in a book in which he came to have entered it? His defence is that the omission to make the entry was accidental. The account book is examined and it is found that in a long series of instances omissions of small sums have been made, each of which omissions is in A's favour. This, in the absence of explanation, would leave no reasonable doubt of A's guilt in each and every case. It would be practically impossible to account for such facts except upon the assumption of systematic fraud. Logically, this is an instance of the Method of Agreement applied to a number of instances as to exclude the operation of chance. When, however, this is done, the Method of Agreement becomes a case of the Method of Difference.

59. Converging probabilities. The well-known cases in which guilt is inferred from a number of separate, independent, and, so to speak, converging probabilities, may be regarded as an illustration of the same principle. Their general type is as follows:

B was murdered by someone.

Whoever murdered B had a motive for his murder.

A had a motive for murdering B.

Whoever murdered B had an opportunity for murdering B.

A had an opportunity for murdering B.

Whoever murdered B made preparations for the murder of B.

A acted in a manner which might amount to a preparation for murdering B.

In each of these instances, which might of course be indefinitely multiplied, one item of agreement is established between the ascertained fact that B was murdered and the hypothesis that A murdered him, and it does sometimes happen that this coincidence may be multiplied to such an extent and may be of such a character as to exclude the supposition of chance, and justify the inference that A was guilty.²⁴ The case, however is a rare one, and there is always a great risk of injustice unless the facts proved go beyond the mere multiplication of circumstances separately indicating guilt, and amount to a substantial exclusion of every reasonable possibility of innocence.

60. Illustration. The celebrated passage in Lord Macaulay's Essays in which he seeks to prove that Sir Phillips Francis was the author of Junius's letters, is an instance, of an argument of this kind. The letters, he says, show that five facts can be predicated of Junius, whoever he may have been. But these five facts may also be predicated of Sir Phillips Francis and no other. Whether any part of this argument can in fact be sustained, is a question to which it would be impertinent to refer here, but that the method on which it proceeds is legitimate there can be no doubt.

61. Rules as to corpus delicti. The cases in which it is most probable that injustice will be done by the application of the method of agreement to judicial inquiries are those in which the existence of the principal fact has to be inferred from circumstances pointing to it. This is the foundation of the well-known rule that the *corpus delicti* should not in general, in criminal cases be inferred from other facts, but should be proved independently. It has been sometimes narrowed to the proposition that no one should be convicted of murder unless the body of the murdered person has been discovered. Neither of these rules is more than a rough and partial application of the

²⁴ See Richardson's case, p. 64 of Sir James Fitzjames Stephen's Introduc-

tion to the Evidence Act (Ed. 1893).

general principle stated above. If the circumstances are such as to make it morally certain (within the definition given above) that a crime has been committed, the inference that it was so committed is as safe as any other such inference.

62. Illustrations. The captain of a ship, a thousand miles from any land, and with no other vessel in sight, is seen to run into his cabin, pursued by several mutinous sailors. The noise of a struggle and a splash are heard. The sailors soon afterwards come out of the cabin and take the command of the vessel. The cabin windows are opened. The cabin is in confusion, and the captain is never seen or heard of again.

A person looks at his watch and returns it to his pocket. Immediately afterwards a man comes past, and makes a snatch at the watch, which disappears. The man being pursued, runs away and swims across a river; he is arrested on the other side. He has no watch in his possession and the watch is never found.

In these cases, it is morally certain that murder and theft respectively were committed, though in the first case the body, and in the second the watch is not producible.

63. Existence of corpus delicti sometimes wrongly inferred. Cases, however, do undoubtedly occur in which the inference that a crime has been committed at all is incorrect. They may often be resolved into a case of begging the question. The process is this: suspicion that a crime has been committed is excited, upon inquiry a number of circumstances are discovered, which if it is assumed that a crime has been committed, are suspicious, but which are not suspicious unless the assumption is made.

A ship is cast away under such circumstances that her loss may be accounted for either by fraud or by accident. The captain is tried for making away with her. A variety of circumstances exist which would indicate preparation and expectation on his part if the ship really was made away with, but which would justify no suspicion at all if she was not. It is manifestly illogical first to regard the antecedent circumstances as suspicious because the loss of the ship is assumed to be fraudulent, and next to infer that the ship was fraudulent destroyed from the circumstances of the antecedent circumstances. This, however, is a form of error of great common occurrence both in judicial proceedings and common life.²⁵

The modes in which facts may be so combined as to exclude every hypothesis other than the one which it is intended to establish are very numerous, and are, I think, better learnt from specific illustrations and from actual practice than from abstract theories. One of the objects of the illustrations given in the next chapter is to enable students to understand this matter.

25. An illustration of this form of error occurred in the case of *R. v. Steward, and two others*, who were convicted at Singapore in 1867 for

casting away the Schooner, *Erin* and subsequently received a free pardon on the ground of their innocence.

64. Summary of conclusions. The result of the foregoing inquiries may be summed up as follows:

I. In judicial inquiries the facts which form the materials for the decision of the court are the facts that certain persons assert certain things and certain circumstances. These facts the Judge hears with his own ears. He also sees with his own eyes documents and other things respecting which he hears certain assertions.

II. His task is to infer—

- (1) from what he himself hears and sees the existence of the facts asserted to exist;
- (2) from the facts which on the strength of such assertion he believes to exist other facts which are not so asserted to exist.

III. Each of these inferences is an inference from the effect to the cause, and each ought to conform to the Method of Difference, that is to say, the circumstances in each case should be such that the effect is inconsistent (subject to the limitations contained in the following paragraphs) with the existence of any other cause for it than the cause of which the existence is proposed to be proved.

IV. The highest results of judicial investigation must generally be, for the reasons already given, to show that certain conclusions are more or less probable.

V. The question what degree of probability is it necessary to show in order to warrant a judicial decision in a given case is a question not of logic, but of prudence and is identical with the question—“What risk of error is it wise to run, regard being had to the consequence of error in either direction?”

VI. This degree of probability varies in different cases to an extent which cannot be strictly defined, but wherever it exists it may be called moral certainty.

CHAPTER IV

THE THEORY OF RELEVANCY WITH ILLUSTRATIONS

SYNOPSIS

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| 9. Illustrations—
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| 10. Remarks in cases of <i>Donellan</i> and <i>Belaney</i> . | 22. Confessions. |
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1. **Relevancy means connection of events as cause and effect.** An intelligence of sufficient capacity might perhaps be able to conceive of all events as standing to each other in the relation of cause and effect; and though the most powerful of human minds are unequal to efforts which fall infinitely short of this, it is possible not only to trace the connection between cause and effect both in regard to human conduct and in regard to inanimate matter, to very considerable length, but to see that numerous events are connected together, although the precise nature of the links which connect them may not be open to observation. The connection may be traced in either direction, from effect to cause or from cause to effect; and if these two words were taken in their widest acceptance, it would be correct to say that when any theory has been formed which alleges the existence of any fact all facts are relevant which, if that theory was true, would stand to the fact alleged to exist either in the relation of cause or in the relation of effect.

2. **Objections.** It may be said that this theory would extend the limits of relevancy beyond all reasonable bounds, inasmuch as all events whatever are or may be more or less remotely connected by the universal chain of cause and effect, so that the theory of gravitation would, upon this principle, be relevant, wherever one of the facts in issue involved the falling of an object to the ground.

3. **Answer.** The answer to this objection is, that while, general causes, which apply to all occurrences, are, in most cases, admitted, and do not require proof; but no doubt if their application to the matter in question were doubtful or were misunderstood, it might be necessary to investigate them. For instance, suppose that in an action for infringing a patent, the

defence set up was that the patent was invalid, because the invention had been anticipated by someone who preceded the patentee. The issue might be whether an earlier machine was substantially the same as the patentee's machine. All the facts, therefore, which went to make up each machine would be facts in issue. But each machine would be constructed with reference to the general formulae called laws of nature and thus the existence of an alleged law of nature might well become not merely relevant, but a fact in issue. If the first inventor of barometers had taken out a patent, and had to defend its validity, the variation of atmospheric pressure, according to the height of a column of air, and the fact that air has weight, might have been facts in issue.

4. Traceable influence of causes on effects narrow. With regard to the remark that all events are connected together more or less remotely as cause and effect it is to be observed that though this is or may be true, it is equally true that the limit within which the influence of causes upon effects can be perceived is generally very narrow. A knife is used to commit a murder, and it is notched and stained with blood in the process. The knife is carefully washed, the water is thrown away, and the notch in the blade is ground out. It is obvious that, unless each link in this chain of cause and effect could be separately proved it would be impossible to trace the connection between the knife cleaned and ground and the purpose for which it had been used. On the other hand if the first step, the fact that the knife was bloody at a given time and place—was proved, there would be no use in inquiring into the further effects produced by that fact, such as the staining of the water in which it was washed, the infinitesimal effects produced on the river into which the water was thrown and so forth.

5. Rule as to cause and effect true, subject to caution that every step in the connection must be made out. The rule, therefore, that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are said to be relevant, may be accepted as true, subject to caution that when an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved or be so probable under the circumstances of the case that it may be presumed without proof.

6. Illustrations. Footmarks are found near the scene of a crime. The circumstances are such that they may be presumed to be the foot marks made by the criminal. These marks correspond precisely with a pair of shoes found on the feet of the accused. The presumption founded upon common experience, though its force may vary indefinitely, is that no two pairs of shoes would make precisely the same marks. It may further be presumed, though this presumption is by no means conclusive, that shoes were worn by the owner on a given occasion. Here the steps are as follows:

- (1) The person who committed the crime probably made those marks by pressing the shoes which he wore on the ground.
- (2) The person who committed the crime probably wore his own shoes.
- (3) The shoes so pressed were probably those shoes.

(4) These shoes are A B's shoes.

Therefore A B probably made those marks with those shoes.

Therefore A B probably committed the crime.

These facts may be exhibited in the relation of cause and effect thus—

- (1) A's owning the shoes was the cause of his wearing them.
- (2) His wearing them at a given place and time caused the marks.
- (3) The marks were caused by the flight of the criminal.
- (4) The flight of the criminal was caused by the commission of the crime.
- (5) Therefore the marks were caused by the flight of A, the criminal after committing the crime.

7. **Obscurity of this definition.** Though this mode of describing relevancy might be correct it would not be readily understood. For instance, it might be asked how is an *alibi* relevant under this definition. The answer is, that a man's absence from a given place at a given time is a cause of his not having done a given act at that place and time. This mode of using language would, however, be obscure, and it was for this reason that relevancy was very fully defined in the Evidence Act (Sections 6—11 both inclusive). These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly worded very widely, and in such a way as to overlap each other. Thus, a motive for a fact in issue (Section 8) is part of its cause (Section 7). Subsequent conduct influenced by it (Section 8) is part of its effect (Section 7). Facts relevant under Section 11 would, in most cases, be relevant under other sections. The object of drawing the Act in this manner was that the general ground on which facts are relevant might be stated in as many and as popular forms as possible so that if a fact is relevant, its relevancy must be easily ascertained.

8. **Importance of these sections.** These sections are by far the most important as they are the most original part of the Evidence Act, as they affirm positively what facts may be proved whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved.

Important as these sections are for purposes of study, and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in English Courts, they are not likely to give rise

to litigation or to nice distinction. The reason is that Section 167 of the Evidence Act, which was formerly Section 57 of Act II of 1855, renders it practically a matter of little importance whether evidence of a particular fact is admitted or not. The extreme intricacy and minuteness of the law of England on this subject is principally due to the fact that the improper admission or rejection of a single question and answer would give a right to a new trial in a civil case, and would upon a criminal trial be sufficient ground for the quashing of a conviction before the court for Crown cases reserved.

The improper admission or rejection of evidence in India has no effect at all unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. A Judge, moreover, if he doubts as to the relevancy of a fact suggested, can, if he thinks it will lead to anything relevant, ask about it himself under Section 165.

9. Illustrations. In order to exhibit fully the meaning of these sections to show how the Act was intended to be worked and to furnish students with models by which they may be guided in the discharge of the most important of their duties, abstracts of the evidence given at the following remarkable trials are appended:

1. R. v. Donellan.
2. R. v. Belaney.
3. R. v. Richardson.
4. R. v. Patch.
5. R. v. Palmer.

To every fact proved in each of these cases, the most intricate, a note is attached showing under what section of the Evidence Act it would be relevant.

The general principles of evidence are, perhaps, more clearly displayed in trials for murder than in any other. Murders are usually concealed with as much care as possible; and, on the other hand, they must, from the nature of the case, leave traces behind them which render it possible to apply the argument from effects to causes with greater force in these than in most other cases. Moreover, as they involve capital punishment and excite peculiar attention, the evidence is generally investigated with special care. There are accordingly few cases which show so distinctly the sort of connection between fact and fact, which makes the existence of one fact a good ground for inferring the existence of another.

(a) *Case of R. v. Donellan*. John Donellan, Esq., was tried at Warwick

1. Wills on "Circumstantial Evidence."

Spring Assizes, 1781, before Mr. Justice Buller, for the murder of Sir Theodosius Broughton, his brother-in-law, a young man of fortune, twenty years of age² who up to the moment of his death, had been in good health and spirits, with the exception of a trifling ailment, for which he occasionally took a laxative draught³. Mrs. Donellan was the sister of the deceased, and together with Lady Broughton, his mother, lived with him at Lawford Hall, the family mansion.⁴

In the event of Sir T. Broughton's death, unmarried and without issue, the greater part of his fortune would descend to Mrs. Donellan⁵, but it was stated, though not proved, by the prisoner in his defence that he on his marriage entered into articles for the immediate settling of her whole fortune on herself and children, and deprived himself of the possibility of enjoying even a life-estate in case of her death, and that the settlement extended not only to the fortune but to expectancies.⁶

For some time before the death of Sir Theodosius, the prisoner had, on several occasions, falsely represented his health to be very bad and his life to be precarious.⁷ On the 29th of August, the apothecary in attendance sent him a mild and harmless draught to be taken the next morning⁸. In the evening, the deceased was out fishing,⁹ and the prisoner told his mother that he had been out with him, and that he had imprudently got his feet wet, both of which assertions were false.¹⁰ When Sir Theodosius was called on the following morning he was in good health,¹¹ and about seven o'clock his mother went to his chamber to give him his draught,¹² of which he immediately complained,¹³ and she remarked that it smelt like bitter almonds¹⁴. In about two minutes, he struggled very much as if to keep the medicine down, and Lady Broughton observed a gurgling in his stomach,¹⁵ in ten minutes he seemed inclined to dose,¹⁶ but in five minutes afterwards she found him with his eyes fixed, his teeth clenched, and froth running out of his mouth, and within half an hour after taking the dose he died.¹⁷

Lady Broughton ran downstairs to give orders to a servant to go for the apothecary, who lived about three miles distant,¹⁸ and in less than five minutes

2. Introductory fact (section 9).
3. Introductory fact (section 9).
4. The facts which were facts in issue happened (section 7).
5. Motive (section 8).
6. Fact relating an inference suggested by a relevant fact (section 11). These facts are omitted by Mr. Wills, but are mentioned in my account of the case, *One View of Criminal Law*, p. 338.
7. Facts showing preparation for fact in issue (section 8). The statements are also suspicious as against the prisoner (section 17).
8. A fact affording an opportunity for facts in issue (section 7).
9. Introductory to what follows (section 9).
10. Preparation (section 8). Admission (section 17).
11. State of things under which facts in

- issue happened (section 7).
12. It was suggested that Donellan sought to poison his brother-in-law for a poisoned one administered by Lady Broughton, an innocent agent. This suggestion is not proved to be a fact in issue (section 5).
13. As to this, see section 14.
14. The prisoner perceived by smell the presence of the poison in the draught which was a fact in issue (section 5).
15. The facts which were facts in issue. All these facts go to make up the fact of his death which was a fact in issue.
16. Ibid.
17. Ibid.
18. Introductory to next fact is fixing the time (section 9).

after Sir Theodosius had been taken, Donellan asked where the physic bottle was, and Lady Broughton showed him the two bottles. The prisoner then took up one of them and said, "Is this it," and being answered "Yes," he poured some water out of the water bottle which was near into the phial, shook it, and then emptied it into some dirty water which was in a wash hand basin. Lady Broughton said, "you should not meddle with the bottle," upon which the prisoner snatched up the other bottle and poured water into that also, and shook it, and then put his finger into it and tasted it. Lady Broughton again asked what he was about, and said he ought not to meddle with the bottles, on which he replied that he did it to taste it,¹⁹ though²⁰ he had not tasted the first bottle.²¹ The prisoner ordered a servant to take away the basin, the dirty things and the bottles, and put the bottles into her hand, for that purpose, she put them down again on being directed by Lady Broughton to do so, but subsequently removed them on the peremptory order of the prisoner.²² On the arrival of the apothecary, the prisoner said the deceased had been out the preceding evening fishing, and had taken cold, but he said nothing of the draught which he had taken.²³ The prisoner had a still in his own room which he used for distilling rose,²⁴ and a few days after the death of Sir Theodosius he brought it full of wet lime to one of the servants to be cleaned.²⁵ The prisoner made several false and inconsistent statements to the servants as to the cause of the young man's death¹ and on the day of his death he wrote to Sir W. Wheeler, guardian, to inform him of the event, but made no reference to its suddenness.² The coffin was soldered up on the fourth day after the death.³ Two days afterwards Sir W. Wheeler in consequence of the rumours which had reached him of the manner of Sir Theodosius's death, and that suspicions were entertained that he had died from the effects of poison,⁴ wrote a letter to the prisoner requesting that an examination might take place, and mentioning the gentlemen by whom he wished it to be conducted.⁵ The prisoner accordingly sent for them, but did not exhibit Sir W. Wheeler's letter—fearing to the suspicion that the deceased had been poisoned, nor did he mention to them that they were sent for at his request. Having been induced by the prisoner to suppose the case to be one of ordinary death,⁶ and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination on the ground that it might be attended with personal danger. On the following day, a medical man who had heard of their refusal to examine the body offered to do so, but the prisoner declined his offer on the ground that he had not been directed to send for him.⁷ On

19. Subsequent conduct influenced by a fact in issue and statements explanatory of conduct (section 8).

²⁰ This word is Mr. Wills' comment.

21. Subsequent conduct influenced by a fact in issue and statements explanatory of conduct (section 8).

²² Subsequent conduct and explanatory statements (section 8).

23. *Ibid.*

24. Opportunity to distil laurel-water, the prisoner said to have been used (section 7).

25. Subsequent conduct (section 8).

1. Admission, 17, 18.

2. *Ibid.*

3. Introductory to what follows (section 9).

4. Introductory to and explanatory of,

what follows (section 9). It should be observed that proof of the rumours and suspicions for the purpose of showing the truth of the matters remoured and suspected would not be admissible. The fact that there were rumours and suspicions explains Sir W. Wheeler's letter.

5. Statement to the prisoner and affecting his conduct (section 8, ex. 2).

6. Subsequent conduct of prisoner (section 8) and Mr. Wills' comment on the conduct.

7. Subsequent conduct (section 8). The fact that the first set of doctors refused explains the prisoner's conduct by showing that it had the effect of preventing examinations

the same day, the prisoner wrote to Sir W. Wheeler a letter in which he stated that the medical men had fully satisfied the family, and endeavoured to account for the event by the ailment under which the deceased had been suffering; but he did not state that they had not made the examination.⁸ Three or four days after, Sir W. Wheeler having been informed that the body had not been examined,⁹ wrote to the prisoner insisting that it should be done¹⁰ which, however, he prevented by various disingenuous contrivances,¹¹ and the body was interred without examination.¹² In the meantime, the circumstances having become known to the coroner, he caused the body to be disinterred and examined on the eleventh day after death. Putrefaction was found to be far advanced, and the head was not opened, nor the bowels examined and in other respects the examination was incomplete.¹³ When Lady Broughton in giving evidence before the coroner's inquest related the circumstances of the prisoner, having raised the bottles he was observed to take hold of her sleeve and endeavour to check her, and he afterwards told her that she had no occasion to have mentioned that circumstance, but only to answer such questions as were put to her; and in a letter to the coroner and jury he endeavoured to impress them with the belief that the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish.¹⁴ Upon the trial four medical men—three physicians and an apothecary—were examined on the part of the prosecution, and expressed a very decided opinion mainly grounded upon the symptoms, the suddenness of the death, the post mortem appearances, the smell of the draught as observed by Lady Broughton, and the similar effects produced by experiments upon animals, that the deceased had been poisoned with laurel water,¹⁵ one of them stating that on opening the body he had been affected with a biting acrimonious taste like that which affected him in all the subsequent experiments with laurel water.¹⁶ An eminent¹⁷ surgeon and anatomist stated a positive opinion that the symptoms did not necessarily lead to the conclusion that the deceased had been poisoned and that the appearances presented upon dissection explained nothing but putrefaction.¹⁸ The prisoner was convicted and executed.

(b) *Case of R. v. Belaney*¹⁹ A surgeon named Belaney was tried at the Central Criminal Court, August, 1841, before Mr. Baron Gurney, for the murder of his wife. They left their place of residence at North Sunderland, on a journey of pleasure to London on the 1st of June (having a few days previously made mutual wills in each other's favour),²⁰ where on the 4th of

(section 7). The ground on which they refused tends to rebut this inference (section 9), but the second doctor's offer and the prisoner's conduct thereon, tend to confirm it (section 9).

8 Subsequent conduct (section 11), and admission (section 17).

9 Introductory (section 9).

10 Statement to the prisoner affecting his conduct (section 8, ex 2).

11 Each contrivance and each circumstance which showed that it was disingenuous would come under the head of subsequent conduct (section 8).

12 The burial was part of the transaction (section 6). The absence of

examination is explanatory of parts of the medical evidence. The whole is introductory to medical evidence (section 9).

13 Introductory to opinions of experts (sections 9, 45, 46).

14 Subsequent conduct (section 8) and admissions (section 17).

15 Opinion of experts (section 45).

16 This is a case of testing a fact in issue, viz. the laurel water present in the body. See definition of fact (section 3).

17 This was the famous John Hunter.

18 Opinion of experts (section 45).

19 Wills on "Circumstantial Evidence," pp. 175-178.

20 Motive (section 8).

that month they went into lodgings.— The deceased was well advanced in pregnancy, was slightly indisposed after the journey; but not sufficiently so to prevent her going about with her husband.— On the 8th, being the Sunday morning after the arrival in town, the prisoner rang the bell for some hot water, a tumbler, and a spoon, — and he and his wife were in, and conversing in their chamber about seven o'clock. About a quarter before eight the prisoner called the landlady upstairs, saying that his wife was very ill; and she found her lying motionless on the bed, with her eyes shut and her teeth closed and foaming at the mouth. On being asked if she was subject to fits, the prisoner said she had fits before, but none like this, and that she would not come out of it. On being pressed to send for a doctor, the prisoner said he was a doctor himself, and should have let blood before, but there was no pulse. On being further pressed to send for a doctor and his friends he assented, adding that she would not come to, that this was an affection of the heart, and that her mother died in the same way nine months ago. The servant was accordingly sent to fetch two of the prisoner's friends, and on her return she and the prisoner put the patient's feet and hands in warm water and applied a mustard plaster to her chest. A medical man was sent for but before his arrival the patient had died.— There was a tumbler close to the head of the bed, about one third full of something clear, but weaker than water, and there was also an empty tumbler on the other side of the table and a paper of Epsom salt.— In reply to a question from a medical man whether deceased had taken any medicine that morning the prisoner said that she had taken nothing but a little salt.— On the same morning the prisoner ordered a grave for interment on the following Monday.— In the meantime, the contents of the stomach were examined and found to contain prussic acid and Epsom salts.— It was decided that the symptoms were similar to those of death by prussic acid, but might be the result of any powerful solvent poison and that the means resorted to by the prisoner were not likely to produce recovery, but that cold effusion, artificial respiration, and the application of brandy ammonia (which in the shape of smelling salts is found in every house) and other stimulents were the appropriate remedies and might probably have been effective. No smell of prussic acid had been discovered in the room, though it had a very strong odour, but the window was open, and it was stated that the odour is soon dissipated by a current of air.— The prisoner had purchased prussic acid, as also acetate of morphia, on the preceding day, from a vendor of medicines with whom he was intimate; but he had been in the habit of using these poisons under advice for a complaint in the stomach.— Two days after the fatal event the prisoner stated to the medical man, who had been called in and who had assisted in the examination of the body, that on the morning in question he was about to take some prussic acid, that on

21. Introductory (section 9).
22. State of things under which fact in issue happened (section 7).
23. Preparation (section 8).
24. The death and attendant circumstances are facts in issue and part of the transaction (sections 5, 26). The other facts are conduct (section 8) and admissions (sections 17, 18).
1. Admissions (sections 17, 18).

2. Conduct (section 8).
3. Effect of poisoning (section 7), opinions of experts (sections 45, 46). The absence of the smell of prussic acid and the presence of the draughts are respectively a fact suggesting the absence of prussic acid, and a fact rebutting that inference (section 9).
4. The fact that the prisoner had purchased prussic acid (section 9).

endeavouring to remove the stopper he had some difficulty, and used some force with the handle of a tooth brush; that in consequence of breaking the neck of the bottle by force, some of the acid was spilt; that he placed the remainder in the tinbuck on the drawers at the end of the bedroom; that he went into the front room to fetch a bottle wherein to place the acid, but instead of so doing began to write to his friends in the country, when in a few minutes he heard a scream from his wife's bedroom, calling for cold water, and that the prussic acid was undoubtedly the cause of her death. Upon being asked what he had done with the bottle, the prisoner said he had destroyed it; and on being asked why he had not mentioned the circumstances before, he said he had not done so because he was so distressed and ashamed at the consequence of his negligence. To various persons in the north of Ireland, the prisoner wrote false and suspicious accounts of his wife's illness. In one of them, dated from the Fuston Hotel on the 6th of June, he stated that his wife was unwell, and that two medical men attended her, and that, in consequence, he should give up an intended visit to Holland, and intimated his apprehension of a relapse. For these statements there was no foundation. At this time, moreover, he had removed from the Fuston Hotel into lodgings, and on the same day he had made arrangement for leaving his wife in London, and proceeded on his visit to Holland. In another letter, dated 8th of June, and posted after his wife's death, though it could not be determined whether it was written before or after, the prisoner stated that he had had his wife removed from the hotel to private lodgings, where she was dangerously ill, and attended by two medical men, one of whom had pronounced her heart to be diseased; these representations were equally false. In another letter, dated the 9th of June, but not posted until the 10th he stated the fact of his wife's death, but without any allusion to the case; and in a subsequent letter he stated the reason for the suppression to be to conceal the shame and reproach to his conscience. The prisoner's statements to his landlady that his wife had died of a cold from a flu of the heart was also a falsehood, the prisoner having himself stated in writing to the registrar of burials that his wife was the cause of death.⁵ It was, however, proved that the prisoner was of a kind disposition, that he and his wife had lived upon affectionate terms, and that he was extremely careless in his habits,⁶ and no motive for so horrible a deed was clearly made out, though it was urged that it was the desire of obtaining her property by means of her testamentary disposition.⁷ Upon the whole, though the case was to the last degree suspicious, it was certainly possible that an accident might have taken place in the way suggested, and the jury brought in a verdict of acquittal.

10. Remarks in cases of Donellan and Belaney. Two cases of Donellan and Belaney are mentioned in their respective sections, but throw light upon one of the most important of the points connected with judicial evidence, the point namely as to the amount of uncertainty which constitutes what can be called a reasonable doubt. This is a question not of evidence, but of prudence. The cases in question show that different tribunals at different times, do not measure it in precisely the same way. In Donellan's case the jury

⁵ All these are admissions (sections 17, 18) and conduct (section 3),

⁶ Character (section 53).
⁷ Motive (section 8).

did not think the possibility that Sir Theodosius Broughton might have died of a fit sufficiently great to constitute reasonable doubt as to his having been poisoned. In *Brannan's case* the jury thought that the possibility, that the prisoner gave his wife the poison by accident, did constitute a reasonable doubt as to his guilt. If the chances of the guilt and innocence of the two men could be numerically expressed, they would be as nearly as possible equal, and it might be said that both or that neither ought to have been convicted, if it were not for the all important principle that every case is independent of every other, and that no decision upon facts forms a precedent for any other decision. If two juries were to try the very same case, upon the same evidence and with the summing up and the same arguments by counsel, they might very probably arrive at opposite conclusions and yet it might be impossible to say that either of them was wrong. Of the moral qualifications for the office of a Judge, few are more important than the strength of mind which is capable of admitting the unpleasant truth that it is often necessary to act upon probabilities, and to run some risk of error. The cruelty of the old criminal law of Europe, and of England as well as of other countries produced many bad effects, one of which was that it intimidated those who had put it in force. The saying that it is better that ten criminals should escape than that one innocent man should be convicted expresses this sentiment which has been carried too far, and has done much to enervate the administration of justice.

11. Case of R. v. Richardson.⁸ In the autumn of 1786, a young woman who lived with her parents in a remote district in the Stewartry of Kirkcubright was one day left alone in the cottage⁹ her parents having gone out to the harvestfield¹⁰. On their return home a little after midday¹¹ they found their daughter murdered¹² with her throat cut¹³ in a most shocking manner.

The circumstances in which she was found, the character of the deceased, and the appearance of the wound all concurred in excluding all supposition of suicide¹⁴ while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have had the weapon in his left hand¹⁵. Upon opening the body the deceased appeared to have been some months gone with child¹⁶ and on examining the ground about the cottage there were discovered the footsteps of a person who had seemingly been running hastily from the cottage by an indirect road through a quagmire or bog in which there were stepping stones¹⁷. It appear-

8. Wills, pp. 225—229. Mr. Wills observes: "This case is also concisely stated in the 'Memoirs of the Life of Sir Walter Scott.' IV, p. 52, and it supplied one of the most striking incidents in 'Guy Mannering'."

9. Introductory (section 9).

10. Opportunity (section 7).

11. Explanatory (section 9).

12. Introductory (section 9).

13. Mr. Wills' comment. They found her with her throat cut and Mr. Wills says, she was murdered but

her murder was to them an inference, not a fact (section 3).

14. Fact in issue (section 5).

15. Suicide would be a relevant fact as being inconsistent with murder. The facts which exclude suicide are relevant as inconsistent with a relevant fact (section 11).

16. Opinion of experts (section 45).

17. State of things under which death happened (section 7).

18. Effects of facts in issue (section 7).

ed, however, that the person in his haste and confusion had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg¹⁹. The prints of the footsteps were accurately measured and an exact impression taken of them,²⁰ and it appeared that they were those of a person, who must have worn shoes, the soles of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them²¹. There were discovered also along the track of the footsteps, and at certain intervals, drops of blood, and, on a stile or small gateway near the cottage and in the line of the footsteps some marks resembling those of a hand which had been bloody²². Not the slightest suspicion at this time attached to any particular person as the murderer nor was it even suspected who might be the father of the child of which the girl was pregnant²³. At the funeral a number of persons of both sexes attended²⁴, and the steward-depute thought it the fittest opportunity of endeavouring, if possible, to discover the murderer, conceiving rightly that to avoid suspicion, whoever he was, he would not on that occasion be absent²⁵. With this view he called together after the interment, the whole of the men who were present, being about sixty in number¹. He caused the shoes of each of them to be taken off, and measured, and one of the shoes was found to resemble pretty nearly the impression of the footsteps near to the cottage. The wearer of the shoe was the schoolmaster of the parish which led to a suspicion that he must have been the father of the child, and had been guilty of the murder to save his character. On a closer examination of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was round at the place². If measurement of the rest went on, and after going through nearly the whole number one at length was discovered which corresponded with the impression in dimensions, shape of the foot, form of the sole, and the number and position of the nails³. William Richardson, the young man to whom the shoe belonged, on being asked where he was the day deceased was murdered, replied seemingly without embarrassment, that he had been all that day employed at his master's work⁴, a statement which his master and fellow-servants who were present confirmed⁵. This going so far to remove suspicion, a warrant of commitment was not then granted, but some circumstances occurring a few days afterwards having a tendency to excite it anew, the young man was again

19. This is so stated as to mix up inference and fact. Stripped of inference the fact might have been stated thus, "There were such marks in the bog as would have been produced if a person crossing the stepping stones had slipped with one foot. The mud was of such a depth that a person so slipping would get wet to the middle of the leg."

20. Effects of facts in issue (section 7).

21. Ibid.

22. Ibid.

23. Observation.

24. Introductory (section 9).

25. Effects of fact in issue—(section 7).

1. Introductory (section 9).

2. Irrelevant.

3. The making of the footprint was an effect of, or conduit subsequent

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to and effected by, a fact in issue (section 7). The measurement of the sixty shoes, of which one only corresponded exactly with the mark was a fact, or rather a set of facts, making highly probable the relevant fact that that shoe made that mark (section 11). The experiment itself is an application of the method of difference. The shoe would make the mark, and no other of a very large number would.

4. This would be relevant against him, but not in his favour as an admission (sections 17, 18).

5. The fact that his master and fellow-servants confirmed his statement is irrelevant. If they had testified afterwards to the fact itself, it would have been relevant.

hended and lodged in jail.⁶ Upon his examination,⁷ he acknowledged that he was left handed,⁸ and some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood a few days before.⁹ He still adhered to what he had said of his having been on the day of the murder employed constantly in his master's work¹⁰ but, in the course of the inquiry, it turned out that he had been absent from his work about half an hour, the time being distinctly ascertained, in the course of the forenoon of that day: that he called at a smith's shop under the pretence of wanting something which it did not appear that he had any occasion for; and that his smith's shop was in the way to the cottage of the deceased.¹¹ A young girl, who was some hundred yards from the cottage, said that, about the time when the murder was committed (and which corresponded to the time when Richardson was absent from his fellow servants), she saw a person exactly with his dress and appearance running hastily towards the cottage but did not see him return, though he might have gone round by a small eminence which would intercept him from her view, and which was the very track where the footsteps had been traced.¹²

His fellow servants now recollected that on the forenoon of that day they were employed with Richardson in driving their master's cart, and that when passing by a wood which they named, he said that he must run to the smith's shop and would be back in a short time. He then left his cart under their charge, and having waited for him about half an hour, which one of the servants ascertained by having at the time looked at his watch, they remarked on his return that he had been absent a longer time than he said he would be, to which he replied that he had stopped in the wood to gather some nuts. They observed at the same time one of his stockings wet and soiled as if he had stepped in a puddle. He said he had stepped into a marsh, the name of which he mentioned, on which his fellow servants remarked "that he must have been either mad or drunk if he stepped into that marsh, as there was a footpath which went along the side of it." It then appeared by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow servants that he might have gone there, committed the murder, and returned to them.¹³ A search was then made for the stockings

6. Irrelevant.

7. By Scotch law, as well as by the Code of Criminal Procedure, a prisoner may be examined.

8. The fact that he was left handed would be a cause of a fact in issue, viz. the proper way in which the fatal wound was given. The admission that he was left handed would be relevant as proof of the fact by sections 17, 18.

9. If it was suggested that the scratches were made in a struggle with the girl, they would be an effect of a fact in issue (section 7), and the statement would be relevant against the prisoner as an admission (sections 17, 18).

10. Opportunity (section 7). Admissions (sections 17, 18). The call at

the shop was preparation by making evidence (section 8). Illustration (c).

11. Ibid.

12. There is here a mixture of fact and inference. The girl could not know that a murder was committed at the time when it was committed. Probably she mentioned the time and it corresponded with the time when Richardson was away. This would be preparation and opportunity (section 7). The existence of the small eminence explains her not seeing him return (section 9).

13. All these facts are either opportunity or preparation or subsequent or previous conduct or admission (sections 7, 8, 17).

he had worn that day.¹⁴ They were found concealed in the thatch of the apartment where he slept, and appeared to be much soiled, and to have some drops of blood in them.¹⁵ The fact he accounted for by saying first, that his nose had been bleeding some days before; but it being observed that he wore other stockings on that day, he said he had assisted in bleeding a horse; but it was proved that he had not assisted and had stood at such a distance that the blood could not have reached him.¹⁶ On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the moor or puddle adjoining the cottage, and which was of a very particular kind, none other of the same kind being found in that neighbourhood.¹⁷ The shoe-maker was then discovered who had mended his shoes a short time before and he spoke distinctly to the shoes of the prisoner which were exhibited to him as having been those he had mended.¹⁸ It then came out that Richardson had been acquainted with the deceased, who was considered in the country as of weak intellect, and had on one occasion been seen with her in a wood in circumstances that led to a suspicion that he had criminal intercourse with her, and on being taunted with having such connection with one in her situation, he seemed much ashamed, and greatly hurt.¹⁹ It was proved further, by the person who sat next to him when his shoes were measured, that he trembled much and seemed a good deal agitated, and that, in the interval between that time and his being apprehended, he had been advised to fly, but his answer was, "Where can I fly to?"²⁰

On the other hand, evidence was brought to show that about the time of the murder, a boat's crew from Ireland had landed on that part of the coast near to the dwelling of the deceased,²¹ and it was said that some of the crew might have committed the murder, though their motive for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that anything was missing from the cottages in the neighbourhood. The prisoner was convicted, confessed, and was hanged.

This case illustrates the application of what Mr Mill calls the method of agreement upon a scale which excludes the supposition of chance, thus:—

- (1) The murderer had a motive,—Richardson had a motive.

14. Introductory to next fact (section 91).

15. The antecedent is subsequent conduct (section 8). The state of the stockings is the effect of a fact in issue (section 7).

16. The antecedent is subsequent conduct (section 8) or admissions (section 11 and 18). The prisoner's allegation about the horse is an allegation of a fact explaining the relevant fact, that there was blood on the stockings (section 9) and the fact proved about his distance from the horse is a fact rebutting the inference suggested thereby that the blood was the horse's (section 9).

17. Effect of a fact in issue (section 7). The similarity of the sand on the stockings to the sand in the moor was one of the effects of the slip

which was the effect of the murder: 18. That the marks were made by the prisoner's shoe was relevant as an effect of facts in issue. That the shoes which made the marks were the prisoner's had been already proved by their being found on his feet. It is rather poor proof, seems superfluous, unless it was suggested that they belonged to someone else.

19. The opinion about her would be irrelevant. The fact that her intellect was weak would be part of the state of things under which the murder happened and with what follows would show motive (sections 7, 8).

20. Subsequent conduct (section 10). The weight of this is very slight.

21. Opportunity for the murder (section 7).

(2) The murderer had an opportunity at a certain hour of a certain day in a certain place,—Richardson had an opportunity on that hour of that day at that place.

(3) The murderer was left handed,—Richardson was left handed.

(4) The murderer wore shoes which made certain marks,—Richardson wore shoes which made exactly similar marks.

(5) If Richardson was the murderer and wore stockings, they must have been soiled with a peculiar kind of sand he did wear stockings which were soiled with that kind of sand.

(6) If Richardson was the murderer, he would naturally conceal his stockings,—he did conceal his stockings.

(7) The murderer would probably get blood on his clothes,—Richardson got blood on his clothes.

(8) If Richardson was the murderer, he would probably tell lies about the blood,—he did tell lies about the blood.

(9) If Richardson was the murderer, he must have been at the place at the time in question,—a man very like him was seen running towards the place at the time.

(10) If Richardson was the murderer, he would probably tell lies about his proceedings during the time when the murder was committed,—he told such lies.

Here are ten separate marks, five of which must have been found in the murderer, one of which must have been found on the murderer if he wore stockings, whilst others probably would be found in him.

All ten were found in Richardson. Four of them were so distinctive that they could hardly have met in more than one man. It is hardly imaginable that two left-handed men, wearing precisely similar shoes and closely resembling each other, should have put the same leg into the same hole of the sedge marsh at the same time, that one of them should have committed a murder, and that the other should have causelessly hidden the stocking which had got soiled in the marsh. Yet this would be the only possible supposition consistent with Richardson's innocence.

12. *Case of R. v. Patch.*²² A man named Patch had been received by Mr. Isaac Blight, a shipbreaker, near Greenland Dock, into his service in the year 1803. Mr. Blight having become embarrassed in his circumstances in July, 1805, entered into a deed of composition with his creditors, and in consequence of the failure of this arrangement, he made a colourable transfer of his property to the prisoner.²³ It was afterwards agreed between them that

Mr. Blight was to retire nominally from the business, which the prisoner was to manage, and the former was to have two-thirds of the profits, and the prisoner the remaining third, for which he was to pay £1,250. Of this amount £250 was paid in cash, and a draft was given for the remainder upon a person named Goom, which would become payable on the 10th of September, the prisoner representing that he had received the purchase-money of an estate and lent it to Goom.²⁴ On the 10th of September the prisoner represented to Mr. Blight's bankers that Goom could not take up the bill and withdrew it, substituting his own draft upon Goom, to fall due on the 20th September.²⁵ On the 19th of September, the deceased went to visit his wife at Margate, and the prisoner accompanied him as far as Deptford,¹ and then went to London and represented to his bankers that Goom would not be able to face his draft, but that he had obtained from him a note which satisfied him, and therefore, they were not to present it.² The prisoner boarded in Mr. Blight's house, and the only other inmate was a female servant whom the prisoner about eight o'clock the same evening (the 19th) sent out to procure some oysters for his supper.³ During her absence a gun or pistol ball was fired through the shutter of a parlour fronting the Thames, where the family, when at home, usually spent their evenings. It was low water, and the mud was so deep that any person attempting to escape in that direction must have been suffocated. A man who was standing near the gate of the wharf, which was the only other mode of escape, heard the report, but saw no person. From the manner in which the ball entered the shutter it was clear that it had been discharged by some person who was close to the shutter, and the river was so much below the level of the house that the ball, if it had been fired from thence, must have reached a much higher part than that which it struck. The prisoner declined the offer of the neighbour to remain in the house with him that night.⁴ On the following day, he wrote to inform the deceased of the transaction, stating his hope that his shot had been accidental, that he knew no person who had any animosity against him, that he wished to know for whom it was intended, and that he should be happy to hear from him, but much more so to see him.⁵ Mr. Blight returned home on the 23rd September, having previously been to London to see his bankers on the subject of the £1,000 draft.⁷ Upon getting home the draft became the subject of conversation, and the deceased desired the prisoner to go to London, and not to return without the money.⁸ Upon his return the prisoner and the deceased spent the evening in the back parlour, a different one from that in which the family usually sat.⁹ About eight o'clock the prisoner went from the parlour into the kitchen,

24. Motive (section 8).

25. Preparation (section 8).

1. Introductory (section 9), but not important.

2. Preparation (section 8).

3. Explains what follows (section 8).

4. The suggestion was that Patch fired the shot himself in order to make evidence in his own favour. This would be preparation (section 8). Hence his firing the shot would be a relevant fact. The facts in the text are facts which taken together, make it highly probable that he did so, as they show that he and no one else had the opportunity and that it was done by

someone (section 11). The last fact illustrates the remarks made at pages 58, 59. The inference from the facts stated, assuming them to be true, is necessary; but suppose that the man standing near the gate saw someone running and for reasons of his own denied it, how could he be contradicted?

5. Conduct (section 8).

6. Preparation (section 8).

7. Hardly relevant, except as introductory to what follows (section 9).

8. Motive (section 8).

9. Scene of things under which facts in issue happened (section 7).

and asked the servant for a candle,¹⁰ complaining that he was disordered.¹¹ The prisoner's way from the kitchen was through an outer door which was fastened by a spring lock, and across a paved court in front of the house which was enclosed by palisades, and through a gate over a wharf in front of that court on which there was the kind of soil peculiar to premises for breaking up ships, and then, through a counting-house. All of these doors, as well as the door of the parlour, the prisoner left open, notwithstanding the state of alarm excited by the former shot. The servant heard the privy door slam, and almost at the same moment saw the flash of a pistol at the door of the parlour where the deceased was sitting upon which she ran and shut the outer door and gate. The prisoner immediately afterwards rapped loudly at the door for admittance with his clothes in disorder. He evinced great apparent concern for Mr. Blight who was mortally wounded and died on the following day. From the state of the tide and from the testimony of various persons who were on the outside of the premises, no person could have escaped from them.¹²

In consequence of this event Mrs. Blight returned home,¹³ and the prisoner in answer to an inquiry about the draft which had made her husband so uneasy, told her that it was paid, and claimed the whole of the property as his own.¹⁴ Suspicion soon fixed upon the prisoner,¹⁵ and in his sleeping room was found a pair of stockings rolled up like clean stockings, but with the feet plastered over with the sort of soil found on the wharf, and a ramrod was found in the privy.¹⁶ The prisoner usually wore boots, but on the evening of the murder he wore shoes and stockings.¹⁷ It was supposed that to prevent alarm to the deceased or the female servant, the murderer must have approached without his shoes and afterwards gone on the wharf to throw away the pistol into the river.¹⁸ All the prisoner's statements as to his pecuniary transactions with Goom and his right to draw upon him, and the payment of the bill, turned out to be false.¹⁹ He attempted to tamper with the servant girl as to her evidence before the coroner, and urged her to keep to one account,²⁰ and before that officer he made several inconsistent statements as to his pecuniary transactions with the deceased and equivocated much as to whether he wore boots or shoes on the evening of the murder, as well as to the ownership of the soiled stockings,²¹ which, however, were clearly proved to his and for the soiled state of which he made no attempt to account.²² The prisoner suggested the existence of malicious feelings in two persons with whom the deceased had

10. Preparation (section 8).

11. Ibid.

12. These facts collectively are inconsistent with the firing of shot by anyone except Patch (section 11). They would also be relevant as being either facts in issue, or the state of things under which facts in issue happened (section 7) or as preparation or opportunity (sections 7 and 8 illustration b).

13. Introductory (section 9).

14. Subsequent conduct influenced by a fact in issue (section 8).

15. Irrelevant.

16. Effect of fact in issue (section 7).

17. State of things under which facts in

issue happened (section 7).

18. Fact and inference are mixed up in this statement, the facts are (1) that the state of things was such that the deceased and his servant would have heard the steps of a man with shoes on under the window and (2) that a person who wished to throw anything into the Thames would have to go on to the wharf.

19. Preparation (section 8).

20. Subsequent conduct (section 8) and admission (sections 17 and 18).

21. Effect of fact in issue (section 7).

22. Ibid.

been on ill terms,²³ but they had no motive²⁴ for doing him any injury: and it was clearly proved that upon both occasions of attack they were at a distance²⁵

Patch's case illustrates the method of difference¹ and the whole of it may be regarded as a very complete illustration of Section 11. The general effect of the evidence is, that Patch had motive and opportunity for the murder, and that no one else except himself, could have fired either the shot which caused the murdered man's death, or the shot which was intended to show that the murdered man had enemies who wished to murder him. The relevancy of the first shot arose from the suggestion that it was an act of preparation. The proof that it was fired by Patch consisted of independent facts, showing that it was fired, and that he, and no one else, could have fired it. The firing of the second shot by which the murder was committed was a fact in issue. The proof of it by a strange combination of circumstances was precisely similar in principle to the proof as to the first shot.

The case is also very remarkable as, showing the way in which the chain of cause and effect links together facts of the most dissimilar kind: and this proves that it is impossible to draw a line between relevant and irrelevant fact, otherwise than by enumerating as completely as possible the more common forms in which the relation of cause and effect displays itself. In Patch's case the firing of the first shot was an act of preparation by way of what is called "making evidence," but the fact that Patch fired it appeared from a combination of circumstances which showed that he might, and that no one else could have done so. It is easy to conceive that some one of the facts necessary to complete this might have had to be proved in the same way. For instance, part of the proof that Patch fired the shot consisted in the fact that no one left certain premises by certain gate, which was one of the suppositions necessary to be negatived in order to show that no one but Patch could have fired the shot. The proof given of this was the evidence of a man standing near who said that at the time in question no one did pass through the gate in his presence, or could have done so unnoticed by him. Suppose that the proof had been that the gate had not been used for a long time; that spiders' webs had been spun all over the opening of the gate; that they were unbroken at night and remained unbroken in the morning after the shot; and that it was impossible that they should have been spun after the shot was fired and before the gate was examined. In that case the proof would have stood thus:

Patch's preparations for the murder were relevant to the question whether he committed it. Patch's firing the first shot was one of his preparations for the murder. The facts inconsistent with his not having fired the shot were relevant to the question whether he fired it. The fact that a certain door was not opened between certain hours was one of the facts which, taken together, were inconsistent with his not having fired the shot. The fact that a spider's web was whole overnight; and also in the morning was inconsistent with the door having been opened.

23. . Motive (section 8)

24. i.e., no special motive beyond general ill-will.

25. Facts inconsistent with relevant fact (section 11).

1. P. 33.

Inversely, the integrity of the spider's web was relevant to the opening of the door; the opening of the door was relevant to the firing of the first shot; the firing of the shot was relevant to the firing of the second shot; and the firing of the second shot was a fact in issue; therefore, the integrity of the spider's web was relevant to a fact in issue.

13. **Case of *R. v. Palmer*.**² On the 14th day of May, 1856, William Palmer was tried at the Old Bailey under powers conferred on the Court of Queen's Bench by 19 Vic., c. 16, for the murder of John Parsons Cook at Rugeley, in Staffordshire. The trial lasted twelve days, and ended on the 27th May, when the prisoner was convicted, and received sentence of death, on which he was afterwards executed at Stafford.

Palmer was a general medical practitioner at Rugeley, much engaged in sporting transactions. Cook, his intimate friend, was also a sporting man; and, after attending Shrewsbury races with him on the 13th November, 1855, returned in his company to Rugeley and died at the Talbot Arms Hotel, at that place, soon after midnight, on the 21st November, 1855, under circumstances which raised a suspicion that he had been poisoned by Palmer. The case against Palmer was that he had a strong motive to murder his friend, and that his conduct before, at the time of, and after his death, coupled with the circumstances of death itself, left no reasonable doubt that he did murder him by poisoning him with antimony and strychnine administered on various occasions—the antimony probably being used as a preparation for the strychnine.

The evidence stood as follows: At the time of Cook's death, Palmer was involved in bill transactions which appeared to have begun in the year 1853. His wife died in September, 1854, and on her death he received £13,000 on policies on her life, nearly the whole of which was applied to the discharge of his liabilities³. In the course of the year 1855, he raised other large sums, amounting in all to £13,500, on what purported to be acceptances of his mother's. The bills were renewed from time to time at enormous interest (usually sixty per cent per annum) by a moneylender named Pratt, who at the time of Cook's death, held eight bills—four on his own account and four on account of his client, two already overdue and six others falling due some in November and others in January. About £1,000 had been paid off in the course of the year, so that the total amount then due or shortly to fall due to Pratt, was £12,000. The only means which Palmer had by which these bills could be provided for was a policy on the life of his brother Walter Palmer, for £13,000. Walter Palmer died in August, 1855, and William Palmer had instructed Pratt to recover the amount from the insurance office, but the office refused to pay. In consequence of this difficulty, Pratt earnestly pressed Palmer to pay something in order to keep down the interest or diminish the principal due on the bills. He issued writs against him and his mother on the 6th November and informed him in substance that they would be served at once unless he would pay something on account. Shortly before the Shrewsbury races, he

2. Reprinted from "General View of the Criminal Law of England," p. 357.

3. A bill was found against him for

her murder.
4. A bill was found against Palmer for his murder.

had accordingly paid three sums, amounting in all to £800, of which £600 went in reduction of the principal, and £200 was deducted for interest. It was understood that more money was to be raised as early as possible.

Besides the money due to Pratt, Mr. Wright of Birmingham held bills for £10,400. Part of these, amounting to £6,500, purporting to be accepted by Mrs. Palmer, were collaterally secured by a bill of sale of the whole of William Palmer's property. These bills would fall due on the first or second week of November. Mr. Padwick also held a bill of the same kind for £2,000 on which £1,000 remained unpaid, and which was twelve months overdue on the 16th of October, 1855. Palmer, on the 12th November, had given Esplin a cheque antedated on the 28th November, for the other £1,000. Mrs. Sarah Palmer's acceptance was on nearly all these bills, and in every instance was forged.

The result was that about the time of the Shrewsbury races, Palmer was being pressed for payment on forged acceptances to the amount of nearly £20,000 and that his only resources were a certain amount of personal property, over which Wright held a bill of sale, and a policy for £15,000, the payment of which was refused by the office. Should he succeed in obtaining payment he might no doubt struggle through his difficulties, but there still remained the £1,000 antedated cheque given to Esplin, which it was necessary to provide for at once by some means or other. That he had no funds of his own was proved by the fact that his balance at the bank on the 19th November was £9.6s. and that he had to borrow £25 of a farmer named Walbank, to go to Shrewsbury races. It follows that he was under the most pressing necessity to obtain a considerable sum of money, as even a short delay in obtaining it might involve him not only in insolvency, but in a prosecution for uttering **forged acceptances.**

Besides the embarrassment arising from the bills in the hands of Pratt, Wright and Padwick, Palmer was involved in a transaction with Cook, which had a bearing on the rest of the case. Cook and he were parties to a bill for £500 which Pratt had discounted, giving £365 in cash, and a wine warrant for £65, and charging £60 for discount and expenses. He also required an assignment of two race horses of Cook's, Polo Star and Sirius, as a collateral security. By Palmer's request the £365, in the shape of a cheque payable to Cook's order and the wine warrant, were sent by post to Palmer at Doncaster. Palmer wrote Cook's endorsement on the cheque, and paid the amount to his own credit at the Bank at Rugeley. On the part of the prosecution it was said that this transaction afforded a reason why Palmer should desire to be rid of Cook, inasmuch as it amounted to a forgery by which Cook was defrauded of £375. It appeared, however, on the other side, that there were £400 worth of notes relating to some other transaction in the letter which enclosed the cheque; as it did not appear that Cook had complained of getting no consideration for his acceptance, it was suggested that he had authorized Palmer to write his name on the back of the cheque, and had taken the notes himself. This arrangement seems not improbable as it would otherwise be hard to explain why Cook acquiesced in receiving nothing for his acceptance, and there was evidence that he meant to provide for the bill when it became due. It

also appeared later in the case that there was another bill for £500, in which Cook and Palmer were jointly interested.⁵

Such was Palmer's position when he went to Shrewsbury races, on Monday, the 12th November, 1895. Cook was there also; and on Tuesday, the 13th his mare Pole-Star won the Shrewsbury Handicap, by which he became entitled to the stakes, worth about £380, and bets to the amount of nearly £2,000. For these bets he received £700 or £800 on the course at Shrewsbury. The rest was to be paid at Tattersall's on the following Monday, the 19th November. After the race Cook invited some of his friends to dinner at the Raven Hotel, and on the occasion and on the following day he was both sober and well.⁶ On the Wednesday night a man named Ishmael Fisher came into the sitting room, which Palmer shared with Cook, and found them in company with some other men drinking brandy and water. Cook complained that the brandy "burned his throat dreadfully" and put down his glass with a small quantity remaining in it. Palmer drank up what was left, and, handing the glass to Read asked him if he thought there was anything in it; to which Read replied, "What's the use of handing me the glass when it's empty?" Cook shortly afterwards left the room, called out Fisher and told him that he had been very sick, and, "He thought that damned Palmer had dosed him." He also handed over to Fisher £700 or £800 in notes to keep for him.⁷ He then became sick again, and was ill all night, and had to be attended by a doctor. He told the doctor, Mr. Gibson, that he thought he had been poisoned, and he was treated on that supposition.⁸ Next day Palmer told Fisher that Cook had said that he (Palmer) had been putting something into his brandy. He added that he did not play such tricks with people, and that Cook had been drunk the night before which appeared not to be the case.⁹ Fisher did not expressly say that he returned the money to Cook, but from the course of the evidence it seems that he did,¹⁰ for Cook asked him to pay Pratt £200 at once, and to repay himself on the following Monday out of the bets which he would receive on Cook's account at the settling at Tattersall's.

About half past ten on the Wednesday, and apparently shortly before Cook drank the brandy and water which he complained of Palmer was seen by a Mrs. Brooks in the passage looking at a glass lamp through a tumbler which contained some clear fluid like water, and which he was shaking and turning in his hand. There appears, however, to have been no secrecy in this, as he spoke to Mrs. Brooks and continued to hold and shake the tumbler as he did so.¹¹ George Myatt was called to contradict this for the prisoner. He said that he was in the room when Palmer and Cook came in. First Cook made a remark about the brandy, though he gave a different version of it from

5. All these facts go to show motive (section 8).

6. State of things under which the following facts occurred (section 7).

7. Conduct of person against whom offence was committed, and statement explanatory of such conduct (section 8, exp. 1).

8. The administration of antimony by Palmer would be a fact in issue, as being one of a set of acts of

poisoning which finally caused Cook's death. Cook's feelings were relevant as the effect of his being poisoned (section 11) and his statement as to them was relevant under section 11 as a statement showing the existence of a relevant bodily feeling.

9. Admission (sections 17, 18).

10. Motive (section 8).

11. Preparation (section 8).

Fisher and Read, that he did not see anything put in it, and that if anything had been put in it he should have seen. He also swore that Palmer never left the room from the time he came in till Cook went to bed. He also put the time later than Fisher and Read¹². All this, however, came to very little. It was the sort of difference which always arises in the details of evidence. As Myatt was a friend of Palmer's he probably remembered the matter (perhaps honestly enough) in a way more favourable to him than the other witnesses.

It appeared from the evidence of Mrs. Brooks, and also from that of a man named Herring, that other persons besides Cook were taken ill at Shrewsbury, on the evening in question with similar symptoms. Mrs. Brooks said, 'We made an observation we thought the water might have been poisoned in Shrewsbury.' Palmer himself vomited on his way back to Rugeley according to Myatt.¹³

The evidence as to what passed at Shrewsbury clearly proves that Palmer being then in great want of money, Cook was to his knowledge in possession of £100 or £200 in bank notes and was also entitled to receive on the following Monday about £1,400 more. It also shows that Palmer may have given him a dose of antimony, though the weight of evidence to this effect is weakened by the proof that diarrhoea and vomiting were prevalent in Shrewsbury at the time. It is however, important in connection with subsequent events.

On Thursday, November 15th, Palmer and Cook returned together to Rugeley, where they reached about ten at night. Cook went to the Talbot Arms, and Palmer to his own house immediately opposite. Cook still complained of being unwell. On the Friday he dined with Palmer in company with an attorney, Mr. Jeremiah Smith, and returned perfectly sober about ten in the evening.¹⁴ At eight on the following morning (November 17) Palmer came over, and ordered a cup of coffee for him. The coffee was given to Cook by Mrs., the chambermaid in Palmer's presence. When she next went to his room, an hour or two afterwards, it had been vomited.¹⁵ In the course of the day, and apparently about the middle of the day, Palmer sent a woman named Rowley to get some broth for Cook at an inn called the Albion. She brought it to Palmer's house, put it by the fire to warm, and left the room. Soon after Palmer brought it out, poured it into a cup and sent it to the Talbot Arms with a message that it came from Mr. Jeremiah Smith. The broth was given to Cook, who at first refused to take it. Palmer, however, came in and said he must have it. The chambermaid brought back the broth, which she had taken downstairs and left it in the room. It also was thrown up.¹⁶ In the course of the afternoon Palmer called in Mr. Bunford, a surgeon, eighty years of age, to see Cook and told him that when Cook dined at his (Palmer's) house he had taken too much champagne.¹⁷ Mr. Bunford, however, found no bad symptoms about him and he said he

12. Evidence against last fact (section 5).

13. *Ibid.* (see text) and its effect as this was an act of poisoning (section 5).

14. *Ibid.* (see text) and its effect as this was an act of poisoning (section 5). Conduct and statements explaining conduct (section 8).

15. *Ibid.*

16. *Ibid.* (see text) and its effect as this was an act of poisoning (section 5).

17. *Ibid.* (see text) and its effect as this was an act of poisoning (section 5).

had only drunk two glasses.¹⁸ On the Saturday night Mr. Jeremiah Smith slept in Cook's room as he was still ill. On Sunday, between twelve and one, Palmer sent over his gardener, Hawley, with some more broth for Cook.¹⁹ Elizabeth Mills, the servant at the Talbot Arms, tasted it taking two or three spoonfuls. She became exceedingly sick about half an hour afterwards, and vomited till 5 o'clock in the afternoon. She was so ill that she had to go to bed. This broth was also taken to Cook and the cup afterwards returned to Palmer. It appears to have been taken and vomited, though the evidence is not quite explicit on that point.²⁰ By the Sunday's post Palmer wrote to Mr. Jones an apothecary and Cook's most intimate friend, to come and see him. He said that Cook was "confined to his bed with a severe bilious attack combined with diarrhoea." The servant Mills said there was no diarrhoea.²¹ It was observed on the part of the defence that this letter was strong proof of innocence. The prosecution suggested that it was "part of a deep design, and was meant to make evidence in the prisoner's favour." The fair conclusion seems to be that it was an ambiguous act which ought to weigh neither way, though the first food about Cook's symptoms is suspicious as far as it goes.

On the night between Sunday and Monday Cook had some sort of attack. When the servant Mills went into his room on Monday he said, "I was just mad for two minutes." She said, "Why did you not ring the bell?" He said, "I thought that you would be all fast asleep, and not hear it." He also said he was disturbed by a quarrel in the street. It might have waked and disturbed him, but he was not sure. This incident was not mentioned at first by Barnes and Mills, but was brought out on their being recalled at the request of the prisoners' counsel. It was considered important for the defence, as proving that Cook had had an attack of some kind before it was suggested that any strychnine was administered, and the principal medical witness for the defence, Mr. Nunnally, referred to it with this view.²²

On Monday, about a quarterpast or half past seven, Palmer again visited Cook; but as he was in London about half past two, he must have gone to town by an early train. During the whole of Monday Cook was much better. He dressed himself, saw a jockey and his trainer, and the sickness ceased.²³

In the meantime Palmer was in London. He met by appointment a man named Herring who was connected with the Turf. Palmer told him he wished to settle Cook's account and read to him from a list, which Herring copied as Palmer read it, the particulars of the bets which he was to receive. They amounted to £984 clear. Of this sum Palmer instructed Herring to pay £450 to Pratt and £530 to Padwick. The nature of the debt to Padwick was not proved in evidence, as Padwick himself was not called. Palmer told Herring

18. Robert Palmer's account of Palmer's favour suggested by the preceding fact and explains the object of his conduct by showing that his statement was false (section 9). Cook's statement relates to his state of body (section 14).

19. Fact in issue, administration of poisons (section 5).

20. Effect of facts in issue (section 7).

21. Conduct (section 8) and explanation of it (section 9).

22. Facts tending to rebut inference from previous fact (section 9).

23. Supports the inference suggested by the previous fact that Palmer's doses caused Cook's illness (section 9).

the £450 was to settle the bill for which Cook had assigned his horses. He wrote Pratt on the same day a letter in these words: "Dear Sir,—You will place the £50 I have just paid you, and the £450 you will receive from Mr. Herring together £500 and the £200 you received on Saturday" (from Fisher) "towards payments of my mother's acceptance for £2000 due on 25th October."²⁴

Herring received upwards of £800, and paid part of it away according to Palmer's directions. Pratt gave Palmer credit for the £450, but the £350 was not paid to Padwick, according to Palmer's directions, as part was retained by Mr. Herring for some debts due from Cook to him, and Herring received less than he expected. In his reply the Attorney General said that the £350 intended to be paid to Padwick was on account of a bet, and suggested that the motive was to keep Padwick quiet as to the ante-dated cheque for £1,000 given to Espin on Padwick's account. There was no evidence of this, and it is not of much importance. It was clearly intended to be paid to Padwick on account not of Cook (except possibly as to a small part), but of Palmer. Palmer thus disposed, or attempted to dispose, in the course of Monday, November 19th, of the whole of Cook's winning for his own advantage.²⁵

This is a convenient place to mention the final result of the transaction relating to the bill for £500, in which Cook and Palmer were jointly interested. On Friday when Cook and Palmer dined together (November 16th) Cook wrote to Fisher (his agent) in these words: "It is of very great importance to both Palmer and myself that a sum of £500 should be paid to a Mr. Pratt of 5, Queen Street, Mastan. £500 has been sent up to night, and if you would be kind enough to pay the other £200 tomorrow, on the receipt of this, you will greatly oblige me. I will settle it on Monday at Lattersalls." Fisher did pay the £200, expecting as he said, to settle Cook's account on Monday, and repay himself. On Saturday, November 17th (a day after the date of the letter, "a person," said Pratt, "whose name I did not know, called on me with a cheque and paid me £500) on account of the prisoner that" (apparently the cheque not the £500) "was a cheque of Mr. Fishers". When Pratt heard of Cook's death, he wrote to Palmer, saying, "The death of Mr. Cook will now compel you to look about as to the payment of the bill for £500 due on the 2nd December."¹

Great use was made of these letters by the defence. It was argued that they proved that Cook was helping Palmer, and was eager to relieve him from the pressure put on him by Pratt; that in consequence of this he not only took up the £500 bill, but authorized Palmer to apply the £800 to similar purposes, and to get the amount settled by Herring, instead of Fisher, so that Fisher might not stop out of it the £200 which he had advanced to Pratt; it was asked how it could be Palmer's interest, on this supposition, that Cook should die, especially as the first consequence of his death was Pratt's application for the money due on the £500 bill.

24. Conduct and statement explanatory thereof (section 8, ex. 2).

25. All this is Palmer's conduct and is

explanatory of it (sections 7, 9).
1. Motive for not poisoning Cook (section 8).

These arguments were, no doubt, plausible; and the fact that Cook's death compelled Pratt to look to Palmer for the payment of the £500 lends them weight; but it may be asked, on the other hand, why should Cook give away the whole of his winnings to Palmer? Why should Cook allow Palmer to appropriate to the diminution of his own liabilities the £200 which Fisher had advanced to the credit of the bill on which both were liable? Why should he join with Palmer in a plan defrauding Fisher of his security for this advance? No answer to any of these questions was suggested. As to the £300, Cook's letter to Fisher says, "£300 has been sent up this evening." There was evidence that Pratt never received it, for he applied to Palmer for the money on Cook's death. Moreover, Pratt said that on Saturday he had received £300 on account of Palmer, which he placed to the account of the forged acceptance for £2,000. Where did Palmer get the money? The suggestion of the prosecution was that Cook gave it to him to pay Pratt on account of their joint bill and that he paid it on his own account. This was probably the true view of the case. The observation that Pratt, on learning of Cook's death applied to Palmer to pay the £500 bill, is met by the reflection that that bill was genuine, and collaterally secured by the assignment of the race horses, and that the other bill bore a forged acceptance, and must be satisfied at all hazards. The result was that on the Monday evening Palmer had the most impetuous interest in Cook's death, for he had robbed him of all he had in the world, except the equity of redemption in his two horses.

On Monday evening (November 19th) Palmer returned to Rugeley and went to the shop of Mr. Salt, a surgeon there, about 9 p.m. He saw Newton, Salt's assistant, and asked him for three grains of strychnine, which were accordingly given him.² Newton never mentioned this transaction till a day or two before his examination as a witness in London, though he was examined at the inquest. He explained this by saying that there had been quarrel between Palmer and Salt, his (Newton's) master, and that he thought Salt would be displeased with him for having given Palmer anything. No doubt the concealment was improper, but nothing appeared on cross-examination to suggest that the witness was wilfully perjured.

Cook had been much better throughout Monday, and on Monday evening Mr. Bamford, who was attending him, brought some pills for him, which he left at the hotel. They contained neither arsenic nor strychnine. They were taken up in the box in which they came to Cook's room by the chambermaid, and were left there on the dressing table about eight o'clock. Palmer came (according to Barnes the waitress) between eight and nine, and Mills said she saw him sitting by the fire between nine and ten.³

If this evidence were believed, he would have had an opportunity of substituting poisoned pills for those sent by Mr. Bamford just after he had according to Newton, procured strychnine. The evidence, however, was contradicted by a witness called for the prisoner, Jeremiah Smith, the attorney. He said that on the Monday evening, about ten minutes past ten, he saw Palmer

2. Preparation (section 8).
3. Opportunity. The rest is introduc-

tory (sections 7, 9).

coming in a car from the direction of Stafford; that they went up to Cook's room together, stayed two or three minutes, and went with Smith to the house of old Mrs. Palmer, his mother. Cook said, "Barnford sent him some pills, and he had taken them, and Palmer was late, intimating that he should not have taken them if he had thought Palmer would have called in before." If this evidence were believed it would of course have proved that Cook took the pills which Barnford sent as he sent them.⁴ Smith, however, was cross-examined by the Attorney General at great length. He admitted with the greatest reluctance that he had witnessed the assignment of a policy for £13,000 by Walter to William Palmer, that he wrote to an office to effect an insurance for £10,000 on the life of Bates, who was Palmer's groom, at £1 a week; that he tried, after Walter Palmer's death, to get his widow to give up her claim on the policy; that he was applied to attest other proposals for insurances on Walter Palmer's life for similar amounts; and that he had got a cheque for £5 for attesting the assignment.⁵

Lord Campbell said of this witness in summing up, "Can you believe a man who so disgraces himself in the witness-box? It is for you to say what faith you can place in a witness, who, by his own admission, engaged in such fraudulent proceedings."

It is curious that though the credit of this witness was so much shaken in cross-examination, and though he was contradicted both by Mills and Newton, he must have been right and they wrong as to the time when Palmer came down to Rugeley that evening. Mr. Mathews, the inspector of police at the Euston station, proved that the only train by which Palmer could have left London after half past two (when he met Herring) started at five, and reached Stafford on the night in question at a quarter to nine. It is about ten miles from Stafford to Rugeley, so that he could not have got across by the road in much less than an hour,⁶ yet Newton said he saw him "about nine," and Mills saw him "between nine and ten." Nothing, however, is more difficult than to speak accurately to time; on the other hand, if Smith spoke the truth, Newton could not have seen him at all that night and Miss, if at all, must have seen him for a moment only in Smith's company. Mills never mentioned Smith, and Smith would not venture to swear that she or any one else saw him at the Tilbot Arms. It was a suspicious circumstance that Sergeant Snee did not open Smith's evidence to the jury. An opportunity for perjury was afforded by the mistake made by the witnesses as to the time, which the defence were able to prove by the evidence of the police inspector. If Smith were disposed to tell an untruth, the knowledge of this fact would enable him to do so with an appearance of plausibility.

Whatever view is taken as to the effect of this evidence it was clearly proved that about the middle of the night between Monday and Tuesday Cook had a violent attack of some sort. About twelve or a little before, his bell rang; he screamed violently. When Mills, the servant, came in he was sitting

4 Evidence against the existence of the fact stated (section 5).

5 This cross-examination tended to test the veracity of the witness and to test his credit (section 146).

6 Facts inconsistent with a relevant fact (section 11), and fixing the time of the occurrence of a relevant fact (section 9).

up in bed, and asked that Palmer might be fetched at once. He was beating the bed clothes; he said he should suffocate if he lays down. His head and neck and his whole body pumped and jerked. He had great difficulty in breathing, and his eyes protruded. His hand was stiff, and he asked to have it rubbed. Palmer came in, and gave him a draught and some pills. He snapped at the glass, and got both it and the spoon between his teeth. He had also great difficulty in swallowing the pills. After this he got more easy, and Palmer stayed by him some time sleeping in an easy chair.⁷

Great efforts were made in cross-examination to shake the evidence of Mills by showing that she had altered the evidence which she gave before the Coroner, so as to make her description of the symptoms tally with those of poisoning by strychnine, and also by showing that she had been drilled as to the evidence which she was to give by persons connected with the prosecution. She denied most of the suggestions conveyed by the questions asked her, and explained others.⁸ As to the differences between her evidence before the Coroner and at the trial, a witness (Mr. Gardner an attorney) was called to show that the depositions were not properly taken at the inquest.⁹

On the following day, Tuesday, the 20th, Cook was a good deal better. In the middle of the day he sent the boots to ask Palmer if he might have a cup of coffee. Palmer said he might, and came over, tasted a cup made by the servant, and took it from her hands to give it to Cook. This coffee was afterwards thrown up.¹⁰

A little before or after this, the exact hour is not important, Palmer went to the shop of Hawkins, a druggist at Rugeley, and was there served by his apprentice Roberts with two drachms of prussic acid, six grains of strychnine, and two drachms of Batley's sedative.¹¹ Whilst he was making the purchase, Newton from whom he had obtained the other strychnine the night before came in; Palmer took him to the door, saying he wished to speak to him; and when he was there asked him a question about the firm of a Mr. Edwin Salt—a matter with which he had nothing at all to do. Whilst they were there a third person came up and spoke to Newton, on which Palmer went back into Hawkins's shop and took away the things, Newton not seeing what he took. The obvious suggestion upon this is that Palmer wanted to prevent Newton from seeing what he was about. No attempt even was made to shake, or in any way discredit, Roberts, the apprentice.¹²

At about 4 p.m. Mr. Jones, the friend to whom Palmer had written, arrived from Lutterworth.¹³ He examined Cook in Palmer's presence, and remarked

7. Effect of fact in issue, viz., the administration of poison (section 7).

8. Former statements inconsistent with evidence (section 155).

9. The depositions before the Coroner would be a proper mode of proof as being a record of a relevant fact made by a public servant in the discharge of his official duty (section 35), and any document purporting to be such a deposition

would on production be presumed to be genuine and the evidence would be presumed to be duly taken (sections 79 and 80), but this might be rebutted (section 4), definition of 'shall presume.'

10. Part of the transaction of poisoning (section 8).

11. Preparation (section 8).

12. Conduct (section 8).

13. Introductory (section 9).

[illegible][illegible][illegible]

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was poisoned (section 7).

15. Preparation (section 8).

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18. Fact in issue (section 15). Conduct (section 8).

would have rested on the head and heels, had it been laid on its back. When the body was laid out, it was very stiff. The arms could not be kept down by the sides till they were tied behind the back with tape. The feet also had to be tied, and the fingers of one hand were very stiff, the hand being clenched. This was about half an hour or three-quarters of an hour after the death.¹⁹

As soon as Cook was dead, Jones went out to speak to the house-keeper, leaving Palmer alone with the body. When Jones left the room he sent the servant Alice to find some new Palmer searching the pockets of Cook's coat and seat-cum-pillow on the pillow and bolster. Jones shortly afterwards returned, and Palmer told him that as Cook's nearest friend, he, Jones, ought to take possession of his watch and ring, and his money, coins and five shillings. He found no other money. Jones said, "Cook's death is a bad thing for me, as I am responsible for doing it, and I hope Mr. Cook's friends will not let me lose it. If they do, my horses will be seized." The betting book was found in Cook's pocket. It will be no use to any one," and added that it would probably be found.²⁰

On the 21st instant, Mr. Wetherby, the Law Society's agent for all Cook for sporting men, received from Palmer a letter enclosing a cheque for £200 against the amount of the Staveley taxes (£181) which was to receive for him. This cheque had been drawn on Palmer at seven o'clock in the evening under peculiar circumstances. Mr. Chesore, the post-master at Ruxley, told him to bring a copy, and when arrived asked him to write out from a copy which was given by Cook, on Wetherby. He said it was the money which Cook had given him, and that he was going to take it over for Cook to sign. Chesore took the body of the cheque, and Palmer took it away. When Mr. Palmer signed the cheque, the stakes had not been paid to Cook's credit. Palmer then returned the cheque to Palmer, to whom the prosecution gave notice to produce it at the trial.²¹ It was called for, but not produced.²² This was the strongest fact against Palmer in the whole of the case. If he had produced the cheque, and if it had appeared to have been really signed by Cook, it would have shown that Cook, for some reason or other, had made a gift of his stakes to Palmer, and this would have destroyed the strong presumption that Palmer's appropriation of the bets to his own credit was a robbery. In fact, it would have nearly wrecked and almost upset the case as to the robbery. On the other hand, the non-production of the cheque amounted to an admission that it was a forgery; and if that were so, Palmer was guilty of forgery, and of stealing his stakes at the time when to all eyes and appearance there was every prospect of his speedy recovery which would result in the detection of the fraud. If he knew that Cook would do that right, this was natural. On any other supposition it was inconceivable rashness.

Even on Thursday, 22nd, or Friday, 23rd, Palmer sent for Chesore again, and produced a paper which he said Cook had given to him some day before

19. Cook's death, in all its detail, was a fact in issue (section 5).

20. Conduct (section 8).

21. Conduct (section 8).

22. See section 66 as to notice to produce.

23. As to these inferences, see section 114, illust. (g).

The paper purported to be an acknowledgment that certain sums the particulars of which were stated were all for Cook's benefit and not for Palmer's. The amount was considerable as at least one item was for £1,000 and another for £500. This document purported to be signed by Cook, and Palmer wished Chesbro to attest Cook's execution of it which he refused to do. This document was called for at trial and not produced. The same observations apply to it as to the cheque.²⁴

Evidence was further given to show that Palmer was forty before, had but £9 6s in the bank and had borrowed £25 from Mr. Shrewsbury, paid away large sums of money soon after Cook's death. He paid Pratt £100 on the 24th, he paid a farmer named Spilsbury £40 2s with a Bank of England note for £50 on the 24th, and Bown a draper, a sum of £60 or thereabouts in two £50 notes on the 20th. The general result of the money transactions is, that Palmer appropriated to his own use all Cook's mts., that he tried to appropriate his stake and that shortly before or just after his death, he was in possession of between £100 and £500 of which he paid Pratt £100 though very shortly before he was being pressed for money.

On Wednesday November 21st, Mr. Jones went up to London and interviewed Mr. Stephens, Cook's stepfather, of his stepson's death. Mr. Stephens went to Lutterworth and a will by which Cook appointed him his executor and then went on to Rugeley, where he arrived about the middle of the day on Thursday. He asked Palmer for information about Cook's affairs and he replied: "There are £1,000 worth of bills out of his name, I can sorry to say my name is to them; but I have got a paper to show to the lawyers and signed by Mr. Cook to show that I never had any benefit from them." Mr. Stephens said that at all events he must be buried. Palmer offered to do so himself and said that the body ought to be fastened up as soon as possible. The conversation then ended for the time. Palmer went out and without authority from Mr. Stephens ordered a shell and a strong oak coffin.

In the afternoon Mr. Stephens, Palmer, Jones and a Mr. Gurney, Cook's brother-in-law dined together, and after dinner Mr. Stephens desired Mr. Jones to fetch Cook's betting-book. Jones went to look for it but was unable to find it. The betting-book had last been seen by the chambermaid Mrs. who gave it to Cook in bed on the Monday night, when he took a stamp from a pocket at the end of it. On hearing that the book could not be found, Palmer said it was of no manner of use. Mr. Stephens said he understood Cook had won a great deal of money at Shrewsbury, to which Palmer replied: "It's no use, I assure you, when a man dies his bets are done with." He did not mention the fact that Cook's bets had been paid to Herring on Monday. Mr. Stephens then said that the book must be found, and Palmer answered that no doubt it would be. Before leaving the inn Mr. Stephens went to look at the

24. Conduct (section 8). See section 66 as to notice to produce. As to these inferences, see section 114 illust. (g).

25. Conduct (section 8).

1. Introductory and explanatory (section 9).

2. Admission and conduct (sections 1, 18; section 8).

3. These facts and inferences together make it highly probable that Palmer stole the betting-book which would be relevant as conduct (sections 8, 11).

[illegible]

A number of other documents have been reviewed and include some MS notes on the subject of the contract. It was, it was found, consisting of a contract for the purchase of a quantity of goods for the purpose of showing that the goods were not of the same quality as the goods which were being sold.

[illegible]

The first of the above symptoms is one of the symptoms of which constipation is a frequent accompaniment and that testimony which was given by the patient in this connection. Evidence was also given in this connection by the testimony of the doctor.

At the time of his death, Cook was about twenty-one years of age. Both his father and mother were of the same age and his mother was not robust. He inherited from his father a tendency to be afflicted with a skin

therefore, such as to show knowledge (section 14).

diseases is different, and symptoms are the same. They were described in similar terms by several of the witnesses. Dr. Todd said the disease begins with stiffness, but it may or may not extend themselves to the other muscles of the limbs. They gradually develop themselves. When once the disease commences, the convulsions are of a severe, but not complete nature. In a case of this kind, the disease terminates in three or four days. The duration of the disease is much as three weeks. There was some evidence that the disease may last as long as upon record. In a case mentioned by Dr. Todd, the convulsions were severe. Mr. Ross, the patient was said to have been attacked by the disease, and it even in some hours earlier, it did not extend itself to the other limbs, and died in that part seven in the evening. This was the only case of this kind on either side, though its duration was not accurately determined. It is not known whether it is traumatic or idiopathic. It is not known whether it is of a duration of hours, but of days.¹⁸

[illegible]

They also noted that the victim did not die of a heart attack, as the victim's heart was not on his body, and the victim's heart was different. They further noted that the victim's heart was not on his body.

Q. What is the form of traumatic tetanus which you have just mentioned? He answered, "No." Q. What is the form of traumatic tetanus which you have just mentioned? He answered, "No." Q. What is the form of traumatic tetanus which you have just mentioned? He answered, "No."

13. Opinions of experts, and facts on which they were based, as to the

45. 46 The rest of the evidence falls under this head.

thrown over her. A few minutes before she died, she said, "Turn me over", she was turned over, and died very quietly almost immediately. The fit lasted about an hour. The hands were clenched, the feet contracted and on a post mortem examination the heart was found empty.

The third case was that of Mrs. Dove, who was poisoned at Leeds by her husband, for which he was afterwards hanged in February 1856. She had five attacks on Monday, Wednesday, Thursday, Friday and Saturday of the week beginning February 18th. She had prickings in the legs and twitchings in the hands. She asked to be allowed to rub her arms and legs before the spasms came on, but when they were strong she could not bear her legs to be touched. The fatal attack in her case lasted two hours and a half. The hands were semibent, feet strongly arched. The lungs were congested, the spinal cord was also much congested. The head being opened first, a good deal of blood flowed out part of which might flow from the heart.

The case in which the patient recovered was that of a paralytic patient of Mr. Moore's. He took an overdose of strychnia, and in about three quarters of an hour Mr. Moore found him stiffened in every limb. His head was drawn back, he was screaming and "frequently requesting that we should turn him, move him, rub him." His spine was drawn back. He snapped at a spoon with which an attempt was made to administer medicine, and was perfectly conscious during the whole time.

Dr. Taylor and Dr. Owen Rees examined Cook's body. They found no strychnia, but they found antimony in the liver, the left kidney, the spleen and also in the blood.

The case for the prosecution, upon this evidence was that the symptoms were those of tetanus and of tetanus produced by strychnia. The case for the prisoner was, first that several of the symptoms observed were inconsistent with strychnia; and secondly that all of them might be explained on other hypotheses. The evidence was given in part by their own witnesses, and in part by the witnesses for the Crown in cross-examination. The replies suggested by the Crown were founded partly on the evidence of their own witnesses given by way of anticipation, and partly by the evidence obtained from the witnesses for the prisoner on cross-examination.

The first and most conspicuous argument on behalf of the prisoner was that the fact that no strychnia was discovered by Dr. Taylor and Dr. Rees was inconsistent with the theory that any had been administered. The material part of Dr. Taylor's evidence upon this point was, that he had examined the stomach and intestines of Cook for a variety of poisons, strychnia among others, without success. The contents of the stomach were gone, though the contents of the intestines remained, and the stomach itself had been cut open from end to end and turned inside out, and the mucous surface on which poison, if present, would have been found was rubbing against the surface of the intestines. This Dr. Taylor considered a most unfavourable condition for the discovery of poison and Mr. Christison agreed with him. Several of the prisoner's witnesses on the contrary—Mr. Nunneley, Dr. Letheby and Mr. Rogers—thought it would only increase the difficulty of the operation, and not destroy its chance of success.

Apart from this Dr. Taylor expressed his opinion that from the way in which strychnia acts it might be impossible to discover it even if the circumstances were favourable. The mode of testing its presence in the stomach is to treat the stomach in various ways, until at last a residue is obtained which, upon the application of certain chemical ingredients, changes its colour if strychnia is present. All the witnesses agreed that strychnia acts by absorption—that is, it is taken up from the stomach by the absorbents, thence it passes into the blood, thence into the solid part of the body, and at some stage of its progress causes death by its action on the nerves and muscles. Its noxious effects do not begin till it has reached the stomach. From this Dr. Taylor argued that if a minimum dose were administered, none would be left in the stomach at the time of death, and, therefore, none could be discovered there. He also said that if the strychnia got into the blood before examination it would be diffused over the whole mass, and so, more than an extremely minute portion would be present in any given quantity. If the dose were half a grain and there were twenty-five pounds of blood in the body, each pound of blood would contain only one fiftieth of a grain. He was also of opinion that the strychnia undergoes some chemical change by reason of which its presence in small quantities in the tissues cannot be detected. In short, the result of his evidence was that if a minimum dose were administered it was uncertain whether strychnia would be present in the stomach after death, and that if it was not in the stomach, there was no certainty that it could be found at all. He also stated that he considered the colour tests fallacious, because the colours might be produced by other substances.

Dr. Taylor further detailed some experiments which he had tried upon animals jointly with Dr. Rees for the purpose of ascertaining whether strychnia could always be detected. He gave a half a grain of strychnia and applied the tests for strychnia to their bodies. In one case where two grains had been administered at intervals, he obtained proof of the presence of strychnia both by a bitter taste and by the colour. In a case where one grain was administered he obtained the taste but not the colour. In the other two cases where he administered one grain and half a grain respectively, he obtained no indication at all of the presence of strychnia. These experiments proved to demonstration that the fact that he did not discover strychnia did not prove that no strychnia was present in Cook's body.

Mr. Nunneley, Mr. Herpath, Mr. Rogers, Dr. Letheby and Mr. Wrightson contradicted Dr. Taylor and Dr. Rees upon this part of their evidence. They denied the theory that strychnine undergoes any change in the blood and they professed their own ability to discover its presence even in most minute quantities in any body into which it had been introduced, and their belief that the colour tests were satisfactory. Mr. Herpath said that he had found strychnine in the blood and in a small part of the liver of a dog poisoned by it, and he also said that he could detect the fifty-thousandth part of a grain if it were unmixed with organic matter. Mr. Wrightson (who was highly complimented by Lord Campbell for the way in which he gave his evidence) also said that he should expect to find strychnia if it were present, and that he had found it in the tissues of an animal poisoned by it.

Here, no doubt, there was a considerable conflict of evidence upon a point on which it was difficult for unscientific persons to pretend to have any opi-

mon. The evidence given for the prisoner, however, tended to prove not so much that there was no strychnia in Cook's body, as that Dr. Taylor ought to have found it, if there was. In other words, it has less to do with the guilt or innocence of the prisoner, than with the question whether Mr. Nunneley and Mr. Harpeth were or were not better analytical chemists than Dr. Taylor. The case, however, did not even begin to shake Dr. Taylor's credit, for no part of the case rested on his evidence except the discovery of the antimony, as to which he was corroborated by Mr. Bramble, and was not contradicted by the prisoner's witnesses. His opinion as to the nature of Cook's symptoms was shared by many other medical witnesses of the highest eminence, whose credit was more than unimpeached. The prisoner's counsel were placed in a curious difficulty by this state of the question. They had to attack and did attack Dr. Taylor's credit vigorously for the purpose of infirming his conclusion that Cook might have been poisoned by strychnine; yet they had also to maintain his credit as a skilful analytical chemist, for if they destroyed it, the fact that he did not find strychnine went for nothing. His edemata was fatal. To admit his skill was to admit client's guilt. To deny it was to destroy the value of nearly all their own evidence. The only possible course was to admit his skill and deny his good faith, but this too was useless, for the reason just mentioned.

Another argument used on behalf of the prisoner was that some of the symptoms of Cook's death were inconsistent with poisoning by strychnine. Mr. Nunneley and Dr. Leakey thought that the facts that Cook sat up in bed when the attack came on, that he moved his arms and legs, and asked to be turned, showed more power of voluntary action than was consistent with poisoning by strychnine. But Mrs. Simpson said she got out of bed at once at the bell, and both she, Mrs. Dove, and Mr. Watson's patient begged to be rubbed and moved before the spasms came on. Cook's movements were before the paroxysm of pain, and the first paroxysm saved his life.

Mr. Nunneley referred to the fact that the heart was empty, and said that in his experiments he always found that the right side of the heart of the poisoned animals was full.

Herein Mr. Smyth's case, however, and in that of the old Scot, the heart was found empty, and in Mrs. Smyth's case the heart and abdomen were opened, and so that the heart was not emptied by the opening of the head. Mr. Clarkson said that if a man died of rupture of the heart, the heart would be emptied by death, and would be found empty, and so that the presence or absence of the blood proved nothing.

Mr. Nunneley and Dr. Leakey also referred to the length of time before the symptoms appeared, as inconsistent with poisoning by strychnine. The time between the administration of the pills and the paroxysm was not accurately measured. It might have been an hour, or a little less, or more; but the poison, if present at all, was administered in pills, which need not begin to operate till they were broken up, and the rapidity with which they would be broken up, would depend upon the materials of which they were made. Mr. Clarkson said that if the pills were made up with porous materials, such as are used in the knowledge of chemistry and medicine, absorption would be

delayed. He said: "I do not think we can fix, without present knowledge, the precise time to the poison beginning to operate." According to the account of one witness in Agens French's case, the poison did not operate for three quarters of an hour, though probably her recollection of the time was not very accurate after ten years. Dr. Taylor also referred (in cross-examination) to cases in which an hour and a half or even two hours elapsed before the symptoms showed themselves.

These were the principal points in Cook's symptoms said to be inconsistent with the administration of strychnia. All of them appear to have been satisfactorily answered. Indeed, the inconsistency of the symptoms with strychnia was hardly mentioned. The defence turned rather on the possibility of showing that they were consistent with some other disease.

In order to make out this point various suggestions were made. In the cross-examination of the different witnesses for the Crown, it was frequently suggested that the case was one of traumatic tetanus caused by syphilitic sores, but to this there were three fatal objections. In the first place, there were no syphilitic sores; in the second place, no witness for the prisoner said that he thought that it was a case of traumatic tetanus; and in the third place, several doctors of great experience in respect of syphilis, specially Dr. Lee, the physician to the Lock Hospital, declared that they never heard of syphilitic sores producing tetanus. Two witnesses for the prisoner were called to show that a man died of tetanus who had sores on his elbow and elsewhere, which were possibly syphilitic, but it did not appear whether he had rubbed or hurt them **and Cook had no symptoms of the sort.**

Another theory was that the death was caused by general convulsions. This was advanced by Mr. Nunneley, but he was unable to mention any case in which general convulsions had produced death without destroying consciousness. He said vaguely he had heard of such cases, but had never met with one. Dr. McDonald, of Gorkirk near Glasgow, said that he considered the case to be one of epileptic convulsions with future complications. But he also failed to mention an instance in which epilepsy did not destroy consciousness. This witness advanced the most extraordinary reasons for supporting that it was a case of this form of epilepsy. He said that the fit might have been caused by sexual excitement, though the man was at Rugeley for nearly a week before his death, and that it was within the range of possibility that sexual intercourse might produce a convulsion fit after an interval of a fortnight.

Both Mr. Nunneley and Dr. McDonald were cross-examined with great closeness. Each of them was taken separately through all the various symptoms of the case, and asked to point out how they differed from those of poisoning by strychnia, and what were the reasons why they should be supposed to arise from anything else. After a great deal of trouble Mr. Nunneley was forced to admit that the symptoms of the proxyima were very like those of strychnia, and that the various predisposing causes which he mentioned as likely to produce convulsions could not be shown to have existed. He said, for instance, that excitement and depression of spirits might predispose to convulsions; but the only excitement under which Cook had laboured was on winning the race

a week before; and as for depression of spirits, he was laughing and joking with Mr Jones a few hours before his death. Dr. McDonald was equally unable to give satisfactory explanation of these difficulties. It is impossible for any individual to convey the full effect which these cross-examinations produced. They deserve to be carefully studied by anyone who cares to understand the full effect of this great instrument for the manifestation not merely of truth, but of accuracy and fairness.

Of the other witnesses for the prisoner, Mr. Herapath admitted that he had said that he thought that there was strychnine in the body, but that Dr. Taylor did not know how to find it. He added that he got his impression from newspaper reports; but it did not appear that they differed from the evidence given at the trial. Dr. Ferriby said that the symptoms of Cook were irreconcilable with everything that he was acquainted with strychnine poison included. He admitted, however, that they were not inconsistent with what he had heard of the symptoms of Mrs. Serpents in Strathclyde, who was undoubtedly poisoned by strychnine. Mr. Pattidge was called to show that the case might be one of arachnitis, or inflammation of one of the membranes of the spinal cord caused by two granules discovered there. In cross-examination he instantly admitted with perfect frankness that he did not think the case was one of arachnitis, as the symptoms were not the same. Mr. ——— on being asked whether the symptoms described by Mr. Jones were consistent with poisoning by strychnine, he said "Quite", and he concluded by saying that in the whole course of his experience and knowledge he had never seen such a death proceed from natural causes. Dr. Robinson from Newcastle was called to show that tetanic convulsions preceded by epilepsy were the cause of death. He, however, expressly admitted in cross-examination that the symptoms were consistent with strychnine, and that some of them were inconsistent with epilepsy. He said that in the absence of any other cause, if he "put aside the hypothesis of strychnine", he would ascribe it to epilepsy, and that he thought the granules in the spinal cord might have produced epilepsy. The degree of importance attached to these granules by different witnesses varied. Several of the witnesses for the Crown considered them unimportant. The last of the prisoner's witnesses was Dr. Richardson, who said the disease might have been "angina pectoris." He said, however, that the symptoms of "angina pectoris" were so like those of strychnine that he should have great difficulty in distinguishing them from each other.

The fact that antimony was found was never seriously disputed, nor could it be denied that its administration would account for all the symptoms of sickness, etc., which occurred during the week before Cook's death. No one but the prisoner could have administered it.

The general result of the whole evidence on both sides appears to be to prove beyond all reasonable doubt that the symptoms in Cook's death were perfectly consistent with those of poisoning by strychnine, and that there was strong reason to believe that they were inconsistent with any other cause. Coupling this with the proof that Palmer bought strychnine just before each of the two attacks, and that he robbed Cook of all his property, it is impossible to doubt the propriety of the verdict.

Palmer's case is remarkable on account of the extraordinary minuteness and labour with which it was tried, and on account of the extreme ability with which the trial was conducted on both sides.

The intricate set of facts which show that Palmer had a strong motive to commit the crime, his behaviour before it; at the time when it was being committed, and after it had been committed; the various considerations which showed that Cook must have died by tetanus produced by strychnine; that Palmer had the means of administering strychnine to him; that he did actually administer what in all probability was strychnine; that he also administered antimony on many occasions, and that all the different theories by which Cook's death otherwise than by strychnine could be accounted for were open to fatal objections, form a collection of eight or ten different sets of facts, all connected together immediately or remotely either as being, or as being shown not to be, the causes or the effects of Cook's murder, or as forming part of the actual murder itself.

The scientific evidence is remarkable on various grounds but particularly because it supplies a singularly perfect illustration of the identity between the ordinary processes of scientific research, and the principles explained above, as being those on which Judicial Evidence proceeds. Take, for instance, the question, did Cook die of tetanus, either traumatic or idiopathic? The symptoms of those diseases are in the first place ascertained inductively, and their nature was proved by the testimony of Sir Benjamin Brodie and others. The course of the symptoms being compared with those of Cook, they did not correspond. The inference by deduction was that Cook's death was not caused by those diseases. Logically the matter might be stated thus:

All persons who die either of traumatic or of idiopathic tetanus exhibit a certain course of symptoms.

Cook did not exhibit that course of symptoms, therefore Cook did not die of traumatic or of idiopathic tetanus.

Every one of the arguments and theories stated in the case may easily be shown by a little attention to be so many illustrations of the rules of evidence on the one hand, and of the rules of induction and deduction on the other.

On the other hand, a flood of irrelevant matter apparently connected with the trial pressed, so to speak, for admittance, and if it had been admitted, would have swollen the trial to unmanageable proportions, and thrown no real light upon the main question. Palmer was actually indicted for the murder of his wife, Anne Palmer, and for the murder of his brother, Walter Palmer. Every sort of story was in circulation as to what he had done. It was said that twelve or fourteen persons had at different times been buried from his house under suspicious circumstances. It was said that he had poisoned Lord George Bentinck who died very suddenly some years before. He had certainly forged his mother's acceptance to bills of exchange, and had carried on a series of gross frauds on insurance offices. There was the strongest reason to suspect that the evidence of Jeremiah Smith, referred to in the case, was plotted, an artful perjury. If Palmer had been tried in France, every one of these and innumerable other topics would have been introduced, and the real matter in dispute would not have been nearly so fully discussed.

No case sets in a clear light either the theory or the practical working of the principles on which the Evidence Act is based.

One special matter on which Palmer's trial throws great light is the nature of the evidence of experts. The provisions relating to this subject are contained in Sections 45 and 46 of the Evidence Act. The only point of much importance in connexion with them is that it should be borne in mind that their evidence is given on the assumption that certain facts occurred but that it does not in common cases show whether or not the facts on which the expert gives his opinion did really occur. For instance, Sir Benjamin Brodie and other witnesses in Palmer's case said that the symptoms they had heard described were the symptoms of poisoning by strychnine but whether the maid-servants and others who witnessed and described Cook's death were or were not speaking the truth was not a question for them, but for the jury. Strictly speaking, an expert ought not to be asked 'Do you think that the deceased man died of poison?' He ought to be asked to what cause he would attribute the death of the deceased man, assuming the symptoms attending his death to have been correctly described, or whether any cause except poison would account for such and such specified symptoms? This, however, is a matter of form. The substance of the rules as to experts is that they are only witnesses, not judges; that their evidence, however important, is intended to be used only as materials upon which others are to form their decision; and that the facts which they have to prove are facts that they entertain certain opinions on certain grounds and on such facts the grounds for their opinions do really exist.

14. Irrelevant facts. Having thus described and illustrated the theory of relevancy, it will be desirable to say something of irrelevant facts which might at first sight be supposed to be relevant.

From the definitions given in the earlier part of the chapter, it follows that facts are irrelevant unless they can be shown to stand in the relation of cause or in the relation of effect of facts in issue, every step in the connection being either proved or being of such a nature that it may be presumed without proof.

(a) *What facts are irrelevant?* The vast majority of ordinary facts simply coexist without being in any assignable manner connected together. For instance, at the moment of the commission of a crime in a great city, numberless other transactions are going on in the immediate neighbourhood, but no one would think of giving evidence of them unless they were in some way connected with the crime. Facts obviously irrelevant, therefore, present little difficulty. The only difficulty arises in dealing with facts which are apparently relevant but are not really so.

(b) *Facts apparently relevant.* The most important of these are three—

1. Statements as to facts made by persons not called as witnesses.
2. Transactions similar to but unconnected with the facts in issue.
3. Opinions formed by persons as to the existence of some relevant facts.

None of these are relevant within the definition of relevancy given in Sections 6-11, both inclusive. It may possibly be argued that the effect of the

second paragraph of Section 113 would be to admit proof of such facts as these. It may, for instance, be said A (not called as a witness) was heard to declare that he had seen B commit a crime. This makes it highly probable that B did commit that crime. Therefore A's declaration is a relevant fact under Section 11. This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of Chapter II (Sections 32-39) as to particular cases of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because no better evidence can be got. The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designably left in the working of the section (in compliance with a suggestion from the Madras Government) on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it:

"No statement shall be recorded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act."

15. Reason for exclusion of hearsay. The reasons why statements as to facts made by persons not called as witnesses are excluded, except in certain specified cases (see Sections 17-39) are various. In the first place, it is a matter of common experience that statements in common conversation are made so lightly and are so liable to be misunderstood or misrepresented, that they cannot be relied upon for any important purpose unless they are made under special circumstances.

16. Objection. It may be said that it is an objection to the weight of such statements, and not to their relevancy. There is some degree of truth in this remark. No doubt when a man has to inquire into facts of which he receives, in the first instance, very confused accounts, it may and often will be extremely important for him to trace the most cursory and apparently futile report. And facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, criminal or civil, would neglect his duty altogether if he shut his ears to everything which was not relevant within the meaning of the Evidence Act.

17. Effect of Section 165. A Judge or Magistrate in India frequently has to perform duties which in England would be performed by the police officers or the jury. He has to sift out the truth for himself as well as he can and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of

11. Section 11 is as follows:
Facts not otherwise relevant are relevant—
(1) If they are inconsistent with any fact in issue or relevant fact.

- (2) If by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

under circumstances which in themselves afford a guarantee for their truth, are an exception to the exclusion of statements as proof of the matter stated.

Judgments in Courts of Justice on other occasions form an exception to the exclusion of evidence transactions not specifically connected with facts in issue, and the provisions as to the admission of evidence of opinion in certain cases are contained in Sections 45—55.

21. Admissions. The general rule with regard to admissions, which are defined to mean all that the parties or their representatives in certain degrees say about the matter in dispute, or facts relevant thereto, is that they may be proved as against those who made them, but not in their favour. The reason of the rule is obvious. If A says, "B owes me money," the mere fact that he says so does not even tend to prove the debt. If the statement has any value at all, it must be derived from some fact which lies beyond it; for instance A's recollection of his having lent B the money. To that fact, of course, A can testify, but his subsequent assertions add nothing to what he has to say. If, on the other hand, A had said, "B does not owe me anything," this is a fact of which B might make use, and which might be decisive of the case.

22. Confessions. Admissions in reference to crimes are usually called confessions. Sections 25, 26 and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure Act XXV of 1891. They differ widely from the law of England and were inserted in the Act of 1891 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody.

23. Statements by witness who cannot be called. Statements made by persons who are dead or otherwise incapacitated from being called as witnesses are admitted in the cases mentioned in Sections 32 and 33. The reason is that in the cases in question no better evidence is to be had.

24. Statements under special circumstances. In certain cases statements are made under circumstances which in themselves are a strong reason for believing them to be true, and in these cases there is generally little use in calling the person by whom the statement was made. The sections which relate to them are 34—38.

It may be well to point out here the manner in which the Evidence Act affects the proof of evidence given by a witness in a Court of Justice. The relevancy of the fact that such evidence was given, depends partly on the general principles of relevancy. For instance, if a witness were accused of giving false testimony the fact that he gave the testimony alleged to be false would be a fact in issue. But the Act also provides for cases in which the fact that evidence was given on a different occasion is to be admissible, either to prove the matter stated (Section 33), or in order to contradict (Sections 155, 8) or in order to corroborate (Section 157) the witness. By reference to these sections it must be ascertained whether the fact that the evidence was given is relevant. If it is relevant Section 35 enacts that an entry of it in a record made by any public servant in the discharge of his duty shall be relevant as a mode of proving it. The Codes of Civil and Criminal Procedure direct all judicial officers to make records of the evidence given before them, and Section 80 of the Evidence Act provides that a document purporting to be a

record of evidence, shall be presumed to be genuine, that statements made as to the circumstances under which it was taken shall be presumed to be true and the evidence to have been duly taken. The result of these sections taken together is that when proof of evidence given on previous occasions is admissible it may be proved by the production of the record or a certified copy (see Section 76).

25. Judgments in other cases. The sections as to judgments (1044) designedly omit to deal with the question of the effect of judgments in presenting further proceedings in regard to the same matter. The law upon this subject is to be found in Section 2 of the Code of Civil Procedure and in Section 460 of the Code of Criminal Procedure. The cases which the Evidence Act provides for, are cases in which the judgment of a Court is in the nature of law, and creates the right which it affirms to exist.

26. Opinions. The opinions of any person, other than the Judge by whom the fact is to be decided, as to the existence of facts in issue or relevant facts, are, as a rule, irrelevant to the decision of the cases to which they relate for the most obvious reasons. To show that such and such a person thought that a crime had been committed, or a contract had been made, would either be to show nothing at all, or would invest the person whose opinion was proved with the character of a Judge. In some few cases the reasons for which are self-evident, it is otherwise. They are specified in Sections 55-57.

27. Character, when important. The sections as to character require little remark. Evidence of character is, generally speaking, only a makeweight, though there are two classes of cases in which it is highly important.

(1) Where conduct is equivocal, or even presumably criminal. In this class of cases, evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character this may be believed.

(2) When a charge rests on the direct testimony of a single witness and on the bare denial of it by the person charged. A man is accused of an indecent assault on a woman with whom he was accidentally left alone. He denies it. Here a high character for morality on the part of the accused person would be of great importance.

CHAPTER V

GENERAL OBSERVATIONS ON THE INDIAN EVIDENCE ACT

[illegible]

expressed in the following propositions:

be judicially noticed.

fact to which he testifies.

3. Documents may be proved either by the production of the original, or by copies certified to be true copies of the original. Primary evidence is required in seven important exceptions in which the production of the original is not required. These are (1) when the original is in the possession of the adverse party, in which case secondary evidence is admissible; (2) when there are several originals, and one is lost or destroyed; (3) when the original is in the possession of a third person, and the party producing the copy is unable to obtain the original; (4) when the original is in the possession of a third person, and the party producing the copy is unable to obtain the original; (5) when the original is in the possession of a third person, and the party producing the copy is unable to obtain the original; (6) when the original is in the possession of a third person, and the party producing the copy is unable to obtain the original; (7) when the original is in the possession of a third person, and the party producing the copy is unable to obtain the original.

in place of the documents themselves.

4. The documents, records, and information referred to in the Act, are preserved in accordance with the provisions of the Act, and are available to be produced in accordance with the provisions of the Act, and the documents, records, and information referred to in the Act, are preserved in accordance with the provisions of the Act, and are available to be produced in accordance with the provisions of the Act.

is produced. It must be presumed to be an accurate copy of the record of evidence. By Section 8(b)(1)(C) it is stated in the record itself as to the circumstances that it was read over to the witness in a language which he understood and must be presumed to be true.

5. Writings when admitted in evidence. No contract, grant, or other disposition of property, whether in law or equity, shall be admitted in evidence of its contents, except in certain specified cases.

It is necessary to provide the necessary information of which it obviously is the duty of the court to provide, and the law provides except in the case of a party who is not a party to the litigation that they receive the necessary information. It is not distinctly understood that the court is not to be understood when the court on the basis of the information it receives are all made in order to provide the necessary information to the parties, and which are of course the necessary information to the parties to litigation unless they are specifically provided for beforehand.

Principles of procedure in doing history and law. The principle must be that the writer must not write without any evidence. It is that the writer must not write what he has heard or the memory of what is told him, but must write what he has seen or heard of it. In order that this principle may be observed, the writer must say exactly that the document is a copy of the original, and that he is the judge for his own conscience as to the truth of the copy. If a previous negotiation is referred to, the writer must say that he has found and shall not be satisfied with the copy, but that the original was not observed. The benefit of the doubt must be given to the use in law that a thing down unless the writer is sure that it is not. If the original were not observed, people would never know what the original was, and they would be free to play fast and loose with their writings.

By becoming more uniform, principles and the duties and exceptions will become simple. I have gathered together a great deal of material in comparison to the importance of the rules which they explain.

The third part of the Act, which contains three chapters (Chapters VII, VIII and IX) and extends in section 1, states the purpose, scope and effect of evidence.

Chapter VII, which treats of the "Division of Good," deals with a subject which requires a little explanation. It has a long list of prescriptions. Like most other works introduced into the list of *Eclogues*, it has various meanings, and has besides a history to which I shall refer very shortly.

In times when the general theory of physics was not perfectly understood, inasmuch as physics was only the province of experiment, that theory was gradually discovered, was in its nature, in its principles, phenomena were made to construct theories as to the nature of the development which is going on, the want of one

on observation. In some cases this was effected by requiring the testimony of a certain number of witnesses in particular cases; such a fact must be proved by two witnesses, such another by four, and so on. In other cases particular items of evidence were regarded as full proof, half full proof, proof less than half full and proof more than half full.

Presumptions. The doctrine of presumptions was closely connected with this theory. Presumptions were inferences which the Judges were directed to draw from certain states of facts in certain cases, and these presumptions were allowed a certain amount of weight in the scale of proof, such a presumption and such evidence amounted to full proof, such another to half full, and so on. The very irregular manner in which the English law of evidence grew up has had, amongst other effects, that of making it an uncertain and difficult question how far the theory of presumptions, and the other theories of which they formed a part affect English law, but substantially the result is somewhat as follows:

Presumptions are of four kinds according to English law:

1. **Conclusive presumptions.** These are rare, but when they occur they provide that certain modes of proof shall not be liable to contradiction.

2. Presumptions which affect the ordinary rule as to the burden of proof that he who affirms must prove. He who affirms that a man is dead must usually prove it, but if he shows that the man has not been heard of for seven years, he shifts the burden of proof on his adversary.

3. There are certain presumptions which, though liable to be rebutted, are regarded by English law as being something more than mere maxims, though it is by no means easy to say how much more. An instance of such a presumption is to be found in the rule that recent possession of stolen goods unexplained raises a presumption that the possessor is either a thief or a receiver.

4. Bare presumption of facts, which are nothing but arguments to which the Court attaches whatever value it pleases.

Chapter VII of the Evidence Act deals with this subject as follows: First it lays down the general principles which regulate the burden of proof (Sections 101–106). It then enumerates the cases in which the burden of proof is determined in particular cases, not by the relation of the parties to the cause but by presumptions (Sections 107–111). It notices two cases of conclusive presumptions, the presumption of legitimacy from birth during marriage (Section 112), and the presumption of a valid cession of territory from the publication of a notification to that effect in the Gazette of India (Section 113). This is one of several conclusive statutory presumptions which will be found in different parts of the Statutes and Acts. Finally, it declares in Section 114, that the Court may in all cases whatever draw from the facts before it whatever inferences it thinks just. The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Court in their discretion, a large number of presumptions to which English law gives to a great or less extent, an artificial value. Nine of the most important of them are given by way of illustration.

All notices of certain general legal principles which are sometimes called presumptions, but which in reality belong rather to the substantive law than the law of Evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them. The most important of these is the presumption, as it is sometimes called, that everyone knows the law. The principle is far more correctly stated in the maxim that ignorance of the law does not excuse a breach of it, which is one of the fundamental principles of Criminal Law.

The subject of estoppels (Chapter VIII) differs from that of presumptions in the circumstance that an estoppel is a personal disqualification, laid upon a person peculiarly circumstanced, from proving peculiar facts. A presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them. Much of the English learning connected with estoppels is extremely intricate and technical, but this arises principally from two causes, the peculiarities of English special pleading and the fact that the effect of prior judgments is usually treated by the English text writers as a branch of the law of Evidence and not as a branch of the law of Civil Procedure.

The remainder of the Act consists of a reduction to express propositions of rules as to the examination of witnesses, which are well established and understood. They call for no commentary or introduction, as they sufficiently explain their own meaning, and do not materially vary the existing law and practice.

CHAPTER VI

SOME CRITICISMS OF THE ACT

It has been said that its "own criticism is the only merit" of Sir James Fitzjames Stephen is not devoid of being improved upon,¹⁶ and it will generally be conceded that, except as regards Section 5, in Chapter II, a great advantage has undoubtedly been gained by the introduction of the Act, in the conduct of the law of Evidence, and the Act has effected a "reform" perhaps more discriminating and more judicious than any other. Some there are who approve of the "reformation" of the Act, proceeds, viz., that it is both possible and desirable to draw a line between what is Evidence, but criticise the actual provisions of the Act as being "unhappy." Others disapprove, preferring the "old" law of Evidence, as it was, or the English law which carries out the "old" law, but which is "not what is, but what is not, Evidence."

Of the first class, Mr. A. W. N. Pritchard, in his criticism on the theory of relevancy, writes, "The Act is a very good example of a law which is a law in words as Sections 6, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 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vant, but it may be one of a kind to which it is not of so suspicious an origin, that it is not to be taken into consideration at all. A word may be taken in a wide sense, but only with the simple and primary meaning in the strict sense of the term.

He points out that the word is used in a wide sense will appear from a reference to the 'Introduction' and the 'Relevancy of Facts' and in this Part Chapter III. Chapter IV is one of which is of the 'Principles of Relevancy' in its wide sense. Chapter II of Part I is a chapter in which the ambiguity is unfortunate. Sir Fitzjames Stephen has fully defined in Sections 6-11 of the Act what the word is observed, it seems to Mr. W. that it is probable that many subsequent sections should have been so defined as do Sections 22, 24, 25, 28, 29, etc. What is really not that the things they mention are not to be taken in words strictly, but that question of relevancy is not to be things are not to be excluded on account of their being other than relevancy. It is not to be admitted that they admit them.

The theory of relevancy is concerned with the thing relevant, and the thing relevant is not a fact, says, he some principle applicable to the fact, whether a particular fact is relevant or not. It is not to a number of facts, but to a number of facts of judicial enquiries is not a principle of relevancy. Sections endeavour to say that, as a fact, is a fact, whether facts unknown to them, or not, is a fact, is calculated to be a fact, or not, is a fact, is able of being defined by the evidence, or not, by an enumeration of its facts. Sir Fitzjames Stephen in chapter of his Introduction to the Act, and has said that relevancy is not a fact, but a fact. "If these two words are taken in their primary sense, to say that when a fact is relevant, it is a fact, is any fact, all facts are relevant, and the fact is the fact alleged to be a fact, and the fact is the effect." Mr. W. is not sure that the words "relevant" and "irrelevant" does not seem to be irrelevant. It is not a fact, in a transcendence sense. Sir Fitzjames Stephen has alleged that at the same time, it is a fact, and he said is, by the fact, is a fact, is a fact, is his intention, but also, it is a fact, is a fact. But in what accretion of the words, the act of stabbing? Or can be the act of stabbing? Upon the is needed. W. is not sure that the evidence that the fact is a fact, is a fact, is children. How is it, is a fact, is a fact, is a fact.

ration of the words 'cause' and 'effect' will not include such facts as these. And if we give them the meaning necessary to make true the statement that relevancy means the connection of events as cause and effect, then the statement itself becomes of no use, because every fact will be relevant. No doubt to a being of superior capacity of intelligence as to see the whole cause of every effect and the whole effect of every cause, everything that ever happened becomes one great fact and nothing is irrelevant. But, for human purposes, there is no question that relevancy and irrelevancy are realities; the difference between the two is recognizable by an ordinary human capacity, and must be something **expressible in ordinary language.**

"The definition that relevancy means the connection of events as cause and effect, leaves us, then, in this difficulty that if we take the words in any, even the widest comprehensible sense, the definition does not include all facts which we know from our experience to be really relevant; and if we give them a transcendent meaning based upon our knowledge that all things precedent have gone together to make up the state of things existing at any time, and that no fact could ever have existed without the co-existence of every other fact that did exist at the same time, then the definition includes everything, and so **ceases to be a definition.**

Thus the statement that relevancy means the connection of events as cause and effect requires some addition, if the words are used in any ordinary sense, and some limitation, if they are given a transcendent sense.

"Mr. Stephen, using the words in the latter sense imposes one limitation and declares precluded existence of another. He says, (a) the rule is to be subject to the caution that every step in the connection must be made out, and (b) that wide general causes, which apply to all occurrences, are in most cases admitted and do not require proof. The first of these limitations goes far to get rid of the objection that everything is relevant. The connection must be discernible, and every step in the connection proved or presumable. But if it is meant that each step must be recognizable as a proceeding from cause to effect, then, as shown above, things really relevant will be excluded. And if any other kind of connection will suffice, then it may be said of both the limitations that they are of little service, that the help they give in deducing particular facts from the general principles is small. For those rules are least likely to be applied to in the case of wide general causes or occurrences the connection of which with the fact in issue is not traceable. The object of the rules is to keep out irrelevant matter that is brought forward. As to a fact, such matter is submitted as evidence every day. Such matter does not usually consist of wide general causes that are admitted, nor of occurrences that have no connection with the facts in issue, and therefore these limitations do not exclude it. Therefore these limitations are not sufficient.

"Now as the theory propounded falls short of defining what relevancy is, so we may expect to find in the rules themselves things that cannot be explained by the theory. Again, as the rules are not deduced from first principles but are generalizations from actual experience, it is possible that in some unusual cases the language of the rules may not prescribe with accuracy the true limit of the relevancy. And thirdly, and for the same reason, it is possible that the rules laid down may not be in every part strictly confined to the subject of **relevancy.**

"Thus it is not immediately apparent, from the theory set forth, why one part of transaction throws light upon another, part which is so distinct from the first as to form in itself a fact in issue. When Mr. Hall shot three or four Gaekwar sowars, and it was a fact in issue whether he shot a particular one, no doubt the fact he shot the others increased the probability of his having shot the one in question. But the theory does not afford a ready explanation of this.

"By Section 7 those facts are relevant to facts in issue, which constitute the state of things under which they happened. A magistrate lately convicted some persons of rioting, and, the object of the riot having been to offend some Hindu religious Reformers, he commenced his judgment with a general history of Religion and religious Reformation down to the present time. The Judge before whom the case came on appeal, remarked upon the irrelevancy of this, and of course it was utterly useless; but the rule quoted does not seem to exclude evidence of it. By the same section facts, which afford an opportunity for the occurrence of a fact in issue, or relevant facts, are relevant. The theory does not explain why. When Mr. Hall shot the sowars, the fact that he had a rifle, gave him an opportunity of shooting the men he shot, but it gave him equal opportunity of shooting other persons whom he did not shoot. Its particular bearing upon the fact in issue to make it relevant is not explained.

"Section 8 is partly concerned with the admissibility of evidence of statement. It includes the substance of the English rule that declarations which are part of the *res gestae* may be proved. But this has nothing to do with strictly so-called ... [v. post, remarks upon III, (j) of this section]

"Section 9 declares facts necessary to explain or introduce a fact in issue to be relevant, but prescribes no test of the necessity. Is there no danger of useless matter being brought upon the record under this rule on the ground that it explains or introduces something to follow? It is true there is a provision under the law for the examination of witnesses, that when either party proposes to give evidence of any fact, the Judge may ask in what manner the fact would be relevant, and need not admit it unless he thinks it would be relevant (Section 136, Evidence Act); but still whether or not the fact is necessary to explain or introduce may be a disputable matter. The first illustration says that when the question is whether a given document is the Will of A, the estate of A's property and his family at the date of the alleged Will may be relevant facts. Now, it is obvious that some particulars about the property would be useful to be known, and some would be useless. So the rule seems partly to fail of its object, in that it does not define what class of particulars is relevant.

"Section 10 is a rule relating to one particular kind of transaction, conspiracy; and Section 12 refers only to the question of damages. But the mind sets to work to ascertain such facts as these in just the same way as in other facts, and it does not appear why special rules are requisite. When any person is charged with conspiracy, one of the facts in issue is the existence of the conspiracy, its absolute existence without reference to the accused person, and from the nature of the thing itself, requiring as it does the action of more than one mind, it is to be expected that causes of it and effects of it will be found existing outside the mind, and without the knowledge of a particular person.

[illegible]

the new rules which he deduces from it.

[illegible]

found that the charge means that the accused person put arsenic into a glass of *sherbet* which, from his knowledge of Colonel Phavre's habits, he knew Colonel Phavre would drink, then Colonel Phavre's habit of drinking *sherbet* at a particular time and the person's knowledge of this are parts of the fact in issue.

But, besides the *causes* of the fact in issue, *causes* of *causes* of the fact in issue may aid in determining any unknown fact. Knowing that the progress of events is from cause to effect, any fact that seems likely to have caused the fact to be determined or any fact that suggests the fact to be determined as a cause of it, may be of use.

Again, one cause may have many effects and one effect may be ascertainable from one effect as well as from another. If then in endeavouring to ascertain whether a particular event has happened we see some other event that suggests as its cause something that would probably have caused the thing we want to ascertain then that event will be of use. For example we want to ascertain whether A stabbed B, and we hear on the occasion on which B is said to have done so, A said to B "then die". Now this seems to imply just such volition employing the tongue as would employing an armed hand to stab B. The words and the fact in issue are effects of the same volition. Similarly were A charged with poisoning B the fact that before the death of B he procured poison of the kind that was administered to B would be relevant. The procuring of the poison is an effect of the cause which may be taken as of the fact in issue.

That there are four classes of facts which aid in determining a fact in issue :

- (1) Any part of the fact alleged or any fact implied by the fact alleged;
- (2) Any cause of the fact;
- (3) Any effect of the fact;

4. Any fact having a common cause with the fact in issue.

But it is not the whole of these facts that are of use. Some facts connected with the fact in issue in one of the four ways mentioned may be of a general nature and existing whether or not the fact in issue happened and therefore indicating nothing as to whether it happened or not. For example A is charged with the murder of B by pushing him over a precipice. Here the fall of B to the ground after he was pushed over is as much a cause of his death as the pushing over and as much an effect of the push as his death is. But gravitation is a general fact and exists all the same whether B went over the precipice or not and proof of it is therefore needless.

Besides such general facts there may be facts connected with the fact in issue in one of the four ways but with such a view shed no light upon it that their probative force is quite insignificant, as, for instance, of a longish quarrel of fifty years ago were brought forward to prove ill feeling between two men who had joined in partnership twenty years before.

To meet both these classes of cases, one proviso only is requisite, namely, that no fact is relevant to another unless it makes the existence of that other more likely. It is not necessary to say anything of the degree of probability the fact must raise. The test is obvious. The Judge who has eventually to decide whether the fact in issue is proved or not must decide whether the fact offered in evidence will, if proved, aid him in that decision.

The theory, then, so far as we have gone, is thus: Those facts are relevant to a fact in issue, the existence of which makes the existence of the fact in issue more probable, and they are found to be connected with the fact in issue in one of these ways: as being (a) part of the fact in issue, (b) cause of it, (c) effect of it, or (d) an effect of a cause of it.

But as, relying upon the principle that effects follow causes, we take from the surrounding circumstances facts that appear to be probable causes or probable effects of a fact unknown, as a means of proving it; so, upon the same principle we may first consider what would be probable causes or effects of the fact unknown and look upon their absence as a means of disproving it.

Therefore, in addition to the four classes of facts above mentioned, which may be said to be positively relevant, we have the following four classes which may be called negatively relevant: (a) facts showing the absence of what might be expected as part of a fact in issue or of what seems to be implied by a fact in issue; (b) facts showing the absence of cause of the fact in issue; (c) facts showing the absence of effect of the fact in issue; (d) facts showing the absence of effects (other than the fact in issue) of the probable cause of the fact in issue. And as it is essential to facts positively relevant that they make the fact in issue more likely, so those facts only are negatively relevant which make the existence of the fact in issue less likely.

Again, as facts are relevant only by reason of their being connected with the fact in issue, it follows, that to disprove the connection of an alleged relevant fact with the fact in issue is as efficacious as to disprove the existence of the fact. To show, for instance, that an alleged cause of a fact in issue would not really have as effect the fact in issue, or to show that an alleged effect of a fact in issue is really the effect of some other cause, does as well as to show that the alleged facts never existed. And as the connection of an alleged relevant fact may be disputed, so it may be affirmed in anticipation of dispute. That is to say, all facts which tend to prove or disprove the connection in the way of relevancy between facts in issue and alleged relevant fact are themselves relevant.

As relevant facts may be proved and as the mode of proof of any fact is (beyond the affirmation of witnesses of the fact) by means of facts relevant to it, it follows that 'facts relevant to relevant facts are themselves relevant.'

These considerations suggested to Mr. Whitworth the following rules, which he considered sufficient to decide, and the simplest test by which to decide, whether any fact offered in evidence is relevant:

Rule I. No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the Judge considers will aid him in deciding the issue.

Rule II. Subject to Rule I, the following facts are relevant :

- (1) Facts which are part of, or which are implied by, a fact in issue ; or which show the absence of what might be expected as a part of, or would seem to be implied by, a fact in issue ;
- (2) Facts which are a cause, or which show the absence of what might be expected as a cause, of a fact in issue ;
- (3) Facts which are an effect, or which show the absence of what might be expected as an effect of fact in issue ;
- (4) Facts which are an effect of a cause or which show the absence of what might be expected as an effect of a cause, of a fact in issue

Rule III. Facts which affirm or deny the relevancy of facts alleged to be relevant under Rule II are relevant.

Rule IV. Facts relevant to relevant facts are relevant

Mr Whitworth gives a single example of each kind of relevancy according to his classification, taking all examples from a simple case, that of Muller, who was tried for the murder of an old gentleman, a banker, named Briggs, by beating him with a life-preserver, as they were travelling together by rail, and then throwing him out of the train. Muller tried to make his escape to America, but was pursued and arrested on his arrival there. One point urged in the prisoner's defence was that he was not physically strong enough to commit the murder as alleged. His object appeared to be robbery.

The kinds of relevancy according to Rule II are four ; but as the first clause contains two classes with an apparent difference, they may, Mr. Whitworth says, be taken for the purpose of illustration as five ; and as each kind may be either positive or negative, the number becomes ten. And as by Rule III the connection of a fact with the fact in issue may be disputed as well as its existence, the number of illustrations required is twenty.

These he gives in the following order.¹⁹

- (a) Part of fact in issue.—It would be relevant to prove that at the time the offence was said to be committed, a witness by the roadside got a glimpse, as the train passed of the prisoner standing up in the carriage with his hand raised above his head.
- (b) Disputing the connection.—It would be relevant to show that at the time in question the prisoner had occasion to close a ventilator in the top of the carriage.
- (c) Absence of what might be expected as part of the fact in issue.—It

would be relevant to show that no noise was heard by the occupants of the next compartment.

- (d) Disputing the connection.—It would be relevant to show that the occupants of the next compartment were fast asleep.
- (e) Fact implied by a fact in issue.—It would be relevant to show that Muller was armed with a weapon.
- (f) Disputing the connection.—It would be relevant to show that such a weapon could not have caused the marks found on the body.

After giving this single example of each kind of relevancy according to his classification, Mr. Whitworth proceeds to decide by reference to the above rules all the cases quoted in illustrations of the rules set forth in this Act and shows that his rules are identical in effect with the Law by reference to them of the illustrations in the Act as follows :

Section 6 : Illustration (a).²⁰ For upon examination every part of a transaction will be found to be connected with every other part as cause or effect or as effects of one cause.

Illustration (b).²¹ That man was wiled is one of the facts in issue. These occurrences are part of that fact.

Illustration (c).²² Besides the fact of the publication, there may be in issue the question of B's good faith or malice, of the sense in which the words were used, whether the occasion was privileged or not. Other parts of the

- (g) Absence of fact implied by fact in issue.—It would be relevant to show that Muller was physically a very weak man.
- (h) Disputing the connection.—It would be relevant to show that under the circumstances but a little strength was required.
- (i) Cause.—It would be relevant to show that Mr. Briggs had done Muller some great injury.
- (j) Disputing the connection.—It would be relevant to show that Muller was not aware that it was Mr. Briggs who had done him an injury.
- (k) Absence of cause.—It would be relevant to show that Mr. Briggs had nothing valuable about him to tempt a robber.
- (l) Disputing the connection.—It would be relevant to show that Muller had reason to believe that Mr. Briggs had valuables in his possession.
- (m) Effect.—It would be relevant to show that immediately after the occurrence Muller took passage for America.
- (n) Disputing the connection.—It would be relevant to show that Muller had sudden and urgent business that called him to America.
- (o) Absence of effect.—It would be relevant to show that the railway carriage bore no marks of a struggle.
- (p) Disputing the connection.—It would be relevant to show that Mr. Briggs was too old and feeble to offer any considerable resistance.
- (q) Effect of a cause of a fact in issue.—It would be relevant to show that Muller had just before provided himself with a life-preserver.
- (r) Disputing the connection.—It would be relevant to show that Muller anticipated violence to himself on

the day in question.

- (s) Absence of effect of cause of fact in issue.—It would be relevant to show that Muller and Mr. Briggs had travelled together for a long distance before the fatal occurrence and that through all that time Muller had equal opportunity to attack Mr. Briggs and had not done so.
- (t) Disputing the connection.—It would be relevant to show that Muller had ascertained how far Mr. Briggs was going to travel, and that he (Muller) could best effect his escape by getting out at some place the the train came to after the occurrence.
- 20 A is accused of the murder of B by beating him. Whatever was said or done by A to B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.
- 21 A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaoles are broken open. The occurrence of these facts is relevant as forming part of the general transaction though A may not have been present at all of them.
- 22 A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the object out of which the libel arose and forming part of the correspondence in which it is contained are relevant facts though they do not contain the libel itself.

correspondence may be causes or effects of the publication, or effects of B's good faith or malice, or effects of the words having been used in a particular sense, or effects of a relationship between the parties showing that the occasion was or was not privileged.

Illustration (d).²³ Each delivery is a relevant fact as being part of the fact in issue: Did the goods pass from B to A?

Section 7: Illustration (a).²⁴ The first fact is relevant as a fact implied by the fact in issue; and the second is relevant as a cause of the fact in issue.

Illustration (b).²⁵ The marks are relevant facts as effects of part of the fact in issue.

Illustration (c).¹ That B was ill before the symptoms ascribed to poison is relevant as denying the connection of cause and effect between the fact in issue (the poisoning) and the relevant fact (the death): that B was well is relevant as asserting this connection. The habits of B are, if it is alleged that the opportunity was availed of, relevant as part of the fact in issue (if the opportunity was not availed of, the habits are not relevant).

Section 8: Illustration (a).² That facts are relevant as causes of the fact in issue.

Illustration (b).³ The fact is relevant as a cause of the fact in issue.

Illustration (c).⁴ The fact is relevant as an effect of a cause of the fact in issue.

23. The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate parties successively. Each delivery is a relevant fact.

24. The facts that shortly before the robbery B went to fair with money in his possession and that he showed it, or mentioned the fact that he had it to a third person are relevant.

25. The question is whether A murdered B. Marks on the ground produced by a struggle at or near the place where the murder was committed are relevant facts.

1. The question is whether A poisoned B. The state of B's health before the symptoms ascribed to poison and habits of B known to

A which afforded an opportunity for the administration of poisons are relevant facts.

2. A is tried for the murder of B. That A incited C that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public are relevant.

3. A sues B upon a bond for the payment of money. B denies the making of the bond. The fact that at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

4. A is tried for the murder of B by poison. The fact that before the death of B, A procured poison similar to that which was administered to B, is relevant.

Illustration (d).⁵ The facts are relevant as effects of the cause of the fact in issue.

Illustration (e).⁶ The facts are relevant; for they are all effects of the immediate cause, (namely, A's resolution to commit the offence) of the fact in issue.

Illustration (f).⁷ The latter fact is relevant as an effect of the fact in issue, and the former as a cause of the latter. As to the sense in which C's statement is relevant see remarks below, illustration (j), post.

Illustration (g).⁸ For A's going away without making any answer is an effect of the fact in issue, and the other two facts are causes of that effect.

Illustration (h).⁹ The first fact is relevant as an effect of the fact in issue, and the second as a cause of that effect.

Illustration (i).¹⁰ The facts are relevant as effects of a fact in issue.

Illustration (j).¹¹ The facts are relevant as effects of the fact in issue. The illustration goes on to say that the fact that without making a complaint she said that she had been ravished, is not relevant as conduct under Section 8 though it may be relevant as a dying declaration or as corroborative evidence. Nowhere, as Mr. Whitworth points out, the strict use of the term 'relevant' has been departed from. That the woman said she had been ravished is relevant.

5. The question is whether a certain document is the Will of A. The facts that not long before the date of the alleged Will, A made inquiry into matters to which the provisions of the alleged Will relate, that he consulted virkils in reference to making the Will, and that he caused draft of other Wills to be prepared of which he did not approve, are relevant.
6. A is accused of a crime. The facts that either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself or that he destroyed or concealed evidence or prevented the presence, or procured the absence of persons who might have been witnesses or suborned persons to give false evidence respecting it, are relevant.
7. The question is whether A robbed B. The fact that, after B was robbed, C said in A's presence, "The police are coming to look for the man who robbed B" and that immediately afterwards A ran away, are relevant.
8. The question is whether A owes B

10,000 rupees. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing "I advise you not to trust A, for he owes B 10,000 rupees" and that A went away without making any answer, are relevant facts.

9. The question is whether A committed a crime. The fact that A absconded after receiving a letter warning him that property was being made for the criminal, and the contents of the letter are relevant.
10. A is accused of a crime. The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime or attempted to conceal things which were or might have been used in committing it are relevant.
11. The question is whether A was ravished. The facts that directly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made, are relevant.

It does not follow that it is admissible. The Act declares when statements may be proved or relevant facts may be proved. When the statement in issue is one instance: that such statements may under certain circumstances be proved as corroborative evidence is another, and another, when the conduct of any person is a relevant fact, statements tending to explain that conduct, or statements made during or affecting that conduct, may be proved. This has been said already, and the rule seems out of place in Section 8. It is said that a statement without complaint is not admissible under the Act says that statement is "not relevant as conduct under this section." Statements (d), (g) and (h) some of the relevant facts are statements. They are also admissible as being connected with conduct, and are accordingly pronounced relevant. It is plain that it is meant that they may be proved. But that the statements are relevant in the strict sense is sufficient for the present purposes.

Illustration (k).¹² The facts in the first sentence of the illustration are relevant as effects of the fact in issue. The fact that he said he had been robbed without making any complaint, is relevant, though whether it is admissible or not depends upon the law relating to the question what statements may be proved.

Section 9: Illustration (a).¹³ The Act says the state of A's property and of his family at the date of the alleged Will may be relevant facts. But it may be stated absolutely that so much of the state of A's property or of his family as shows probable cause for his making such a Will as the alleged one, or as shows the absence of such probable cause, is relevant.

Illustration (b).¹⁴ Upon this issue so much of the position and relations of the parties at the time when the libel was published as shows cause for B's publishing a true libel or a false one, or the absence of such causes and so much as bear upon the matter asserted in the libel as cause of its truth or otherwise, is relevant.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are, the illustration says, irrelevant, because they do not make any fact in issue more or less likely to have happened. But the fact that there was a dispute is relevant if it affected any part of the position and relations of the parties defined above.

Illustration (c).¹⁵ The absconding is relevant as an effect of fact in issue.

¹² The question is whether A was robbed. The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which and the terms on which the complaint was made, are relevant.

¹³ The question is whether a given document is the Will of A.

¹⁴ A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

¹⁵ A is accused of a crime. The fact that soon after the commission of the crime A absconded from his house, is relevant under Sec 8 as conduct subsequent to, and affected

The fact of the sudden call is relevant as denying the connection of cause and effect between the fact in issue and the alleged relevant fact.

The details further than as stated in the illustration do not make the fact in issue more likely or unlikely to have happened.

Illustration (d).¹⁶ This statement is relevant as affirming the connection of cause and effect between the fact in issue (B's persuasion) and the relevant fact (C's leaving A's service).

Illustration (e).¹⁷ B's statement is relevant as an effect of a fact in issue.

Illustration (f).¹⁸ That the riot occurred is a fact in issue, and the cries of the mob are relevant as parts or as effects of the fact.

Section 10: Illustration.¹⁹ And any of these facts that are so connected with the other fact in issue, A's complicity, as to make it more or less likely, are relevant for that purpose also.

Section 11: Illustration (a).²⁰ Presence at Lahore is relevant as denying a part of the fact in issue. The other fact is relevant as making a part of the fact in issue unlikely.

by facts in issue. The fact, that at the time he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly. The details of the business on which he left are not relevant except in so far as they are necessary to show that the business was sudden or urgent.

16. A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service says to A, "I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct which is relevant as a fact in issue.

17. A, accused of theft, is seen to give the stolen property to B who is seen to give it to A's wife. B says, as he delivers it, 'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

18. A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant, as explanatory of the nature of the transaction.

19. Reasonable ground exists for believing that A has joined in a

1. Subs. by the A. O. 1950 for "Queen".

conspiracy to wage war against the [Government of India]¹.

The fact that B procured arms in Europe for the purpose of the conspiracy, collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writing advocating the object in view in Agra, and F transmitted from Delhi to G at Kabul, the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy are each relevant to prove the existence of the conspiracy although he may have been ignorant of all of them and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

20. The question is whether A committed a crime at Calcutta on a certain day, the fact that on that day A was at Lahore is relevant. The fact that near the time when the crime was committed A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

Illustration (b).²¹ That the crime was committed is adduced as an effect of the fact in issue that A committed it. To show that some other person committed it is relevant as denying the connection of cause and effect between the fact in issue and relevant fact; and to show that no other person committed it is relevant as affirming that connection.

Section 12: Illustration.²² For the amount of damages is a fact in issue, and any fact which will enable the Court to determine it will be found to be connected with the fact in issue in one of the ways specified.

Section 13: Illustration.²³ The deed is relevant as a cause of the fact in issue. The mortgage is relevant as an effect of the father's right, which is relevant as a cause of A's right. The subsequent grant of A's right is relevant as denying a fact implied by that relevant fact. Particular instances of exercise of the right are relevant facts as effects of the father's right. And instances in which the exercise of the right were stopped are relevant as contradicting those relevant facts.

Section 14: Illustration (a).²⁴ The fact that, at the same time, he was in possession of many other stolen articles is relevant as an effect of a habit of receiving stolen goods, the habit being relevant as a cause of his receiving the particular article with a knowledge that it was stolen.

Illustration (b).²⁵ The fact is relevant as effect of a habit, which habit is a cause of his delivering the particular piece with a knowledge that it was counterfeit.

Illustration (c).¹ The facts are relevant as the causes of a fact in issue, B's knowledge that the dog was ferocious.

21. The question is whether A committed a crime. The circumstances are such that the crime must have been committed by A, B, C or D. Every fact which shows that the crime could have been committed by one or els, and that it was not committed by either B, C or D, is relevant.

22. In suits in which damages are claimed any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

23. The question is whether A has a right to fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father irreconcilable with the mortgage, particular instances in which A's father exercised the right or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

24. A is accused of receiving stolen

goods, knowing them to be stolen. It is proved that he was in possession of a particular stolen article. (The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.)

25. A is accused of fraudulently delivering to another person a piece of counterfeit coin which at the time when he delivered it, he knew to be counterfeit. The fact that at the time of its delivery A was possessed of a number of other pieces of counterfeit coin is relevant. (The rest of the illustration was added after Mr. Whitworth's pamphlet by Act III of 1891.)

1. A sues B for damage done by a dog of B's which B knew to be ferocious. The fact that the dog had previously bitten X, Y and Z and that they had made complaints to B, are relevant.

Illustration (d).² For A's knowledge on the previous occasions is a cause of his knowledge on the occasion in question, and that there was no time for the previous bills to be transmitted to him by the payee if the payee had been a real person is a cause of his knowledge on the previous occasions and the fact that A accepted the bills is an affirmation of the connection of cause and effect between the fact concerning time and the fact of A's knowledge.

Illustration (e).³ The fact of previous publications is relevant as an effect of the same cause as that of which the fact in issue is an effect.

The fact that there was no previous quarrel between A and B, is relevant as alleging absence of fact in issue. The fact that A reported the matter as he heard it is relevant as denying the connection of cause and effect between the two facts, the malicious intention and the publication.

Illustration (f).⁴ For A's good faith is in issue, i.e., did A, when he represented C as solvent, think him solvent? is in issue. As C's insolvency may be put forward on one side as a cause of A's thinking him not solvent, so that his neighbours and persons dealing with him supposed him to be solvent, may be put forward as effects of causes which are causes also of A's thinking him solvent. Thus the neighbours' suppositions are effects of causes of a fact in issue.

Illustration (g).⁵ The fact that A paid C for the work in question is relevant. For it is in issue,—was B's contract with A? Therefore that A contracted for the same piece of work with C is relevant as showing absence of cause to contract with B, that he paid C is relevant as an effect of the relevant fact that he contracted with C.

2. The question is whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

3. A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact of previous publications by A respecting B, showing ill will, on the part of A towards B is relevant as proving A's intention to harm B's reputation by the publication in question. The fact that there was no previous quarrel between A and B, and that B repeated the matter complained of as he heard it are relevant as

showing that A did not intend to harm the reputation of B.

4. A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent suffered loss. The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him is relevant, as showing that A made the representation in good faith.

5. A is sued by B for the price of work done by B upon a house of which A is owner by the order of C, a contractor. A's defence is that B's contract was with C. The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's account and not as agent for A.

Illustration (h) ⁶ The fact of notice is relevant as a cause of his knowledge that the real owner could be found.

The other fact is relevant as showing that the alleged cause of the fact in issue had not the effect of causing the fact in issue.

Illustration (i) ⁷ For A's intention is a fact in issue. The fact is one which may continue through a space of time, and the shooting is an effect of it.

Illustration (j) ⁸ For the intention to cause fear is a fact in issue. It is a fact capable of prolonged existence, and the previous letters may be effects of it.

Should it, however, be objected that the fact in issue is intention at a particular moment and not intention through a space of time, Mr. Whitworth's reply is, that previous intention is a cause of subsequent intention or both are effects of the same cause.

Illustration (k) ⁹ The expressions are relevant as effects of the cause of the fact in issue or as showing absence of cause of the fact in issue.

Illustration (l) ¹⁰ The statements are relevant as effects of the fact in issue.

Illustration (m) ¹¹ The statements are relevant as effects of the fact in issue.

Illustration (n) ¹² The drawing of B's attention is relevant as a cause of B's knowledge, which is a fact in issue.

6. A is accused of the dishonest misappropriation of property which he had found, and the question is whether when he appropriated it he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given to the public was relevant as showing that A did not in good faith believe that the real owner of the property could not be found. The fact that A knew or had reason to believe, that the notice was given to everybody by C who had heard of the loss of the property and wished to set up a false claim to it is relevant as showing that the fact that A knew of the notice did not disprove A's good faith.

7. A is charged with shooting at B with intent to kill him. The fact of A's having previously shot at B may be proved.

8. A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the in-

tention of the letters.

9. The question is whether A has been guilty of cruelty towards B, his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

10. The question is whether A's death was caused by poison. Statements made by A during his illness as to his symptoms, are relevant facts.

11. The question is what was the state of his mind at the time when an assurance on his life was effected. Statements made by A as to the state of his mind at, or near, the time in question are relevant facts.

12. A sees B too negligent in providing him with a carriage for hire not reasonably fit for use whereby A was injured. The fact that B's attention was drawn on other occasions to the defect of the particular carriage is relevant. The fact that B was habitually negligent about the carriages which he left for hire is irrelevant.

The fact that B was habitually negligent is irrelevant, for it is not connected with the fact in issue.

Illustration (o).¹³ The fact is relevant as an effect of a fact in issue, B's intention.

The fact that A was in the habit of shooting at people is irrelevant for it is not connected with a fact in issue.

Mr. Whitworth adds that this case, in which a habit is declared irrelevant, has some resemblance to that of Illustration (a), where a habit is relevant, but that there is a real difference between the two. He says: "The man who habitually shoots at people with intent to murder them has in each case a definite intention of killing the particular person shot at. There is not, as far as the facts are stated, any ulterior common object to connect together the fact of the previous shooting and the fact in issue. But in the case of receiving stolen property the ulterior common object of making dishonest gain by receiving supplies the connection."

Illustration (p).¹⁴ The first fact is relevant as an effect of the cause of his committing the crime.

The second fact is irrelevant, as it is not connected with the fact in issue, namely, whether he committed the particular crime.

Section 15: Illustration (a).¹⁵ The facts are relevant as effects of the cause of the fact in issue.

Illustration (b).¹⁶ The facts are relevant as effects of the cause of A's making the particular false entry intentionally.

Illustration (c).¹⁷ The facts are relevant as effects of the cause of the intentional delivery of the rupee in question.

13. A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that he was in the habit of shooting at people with intent to murder them is irrelevant.

14. A is tried for a crime. The fact that he said something indicating an intention to commit that particular crime is relevant. The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

15. A is accused of burning down his house in order to obtain money for which it is insured. The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from different insurance offices are relevant, as tending to show that the fires were not acci-

dental.

16. A is employed to receive money from the debtors of B. It is his duty to make entries in a book, showing the amount received by him. He makes an entry showing that on a particular occasion he received less than he really did receive. The question is whether this false entry was accidental or intentional. The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A are relevant.

17. A is accused of fraudulently delivering to B a counterfeit rupee. The question is whether the delivery of the rupee was accidental. The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E, are relevant, as showing that the delivery to B was not accidental.

Section 16: Illustration (a) ¹⁸ The facts are relevant as causes of the act in issue.

Illustration (b) ¹⁹ The facts are relevant, the first as a cause of the fact in issue, and the second as affirming the connection of cause and effect between the first and the fact in issue.

Mr. Whitworth was unfortunately prevented by want of leisure from dealing generally with the criticisms which his essay provoked. One of these was that his first rule was a particular abandonment of the scientific form of the others. Mr. Whitworth's answer to this in his Preface to the Second Edition of his Pamphlet was that an examination of the connection of the first with the other rules would show that their scientific form was of independent value. The second, third and fourth rules supplied, he contended, a definition of relevancy and would be complete if the subject were the theory of relevancy absolutely. The qualification applied by the first rule was required, because the subject is the theory of relevancy for the purpose of judicial evidence. The theory is one thing, its application to a particular purpose is another. He added:

"It might be well to have rules that would express at once both the principle and its limitation. Failing this, I have propounded one rule (an unscientific one) as to the limitation and three others (scientific in form) as to the principle. But the importance or unimportance of the failure is to be measured by considering whether questions of difficulty in actual practice usually relate to the limitation or the principle or to the principle itself; in other words, whether, for the solution of such questions unscientific or scientific rules are provided. Now the first rule relates chiefly to what Sir James Stephen speaks of as wide general causes which apply to all occurrences, are in most cases, admitted, and do not require proof; and the test in cases of disputed relevancy will, I think, usually be found to be one or the other, the scientific rules."

The theory contained in Mr. Whitworth's essay was subsequently adopted by Sir James Stephen himself in the earlier edition of his Digest of the Law of Evidence ²⁰. In the present edition Sir J. F. Stephen substituted another definition of relevancy in place of that contained in the earlier editions and taken from Mr. Whitworth's essay, not as Sir J. F. Stephen observes, because he thought the former definition wrong, but because it gave rather the principle on which the rule depends than a convenient practical rule ²¹.

Dr. Wharton ²² while defining relevancy as that which conduces to the proof of a pertinent hypothesis, a pertinent hypothesis being one which it

18. The question is whether a particular letter was despatched. The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put into that place are relevant.
19. The question is whether a particular letter reached A. The facts that it was posted in due course,

and was not retained through the Dead Letter Office are relevant.
20. Steph. Dig., pp. 156, 157.
21. *Ib.*, p. 158. The substituted definition is given, post, in the Introduction to Ch. II.
22. A Commentary on the Law of Evidence in Civil Issues by F. Wharton, LL. D. 3rd Ed., 1888, Philadelphia, ss. 20, 26.

[illegible]

Hayes's Preliminary Treatise on Evidence at the Common Law, p. 260n. The whole of Ch. VI in which this passage occurs is worthy, as is indeed the rest of the work, of the most careful study.

2. See Markby's Evidence Act.

Introd
3. Markby's Evidence Act 17.
4. Thayer, *op. cit.*, 268n.
5. Thayer, *op. cit.*, 275, 264.
6. *Ib.* 265
7. *Ib.* 270

method of proof; so that where people did not have the jury, or having once had it, did not keep it, as on the Continent of Europe although they, no less than we, worked out a rational system, they developed under the head of evidence no separate and systematized branch of the law."

The main object of the law is to determine not so much what is admissible in proof as what is inadmissible. Assuming in general that what is evidential is receivable, it is occupied in pointing out that part of this mass of matter is excluded, and it denies to this excluded part not the name of evidence but the name of admissible evidence. Some things are rejected as being of too slight a significance or as having too conjectural and remote a connection, others as being dangerous in their effect on the jury and likely to be misused or over-estimated by that body, others as being impolitic or unsafe on public grounds, others on the bare ground of precedent. It is in fact this sort of thing—the rejection on one or another practical ground, of what is really probative—which is characteristic of the English Law of Evidence, stamping it as the child of the jury system.⁸ Admissibility is thus determined, first by relevancy—an affair of logic and experience and not at all of law, secondly, but only indirectly, by the Law of Evidence which declares whether any given matter which is logically probative is excluded.

A practical experience of many years in the working of the Act shows it to be a matter of regret that the English system, which has its basis in the historical reasons to which we have referred, was rejected in favour of the attempt at a constructive treatment adopted in Sections 5–16 of the Act. As **Sir William Markby very justly puts it:**⁹

"What then it will be asked, is a Judge to do when he has to consider whether a fact is relevant? In the first place I answer that this is a question which he has very rarely to consider. Parties to a litigation or their advocates very rarely attempt to offer irrelevant evidence. Their only object in doing so would be to waste time. They hope to influence the opinion of the Judge, and this they cannot expect to do by evidence which is really irrelevant. But if a Judge thinks that he is being asked to listen to what is really irrelevant he would certainly not resort to any abstruse consideration of its cause and effect; he would simply consult his own experience."

The real discussions which take place before a Judge upon evidence are, as he points out, not as to its relevancy but to its admissibility. And this Act would have been far more intelligible if the language of it had corresponded

8. Thayer *op. cit.*, 264–269. It is the fact that the law of evidence is a mere collection of rules, based as being a mere collection of rules on the laws of thought, which is the cause of its influence (the jury) that must at every moment be taken into account, for it is this which brought it into being as it is the absence of this which alone accounts for the non-existence of it in all other than English speaking countries, whether ancient or modern; *ib.*, pp. 267–268. In fact it may be added that the English rules of evidence are

never very scrupulously attended to by tribunals, which like the Court of Chancery, adjudicate both on law and on fact through the same organs and the same procedure. Evidence Act, pp. 17, 18. According to the learned author notwithstanding that this is an Act which professes to contain the whole law of evidence, two at least of the general rules of exclusion (including that against hearsay) are not treated in it. The language of s. 60, he contends, does not, as is generally supposed, exclude hearsay.

with a collection of rules not upon relevancy but upon admissibility. In that case whilst their own reason and commonsense would have told the Judge and parties what was relevant, it would only have been necessary on an objection to look into the provisions of the Act to see whether there was any rule prohibiting the reception of the proposed evidence or not. Whether or not certain kinds of evidence shall be admissible depends on a variety of considerations besides relevancy, and the putting forward of relevancy in the Act as if it were the only test is not only erroneous but unfortunate. It makes the Act difficult to explain and adds to the mystery by which this branch of the law is usually supposed to be surrounded. There is, however, something about the matter that should be remembered, that the ordinary processes of reasoning and argument are not within the scope of the Court House and that action of the law does not properly undertake to regulate these processes except as helping by certain rules which have been prescribed in a random way, the manner to discriminate and select what is admitted and what is excluded, and to operate legal reasoning at the same time, and other reasoning. Though practical considerations come into support. Rules, principles, even axioms of legal reasoning have, however, figured as rules of evidence to the perplexity and confusion of those who sought for a stronger grasp of the subject. The error may be dismissed that legal reasoning is some natural process by which the human mind is required to enter what does not logically follow. What is called the "legal mind" is still the untrained mind and must reason according to the laws of its constitution. But to understand properly the Law of Evidence one must detach and hold apart from it all that belongs to the wider metaphysical and far wider subject.¹⁰ The position may be summed up in saying that the laws of reasoning indicate what facts are relevant. The Law of Evidence declares which of those facts are inadmissible. These latter must be consciously stated and codified. But just as other organic processes of thought are and in most cases are the better carried on unconsciously so that if they are stated and the risk of confusion is involved in an attempted analysis of the reasons. The commonsense and experience of both the parties and the Judge will tell them what they have to prove and what should be proved, and what is relevant for that purpose. And if there be not, abstract considerations of causality will not help them, interesting though these may be in inquiries less practical than those which come before a Court of Justice.¹¹

It is sometimes said and printed that by Mr. Cross of the Evidence at p. 21, that in relation to relevancy the author's objects "to show that admissibility we should know the facts, circumstances, and admissibility." If this were done, there may be some advantage in the law of evidence to prove that it is not a rule of evidence to exclude evidence to a fact in issue, and it is not a rule of evidence to exclude evidence to a fact in issue.

10. Thayer *op. cit.* Ch. VI, and the same author's *Select Cases on Evidence*, 1-4.

11. As matters now stand on an objection to evidence, the party tendering it has to search the Act for the section which justifies its reception. This is not always an easy matter, and it is probably owing to this and not an unnatural

reluctance to enter into the mazes of the law of causality that there is such popular resort to s. 11. In a Code which aimed merely at embodying the rules of exclusion, all evidence would be *prima facie* admissible unless the objecting party could show some positive rule in the Code excluding it.

the exclusionary rule, while **receivability** would mean that the evidence was relevant, material and admissible. But, as pointed out by Mr. Cross, the dual concepts are not employed in practice, and in fact it is by no means certain that their adoption would render the exposition of the law any clearer.

But apart from these criticisms, the modern science of psychology has been seeking to undermine our faith in the basic concepts of the law of evidence adumbrated above. This is not the place for discussing the many criticisms to which the Indian Evidence Act has been subjected to by psychologists. Those desirous may refer to the discussions in Arnold's *Psychology applied to Legal Evidence*, Boss's *Introduction to Jurist Psychology* and McCall's *Psychology for the Lawyer*, the last mentioned being the clearest exposition on the subject. If some of their criticisms are indicated here, it is done only to **food for thought and nothing more**.

Arnold criticises the Law of Evidence, because it requires in many cases the splitting up of a logical single transaction, some of it being admitted and some not. It is possible because of the rule that all evidence must be logically relevant to be admissible, but some logically relevant evidence is not legally relevant and therefore not admissible. He cites several examples, such as the rule that it is not admissible to prove the fact in issue by showing that similar facts have occurred on several occasions. Another is a confession made by one person implicating another with whom he is jointly tried for a different offence committed in the same transaction. The confession would not be competent evidence admissible as against the other. Yet when the Judge or jury has heard the whole transaction, why not the confession as part of the transaction be admissible? He concludes that the rules of evidence are framed 'on the assumption that because parts of a transaction can be separated off in the space from one another, a similar separation can be made in the effect of it all the evidence on the mind, whereas as he has said, the truth is grouped as a whole by intuition and not by deductive steps in corresponding each to so much of the evidence given'. He then points out that it is an intellectual impossibility for a Judge or jury thus to separate the parts and use one discarding the other. The whole transaction is in mind and cannot thus be **swayed aside**.

Arnold then contends that lawyers seek to apply general rules in the shape of legal maxims to particular cases excluding from consideration the particular peculiarities of the case itself and to this he is largely supported by assertions that they cannot enter into all the considerations because **time would never permit**. In short, the law cannot embrace all the complexities of human life. The reply to this in substance is that it is impracticable to consider all aspects and such methods are sufficient and **reliable and correct produce anything but injustice**.

In order to **fasten the proof**, the law of evidence has built up certain presumptions. Experience has shown that from certain facts a certain order of events usually follows and as a short-cut the inferred facts are presumed without the facts are shown. These presumptions are not free from attack. Arnold criticises the legal presumption, instead of relying on science, draws a number of arbitrary assumptions, e.g. that a man must be presumed to know and therefore he intends the probable consequences of his act which constitutes both the

to the other sciences and the experience of mankind. He contends that in the study of mental qualities, human motives and conduct, legal presumptions are void to the conclusions of psychology when they clash, for psychology has especially studied this branch.

One method of proof is by showing other similar acts. The general rule, however, is that it is not admissible to prove the fact in issue by saying that similar facts have occurred on other occasions. To make such similar but unconnected facts admissible it is usually necessary to show some cause and effect connection from which inference may be drawn. The necessity for showing the causative result in excluding much that is of real evidential value. Arnold points out what he considers to be weakness of this rule, and says

"Now it is quite clear that the evidence of the occurrence of similar facts on other occasions may be decidedly valuable, but it is probability and not causality which is here the ground of admission. Similar events are really relevant as tending to make the event in question more probable because they are evidence of the uniformity of nature. It is a case really of induction by simple enumeration which can never be causality. But the larger the number of instances, the greater becomes the probability to the mind of the inquirer of the uniformity alleged or assumed."

As a general proposition adduced from experience and supported by psychology, it is said that it is safe to say that a person is more apt than not under similar circumstances to do what he has done before. The more such conduct a matter of habit, the more certain is this result. Even with considerable volition, the tendency is to follow previous action. On the basis of this probability, there is a probative value to evidence of similar acts or occurrences.

It has been stated that a class of irrelevant facts comes under the broad term *res gestæ*. It has long been a rule of evidence that hearsay testimony is inadmissible. A witness must be sworn in court and be subjected to cross-examination; otherwise, says the law, there would be no assurance that he is telling the truth. 'Conversation is not evidence.' Yet exceptions and modifications have been made so large as almost to obscure the rule itself. This result is the result of building up a rule upon such narrow foundations. The principle that a statement not made in court is unreliable is not borne out by experience. *Res gestæ* is no doubt excepted from this rule, but the Indian Evidence Act puts such limitations as to exclude much useful evidence. Human mind works like chain lightning, sometimes very sluggishly. Different minds even contradict very materially. Therefore, arbitrary limitations in regard to time, place and person based upon *res gestæ* do not rest on any sound psychological basis.

The objection that a statement of the witness is an opinion and conclusion is a common weapon. Ordinary witnesses are prone to drop into common expressions. Thus, in telling what a certain agreement was, the witness says, 'we agreed that', and counsel interrupts and raises the objection that it is not evidence but the conclusion and opinion of the witness. This is absurd and the witness is admonished not to give his opinion but to state the facts. Not quite sure what it is all about, the witness again starts to tell you

his story, and after stating some of the tack words it up with 'we agreed that', only to be again rejected and the court saying, 'Never mind your conclusion, just state what was said.' Still more confused and having lost the thread of his story by the process of exclusion, the witness does very well if he gets through without getting his story up and saying something which he does not mean or forgetting some vital part of the transaction. From a procedural standpoint, the rule is worse than the evil it is aimed to correct. Fundamentally, there is a distinction between fact and conclusion. From the psychological side, 'We agreed' is often a more definite fact and better proof than hours of conversation. Mere words do not have facial gestures, inflections, the nod of agreement or the tacit assumption that are an integral part of many transactions. The human element gets entirely eliminated by such an artificial rule of evidence.

The psychologists fondly foster in on the strange individual with whom every judge, lawyer and juror must be acquainted, viz. Mr. Ordinary Prudent Man. It is stated that we meet him face to face in many cases, and yet none of us can describe his appearance accurately. There is an air of mystery about him and a vagueness that is very disconcerting. In fact in recent decision, "this reasonable man or the Ordinary Prudent Man" has been described by Lord Justice Goff as 'the man in the street or the man on the Clapham omnibus or as I recently read from an American author the man who takes the magazines home and in the evening peeps the latest news in his shirt sleeves'.¹² This authority has a formidable position in the law especially in the law of negligence. This pictorial and artificial creature has no counterpart in real life and leaves out of consideration the variations of personality. The result is that Mr. Ordinary Prudent Man is a creation of every individual judge who presides and appellate courts which read, "How can justice be done it is said, unless we can take into account the entire human personality, the mental constitution of the individual as well as the more or less direct environmental influences which enter into the act in question?" Instead of setting up, therefore, a strawman why not set up some such standard as a reasonable care at the time under the circumstances of a particular case and the personality of the actor.

Thus it is concluded by McCarty, at page 342, that the Law of Evidence based upon the old Common Law and upon a physical and mental knowledge of by one day with the little attempt to adopt evidentiary rules of modern scientific or psychological knowledge should be modernized and that all facts of whatever nature which have any relations, however remote, to the question under investigation should be made admissible and that whatever in short, brings or contributes to bring the mind to the just conviction of the truth or falsehood of any fact asserted or denied should be made evidence.¹³

These changes are set up so because they are reasonable. On the other hand, Sir James Stephen in his Introduction to the Indian Evidence Act has shown how reasonable the old law is in its control of evidence as Sir James points out "it is but more than commonsense view of what constitutes sufficient probability which to act as a term of opinion. It is in reality

12. *Hall v. Brooklands Club*, (1933) 1 K. B. 204, 220.

13. McCarty: *Psychology for the Lawyer*, Chapter XI.

a body of simple and untechnical rules which it is not too much to say any intelligent and impartial man would be led by the facts in issue to set upon in prosecuting the enquiry or settling a dispute in private life. The only difference is that in a court of justice on the facts permitted to be placed before it a greater degree of probability, moral certainty, or, as it is termed, and a more rigid process of proof would be required.

Therefore, in private life also if one is independent and impartial in prosecuting an enquiry or settling a dispute having regard to the fact that these matters will have to be disposed of as expeditiously as possible and adopting ready methods of weighing evidence, irrelevancies will have to be excluded. He will insist upon evidence being confined to the matters in issue. Otherwise, whereas Judges and parties are mortal, controversies will become immortal. Evidence, which might even be highly relevant in a protracted academic investigation, is treated as too remote from the issue in a forensic enquiry. The cause that body is controlled by the time factor. "If we live for a thousand instead of sixty or seventy years and every case was of sufficient importance it might be possible not to mention considerations such as dealing with matters which are not being litigated and dangerous distractions from the real controversy on hand." A case in point is the story told to account for the origin of the title expression 'Let us come back to our sheep.' A lawyer appeared for the case of a client who had lost some sheep talked of evidence to the matter in question, when his unfortunate client recalled him to the sheep. In private enquiries, undoubtedly, irrelevancies become more common. Generally, in ordinary person listens to everything that is said and would remove irrelevancies by suggesting that the witness shall tell him what he knows.

Now let me hear all that you have to say' is a common expression when an inquiry conducted without reference to legal evidence. But the Court, for obvious reasons, cannot follow such methods and has to rule out the irrelevancies into which we all too frequently glide with unconscious freedom. In fact, the moment our attention is relaxed, we are apt to run off the lines of our enquiry. It is not always hands accustomed to legal processes of thought that have to apply the law of evidence. The bulk of our civil and criminal work fails to be disposed of by laymen other than trained judges. Therefore, the rules of inclusion (Sections 5 to 11) and rigid rules of exclusion have been enacted confining evidence to matters in issue and relevant facts. In course of time to make material of belief the best that can possibly be secured. English Jurisprudence has built the following principles, viz., that a witness should not be allowed to give hearsay or second hand evidence, he will not be allowed to give his opinion; courts will not admit similar though uncorroborated facts, they will not admit facts as to the character of the person whose conduct is in question. These rules, however, are not inflexible, because exceptions are made to them such as would naturally suggest themselves as reasonable and proper.

It is quite true that what the witness had seen or other circumstances and what the witness's own private opinion was about the material condition of the connected facts which though similar were uncorroborated with the case in question and of facts which tended to throw discredit on the person charged with a crime.

some extent be relevant. But a moment's reflection will show they are clearly insufficient to establish a grave charge and would be unsafe to make them the grounds of a decision. The reasons why hearsay evidence is not received as relevant evidence are :

- (a) The person giving evidence does not feel any responsibility. If he is cornered he has a line of escape by saying "I do not know but so and so told me";
- (b) truth is diluted and diminished with each repetition; and
- (c) if permitted, gives ample scope for playing fraud by saying "someone told me that....."

It would be attaching importance to a false rumour flying from one head to another. Pope says :

"The flying rumours gathered as they rolled,
Scarce any tale was sooner heard than told ;
And all who told it added something new,
And all who heard it made enlargements too ;
In every ear it spread, on every tongue it grew."

So, what the witness heard other people say must be mere gossip. It will be clear that it is not the best evidence. It is not, moreover, a statement on oath, but a mere report of what had been told by an absentee who may have spoken inadvertently, impulsively or erroneously and who was under no obligation to speak the truth and there is no protection for such statements being made in cross-examination. For other words, such evidence is not likely to be true, or at least it is not sufficient so as to make it trustworthy. There are exceptions when hearsay is likely to be true on the circumstances under which it is given to be received, voluntary confession, an admission a man makes of his own proprietary interest, an ex-ante or a dying declaration or a declaration against his own interest in the course of business. Then, under such guarantees of likelihood of truth, the hearsay rule is relaxed.

In addition, the law relating to *res gestae* 'the event which happened' or, more accurately, the events which happened in the affair, which is now being considered by the Court is a law hearsay evidence which will be heard to help to establish the existence or non-existence of the fact in issue to be proved. *Res gestae*, to which Kenny comprises all relevant facts or events which are either in issue or which though not themselves in issue yet accompany some fact which is in issue, tend to constitute circumstantial evidence which may explain or establish that fact. It is only repetition of second-hand utterances which gets excluded, but all other circumstances, facts, events, etc.

fact in issue in time, place and circumstances, constituting circumstantial evidence and helpful to establish the existence or non-existence of the fact in issue, get admitted. It may also be borne in mind that if spoken words are themselves a fact in issue they are admissible notwithstanding, for instance, that a witness speaks to the slanderous words uttered by a defendant and to refer to a statement at third hand. Thus the logic of restrictive *relevæ gestæ* ~~is not~~ is a witness or juror's investigation may be said at rest. The doctrine of *relevæ gestæ*, properly interpreted, makes available all really useful circumstantial material.

In regard to opinions, apart from the waste of time that would be caused by a law requiring to act their opinions in the witness box and which we with the greatest humanity have often to repress, there is a farther objection that the witness would be usurping the functions of the judge and the jury. But, there are well-recognised exceptions when such opinions will be valuable, e.g., expert testimony. Evidence of similar transactions is not allowed to be given on the simple ground that, but for this rule, a man charged with an offence, for instance, will have to submit to imputations which, in many cases, will be fatal to him, or else defend every action of his whole life in order to explain his conduct on the particular occasion. In addition, unless two actions are linked together by the chain of cause and effect in some unassailable way, we cannot draw logical inferences from one transaction to another merely because they resemble each other. There are important exceptions to this rule in criminal proceedings where it would be safe to draw such inferences in the context of other indications. Thus, where it is necessary to prove intention, knowledge, or some other state of mind, similar facts will be admitted to prove the existence of the facts in question or the accused's state of mind. Thus, if a man is charged with having received property knowing it to have been stolen, the fact that he has received many stolen articles and pledged them would be admissible to show that he knew the property was stolen. And, in like manner, where a man is charged with uttering counterfeit coin, evidence that he uttered on other occasions counterfeit coins will be admitted to show that he knew the coins to be counterfeit. In regard to character, it has been evolved by reason of long experience that evidence of good or bad character is irrelevant and inadmissible in civil cases unless character be the substance of the claim and in criminal cases good character is admissible, but not the fact that he is a bad character unless it be itself the fact in issue or unless evidence has been given that he has a good character. In giving such evidence it is permissible to give evidence only of general reputation and not of particular acts by which the reputation is shown. All this is pointed out by Sir James Stephen as being reasonable and free from difficulty. We all know how false a general reputation is in estimating the probability of a man's conduct in a particular case. The great bard William Shakespeare has rightly seen this reputation may not be true, "oft go without merit and oft lost without reason." We know how often the loss of a dog's bad name, and how often the loss of a man's bad character must be guilty. And, on the other hand, we know how often a spotless reputation is ruined by a single false step or voluntary weakness. Evidence of character therefore is rightly excluded. At the same time it is consistent with our laws leaning towards mercy that it is allowed should be allowed to give evidence of good character subject to the condition that the character can be related by evidence of bad character.

These arise from the differing concepts of the psychologist and the jurist as to the discovery of truth under prescribed evidential procedure. In the case of the psychologist, as mentioned by Mr. Beecher and cited by McCarthy (p. 50), the field of evidence from the point of view of the psychologist is the whole body of knowledge. That is, all facts of whatever nature which have any relation whatever to the question under investigation, are admissible. Such facts have different degrees of probative force but they have all some probative force. Under the law of the human mind, it is absurd, for instance, to exclude hearsay evidence or the evidence of a wife against her husband, or a confession obtained under threats or promises from a police officer, or to refuse to examine an accused person or forbid a party to discontinue his own evidence, no matter whether we have other testimony or not. Whatever in fact causes the lay-guest's definition brings or contributes to bring the mind to a proper conviction of the truth or falseness of any fact asserted or denied is evidence. It may be weak or strong, but it is still evidence and everything that in any way throws light upon the matter at issue is collected and submitted. It follows, therefore, according to Mr. McCarthy that we must re-write our law of evidence and method of proof of facts in the light of the knowledge gained by psychology and in line with modern human experience and replace the rules of evidence which are a heritage of past generations from Common Law of England under vastly different social and economic conditions. On the other hand, the restrictions imposed by the English rules of evidence, which appear in marked contrast to the laxity of proof allowed in some continental tribunals, for example, France unlike England, permits:

(a) leading question.

(b) hearsay evidence,

evidence of matters only remotely relevant are based upon sound reason.

It is true that the chief general rules of evidence consist, excepting for Sections 10 to 11, merely of rules of exclusion which are not limited to excluding such matters as are relevant to the issue to be tried. We exclude relevant testimony also in the case of evidence of matters so slightly relevant as not to be worth the time occupied in proving them. In every instance which might tend to throw light on matters of issue is allowed, trials would be protracted to intolerable lengths and extraordinary ingenuity would be exhibited in discovering every fact which, in the remotest bearing on the question under litigation. Surely, a system of evidence, limited to facts, that are not only relevant but even important, is of such a character that experience shows it likely, to mislead more, not to assist in the logical process of thought as being a more correct guide to the facts than it really is. These are the two fundamental reasons for this principle of exclusion, viz. that untrained minds might thereby be led to a false conclusion and lest the time of the court should be wasted. The third is that an accused person must be treated fairly and equitably at all stages of the procedure, and which has done much towards producing confidence in our courts and has kept the public feeling in full sympathy with the administration of law and has thereby facilitated the task of Government.¹⁶

16. Kenny's *Outlines of Criminal Law*, 17 Ed. Chap. xxvii, p. 435.

Again, on the whole, as pointed out by Dr. Fleming,¹⁷ the law has chosen external objective standards of conduct. This means that individuals are often held guilty of legal default for failing to live up to a standard which, as a matter of fact, they cannot meet. Moral blameworthiness and legal default do not invariably coincide. In our busy pace, legal control stops short of inquiry into the internal personality of conductors, because of administrative limitations. The law can only work in the sphere of external manifestations of conduct. Consequently, legal standards are standards of general application. When men live in society, it is not to the degree of sacrifice of individual peculiarities, going beyond a certain point is necessary for a general welfare. Otherwise substantial benefits would get elevated as the norm. One moment's reflection would show how, for instance, in cases of negligence, if the standards were relaxed for the ignorant, who cannot attain the normal, the burden of accident loss, resulting from the extreme hazards created by society's dangerous groups of accident-prone individuals, would be thrown on the innocent victims of such accidents. Although the legal standard insisted upon is that of a reasonably prudent or ordinary prudence in order to maintain personal equities and recoveries in actual practice within the limits of our principles of evidence, subjective factors are not wholly ignored and allowances are made for many of the personal characteristics of the defendant himself. In fact, as Dean Pound cited by McCarty at page 352 puts it:

"In France, for instance, the law seeks neither to generalise by eliminating the circumstances nor to particularise by including them; instead the law seeks to formulate the general expectation of society as to how individuals will act in the course of their undertakings and thus to guide the commonsense or expert intuition of jury or commission when called on to judge of particular conduct under particular circumstances."

And here, to conclude, on a perusal of the foregoing pages some such idea as the foregoing must have been awakened in our minds. Assuredly the object and aim of the law of evidence is of the highest and most momentous importance; no science, save indeed that which concerns itself with purely moral precepts, can be more elevated than this whose function it is *pro bono publico* to weigh with the nicest scales in the adjudication of disputes the permissible material of belief, that is to say, what facts are relevant and may be proved, and in what way each of the facts constituting the material is to be proved. How may we estimate its principle? A merely casual glance at them will show that they are based on truth and justice—a more profound acquaintance will reveal and convince how admirably they are adapted to the changing wants and necessities of society. The doctrines enunciated by British jurists, modified conformably to the requirements of more varied manner and more practical views, are well blended and incorporated with our law and from this point they have spread to Trans-Africa-Asiatic regions and the deference which the world's great legal realms thus varied and vast testifies to the wisdom from whence they have sprung. True, these principles are sometimes artificially expounded, practically misapplied—or lost in technicalities—but in the abstract they are sound; they readily adapt themselves to advancing knowledge—and as I have already stip in that great career of improvement which man has to make. It is so we may safely predict that they will be Eternal.

CHAPTER VII

COMING CHANGES

(Recommendations of the Law Commission)

The Law Commission of India in their XIV Report on Judicial Administration in Chapter 24, Vol. I, page 546, set out the observations regarding the information gathered by them with reference to the questionnaire issued by them and printed at page 129 of Vol. II of their XIV Report:

"Our Questionnaire related to the need for the reform and the modernization of the law of evidence with particular reference to the relaxation of rules against the admission of what has been called 'hearsay evidence', the admissibility of secondary evidence and cognate matters.

What is commonly known as 'hearsay' is what the term conveys, something that is heard by a witness from a third party. It may be described as oral secondary evidence of an oral statement. The expression is, however, understood by some writers in a much wider sense and applies to what has been called 'unoriginal evidence'. "All evidence is either original or unoriginal. The original is that which a witness reports himself to have seen or heard through the medium of his own senses. Unoriginal, also called derivative, transmitted secondhand or hearsay, is that which a witness is merely reporting not what he himself saw or heard, not what has come under the immediate observation of his own bodily senses, but what he has learnt respecting the fact through the medium of a third person"¹⁸. In its wider sense of unoriginal evidence it will include not only oral statements but written statements **by persons not called as witnesses.**

"2. In England where broadly speaking the admission of evidence is regulated by the English Common Law, exceptions have from time to time been made to the strict rule against the admission of hearsay evidence. These exceptions relate in the main to statements made by **deceased persons.**

"3. In many cases the admission of hearsay evidence was linked in with limitations and qualifications which created difficulties. For example, dying declarations of deceased persons were excluded from evidence if at the time of the declarations there was any prospect of their recovery,

18. *Principles of Evidence*, 9th edition, Sec. 27, cited in **Law of Evidence.**

however slight. Statements and documents prepared by public officers in the course of their duties were admitted but such documents had to be available for public inspection. Though evidence of statements of deceased persons could be admitted subject to certain restrictions the law would not admit in evidence the statements of witnesses where the witnesses though alive were for good and sufficient reasons **not available for giving evidence.**

"4. These and various other difficulties in regard to the admission of hearsay evidence gave rise to considerable criticism and eventually led to the enactment of the English Evidence Act of 1938. Leaving intact the exceptions to the rule of hearsay developed by the common law the Act has enacted some further exceptions. The legislation has however been criticised as not having gone far enough in relaxing the **rule against hearsay.**

"5. Attempts have also been made in the United States to mitigate the rigour of the application of the rule. Attention may be drawn in this connection to the American Model Code of Evidence compiled and published by the American Law Institute in 1942.

"6. The suggestions received by us in answer to the questionnaire and the evidence given before us has not afforded much assistance to us.

"Considering the provisions in regard to the admission of hearsay evidence in our Evidence Act such as Section 32 of the Act, it appears to us that our Act contains provisions for the admission of hearsay evidence in several matters in which it became admissible in England only after the Act of 1938 indeed in certain matters the provisions of the Act are wider and permit evidence to be given of matters which may not be admissible evidence in England even after the recent legislation. It is unnecessary to discuss the matter further in detail. We do not feel justified on the evidence before us in making any recommendations in this respect. The matter may call for further consideration at our hands at a later stage when the revision of the Evidence Act is undertaken by us and proper material is made available to us.

"7. The admission of secondary evidence of documents is governed by the provisions of Chapter V of the Indian Evidence Act. The primary evidence is the document itself produced for the inspection of the Court. The law however, enables secondary evidence of the document to be given in certain cases. The circumstances under which secondary evidence can be given of the existence, condition or contents of a document are stated in Section 65 and Section 66 of the Act. In so far as documents *inter partes* are concerned the rules relating to their proof by secondary evidence seem to be sufficiently wide and no suggestions have been made to us for their enforcement.

"8. The position appears to be different however in regard to public documents. The law enables the proof of the contents of public

documents to be made by the production of certified copies thereof. It has been justly said that delays in the disposal of cases are frequently caused by the need for the production of certified copies of public documents. But it is difficult to conceive of any manner other than the production of a certified copy by which the contents of public documents can be permitted to be proved. If it were left open to parties to adduce other proof of such documents the Court would have to enter into conflicting evidence about their contents and assess its worth. This is obviously undesirable when the document is a public document, the contents of which can be proved beyond dispute by the production of a certified copy. This question may also receive the further attention of the Commission at the time of the revision of the Evidence Act.

“9. Under Section 90 of the Evidence Act, when any document purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting and in the case of a document executed or attested that it was duly executed and attested by the person by whom it purports to be executed and attested. A question has been raised whether this presumption should be made applicable to certified copies of documents thirty years old. What is stated is that if a certified copy is produced before the Court of a document which purports to be thirty years old, the presumption of genuineness should be extended to the original document itself although it is not produced. It is to be noted that what is produced in Court is a certified copy. All that Court can therefore rightly presume is that it is a true copy of the original document. But no inherent testimony is afforded by the certified copy as to the circumstances under which the original came into existence and whether the original itself possessed any feature which would have destroyed or affected its veracity. In order to enable the Court to draw the presumption mentioned in Section 90 two requirements are necessary. The first is that the document should be thirty years old and the other is that it should be produced from custody which the Court considers proper. By so doing, the Court may presume that the original document was as it appeared in the certified copy. But could the Court raise the presumption as to the original document when all that is produced before the Court is a mere certified copy? It may be that the original of which a certified copy more than thirty years old is produced was a fabricated document. It does not therefore seem to us reasonable to extend the presumption to the original when it is not before the court.”

A view was once taken¹⁹ that Section 90 enables the presumptions mentioned above to be drawn in the case of the original on the production of a

19. Subrahmanya Somayajulu v. Seethayya, I. L. R. (1923) 46 Mad. 92; 70 I. C. 729; A. I. R. 1923 M. 1. Reversed on another point in

Seethayya v. Subrahmanya Somayajulu, I. L. R. 52 Mad. 453; 117 J. C. 507; 1929 P. C. 115.

certified copy of a document more than 30 years old. That view is however no longer good law.²⁰

"10. For these reasons we do not recommend the acceptance of the suggestion.

What we recommended is that questions relating to the relaxation of the rule against hearsay evidence, the rule as to circumstances under which secondary evidence should be admissible, judicial notice and ancient documents may be examined by Commission when revising the Evidence Act.

²⁰ *Basant Singh v. Brij Raj Saran Singh*, A. I. R. 1935 P. C. 132 :

62 I. A. 180; 156 I. C. 864

The Indian Evidence Act, 1872

(Act No 1 of 1872)²¹

AS AMENDED UP TO DATE

Revised by the Governor General on the 15th March, 1872)

SYNOPSIS

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| 1. Title. | 2. Lex fori. |
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1. **Title.** The title of an Act is undoubtedly part of the Act itself and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope.² It is not conclusive of the intent of the Legislature, but constitutes only one of the numerous sources from which assistance might be obtained.³ It may be resorted to for explaining an enacting clause, when doubtful.⁴ As to the title of an Act giving colour to, and controlling its provisions, *vide* footnote.⁵

2. *Lex fori.* The law of evidence applicable in every case is that of the *lex fori* which governs the Courts whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not; these and the like questions must be determined, not *lege loci contractus* but by the law of the country where the question arises, where the remedy is sought to be enforced and where the Court sits to enforce it.¹ The '*lex fori*' is, in Anglo American practice, defined determinative on the general principle that procedure is governed by the rules of the *forum*, and the Law of Evidence is part of the Law of Procedure. With this result practical convenience also coincides.² Thus, where

21. For Statement of Objects and Reasons, see Gazette of India, 1868, P. 1574; for the draft or preliminary report, see Select Committee dated 31st March, 1871, see *ibid.*, 1871, Pt. V, p. 273, and for the second Report of the Select Committee, dated 30th January, 1872, see *ibid.*, Pt. V, p. 34; for discussions in Council, see *ibid.*, 1868 Supplement., pp. 1060 and 1209 *ibid.*, 1871 Extra Supplement, p. 42; and Supplement, p. 1641, and *ibid.*, 1872, pp. 136 and 230.
S. K. Chakravarty v. Education Bill, 1907, P. C. 1167, 1909
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22. Vacher & Sons, Ltd. v. London Society of Compositors, 1913 A. C. 107, 128
Pada Lal Lahori v. State of Hyderabad, 1954 Hyd. 129; I. L. R. 1954 Hyd. 441; Aswini Kumar Ghose v. Arbinda Bose N. R., 1953 S. C. R. 1; A. I. R. 1952 S. C. 369.
Hurro v. Shooro Dhonee, (1868) 9 W. R. 402, 404, 405 (F.B.) Beng L. R. Supp. Vol. 985; Karachi Urban Co-operative Bank v. Sahibdin, 1940 Sind 147; 191 I. C. 31; see Salkeld v. Johnson, 2 Exch. 256, 282, 283
Uda v. Imam-ud-din, (1878) 2 A. 74 at 90; and see Alangamanjori v. Sonamani, (1882) B. C. 637, 639, 643; Crawford v. Spooner, (1846) 4 M. I. A. 179, 187.
Bain v. Whitehaven Railway Co. (1850) 3 H. L. Cas. 1, 19, Per Lord Brougham.

the question is one of the proper methods in India of proving an event which occurred in England, the law applicable is the Indian, and not the English, Law of Evidence³. Whatever conflicting views may have been expressed as to the proper law to apply to contracts in relation to land where the *lex loci contractus* and the *lex loci rei sitae* or, as Professor Dicey calls it, the *lex situs* differ, it seems to be generally agreed by Stacey, Dicey, Westlake and other text-writers that in so far as the formalities of alienation or conveyances are concerned, the law applicable is that of the country where the land is situated⁴. Hence, a document relating to and situated in India and not requiring attestation in this country may be proved merely by proving the signature of the executant, even if the document was executed in England and requires to be attested under the English law.⁵

PREAMBLE

Whereas it is expedient to consolidate, define and amend the Law of Evidence: It is hereby enacted as follows:

SYNOPSIS

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|-------------------------------|---|---|-----------------------|
| 1 | Preamble. | (f) Provisos. | |
| 2 | "To consolidate, define and amend the Law of Evidence". | 4 | General Construction: |
| 3 | Interpretation of Statutes: | (a) Reasonable construction. | |
| (a) Headings. | (b) Meaning of words. | | |
| (b) Interpretation clauses. | (c) "May". | | |
| (c) Illustrations. | (d) Exceptions. | | |
| (d) Marginal notes. | (e) Some rules of Interpretation. | | |
| (e) Intention of Legislature. | 5 | Interpretation of the Act with reference to English law | |

1. **Preamble.** The preamble to an Act is, according to Chief Justice Dyer, "a key to open the minds of the makers of the Act and the mischief which they intended to redress". The preamble has for long been regarded as a legitimate aid to construction. The rule is that it may not be used to control or qualify enactments which are in themselves precise and unambiguous, but that if any doubt arises as to the meaning of a particular enactment, recourse may be had to the preamble to ascertain the reasons for the statute and hence the intentions of Parliament⁶. The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the Legislature itself⁷. But it is only when there is ambiguity and when an expression used by the Legislature is capable of more than one meaning, that it is permissible to the Court to look at the preamble, and even to look

3. Wigmore on Evidence, S. 8, 3rd Ed., P. 159.

4. Niharendu Dutt Majumdar v. Emperor, A. I. R. 1942 F. C. 22: 200 I. C. 289; 1942 M. W. N. 417.

5. See Dicey, Conflict of Laws, Ch. 23, and Appendix, Note 17; see also Adams v. Clutterbuck, (1883) 10 Q. B. D. 403; 31 W. R. 723; 52 L. J. Q. B. 607; 48 L. T. 614.

6. See Income-Tax Commissioners v. Pemsel, 1891 A. C. 531 at 542; 65 L. J. Q. B. 265; 65 L. T. 621; 53 J. P. 805 II. L.; Bhola Prasad v. Emperor, A. I. R. 1942 F. C. 17; Janki Singh v. Jagannath, A. I. R. 1918 Pat. 398; 44 I. C. 94; Devji

Meghji v. Lalmita Mosammiya, (1977) 18 Guj. L. R. 515.

7. Halsbury's Laws of England Simonds Ed., Vol. 36, p. 370, para. 514; Surejmal v. State of Rajasthan, A. I. R. 1974 Raj. 116 at 122; Y. A. Mamarde v. Authority under Minimum Wages Act, A. I. R. 1972 S. C. 1721 at 1726.

8. Popatlal Shah v. State of Madras, A. I. R. 1953 S. C. 1105; 1953 Cr. L. J. 1105; 1953 L. W. 369; (1953) 1 Madh. Pra. 739; 1953 S. C. A. 466; 66 Mad. L. W. 5; 1957 S. C. R. 677; 8 D. L. J. 8 (S. C.) 513.

at the title or the Act, in order to find out what was the object with which the Legislature put the legislation upon the statute book, or what was the mischief which the Legislature was out to remedy.⁹ In case of a conflict between the preamble and a section it is the section that prevails.¹⁰

The rule of interpretation is that when the statute is clear its meaning cannot be curtailed or extended by reference to the preamble.¹¹ Where the meaning of the words is plain, it is not the duty of the Courts to busy themselves with supposed intentions.¹² In construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the enactment, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further. The only rule for the construction of statutes is that they should be construed according to the intent of the Legislature which passed them. If the words of the statute are, in themselves, precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves done do, in such case, best declare the intention of the law-giver. But if any doubt arises from the terms employed by the Legislature, it is the safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble which as already stated is a key to open the minds of the makers of the Act and the mischief which they are intended to redress.¹³

In *Attorney General v. Prince Ernest Augustus of Hanover*,¹⁴ Viscount Simonds observed that it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms. But it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. No one should profess to understand any part of a statute before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous. The context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it.

The title and the preamble undoubtedly throw light on the intents and designs of the Legislature, and indicate the scope or the purpose of the Legis-

9. *Commissioner of Labour v. Associated Cement Co., Ltd.*, A. I. R. 1955 B. 363; see also *Tuka Ram Savalaram v. Narain Bal Krishna*, A. I. R. 1952 B. 141; I. L. R. 1952 B. 565; 54 Bom. L. R. 88; *Tej Bahadur Singh v. State*, A. I. R. 1954 All. 675; 1954 A. L. J. 681; *Deorajain Devi v. Satvadhavan Ghoshal*, 1954 Cal. 119; 58 C. W. N. 64; *Nageswara Rao v. State of Madras*, A. I. R. 1954 M. 643; (1953) 2 M. L. J. 724; 1953 M. W. N. 909; *Mohammad Ali Fakhruddin v. Gokul Prasad*, A. I. R. 1954 Nag. 209; I. L. R. 1954 Nag.

323; *District Board, Bhagalpur v. Province of Bihar*, A. I. R. 1954 Pat. 529; *Aswani Kumar Ghose v. Arabinda Bose*, 1952 S. C. 369; 1953 S. C. R. 1.

10. *Secretary of State for India v. Maharaja of Bobbili*, 46 I. A. 302; I. L. R. 43 Mad. 529 (P.C.).

11. See *Pakala v. Emperor*, L. R. 66 I. A. 66; I. L. R. 18 Pat. 234; I. L. R. 1939 Kar. 123; A. I. R. 1939 P. C. 47; 180 I. C. 1.

12. *Ibid.*

13. *Ibid.*

14. (1957) 1 All E. R. 49

(1) where the text of the statute is susceptible of different construction;

language used, and might be used as aids to the construction of statute.¹⁵ Recourse may be had to the terms of the preamble—

(2) where it is clear that the Legislature intended that the very general language used in the enactment must have some limitations put upon it, or extended.

2. "To consolidate, define and amend the law of Evidence". The preamble shows that this Act is not merely a fragmentary enactment but a consolidated enactment repealing all rules of evidence other than those saved by the last part of the second section.¹⁷

The Law of Evidence applicable to India is contained in this Act and in certain Statutes, Acts and Regulations relating to the subject of Evidence saved by the proviso in the second section¹⁸ or enacted subsequent to this Act. This Act does not therefore contain the whole of the Law of Evidence governing this country. It has repealed all rules of evidence not contained in any Statute, Act or Regulation in force in any part of India. A person tendering evidence must therefore show that such evidence is admissible under some provision of Act of this Act or the Acts above mentioned. And there are no other rules of evidence in force in India except such as are contained in these Acts. Thus it was held that since under Section 2 the English Extradition Act which was applicable to this country as part of the law for reasons indicated in the manner prescribed by that Act were re-enacted, so were certain administration papers were tendered on behalf of the person, the Privy Council observed and held:

The English Extradition Act is repealed. The law which is contained in any Statute or Regulation, and the common law, must be shown that these papers are admissible under some provision of the Indian Evidence Act.¹⁹ Instead of assuming the English Law of Evidence, and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the change of the law in principle, and the application of those principles to the cases of most frequent occurrence.²⁰

15. In re The Kerala Education Bill, J. L. R. 1958 Ker. 1167; A. I. R. 1958 S. C. 956; 1958 Ker. L. T. 465; 1959 S. C. J. 321; 1959 S. C. A. 450.

16. Popat Lal Shah v. State of Madras, A. I. R. 1955 S. C. 274; Bengal Immunity Co. v. State of Bihar, (1955) 2 S. C. R. 603; A. I. R. 1955 S. C. 661; 1955 S. C. A. 1140; I. L. R. 34 Pat. 905 (1955) M. L. J. S. C. 158; 1955 S. C. J. 1955 S. C. 446.

17. Collector of Gorakhpur v. Palakdhari Singh, (1889) 12 A. I. at 35. As to construction of consolidating Acts, see Introduction.

18. Repealed by the Repealing Act, 1938 (1 of 1938), S. 2 and Sch.

19. In the matter of Stalimann, (1911)

39 C. 164.

20. See Lekhraj Kuar v. Mahpal, (1879) 7 I. A. 63, 70; 5 C. 744 P. C. 70; see also Collector of Gorakhpur v. Palakdhari Singh, (1889) 12 A. I. at 11, 12, 19, 20, 34, 35, 43. Sec. 2 in effect prohibited the employment of any kind of evidence not specifically authorised by the Act itself; R. v. Abdullah, (1885) 7 A. 385 at 399 (F. B.); but see also ibid. p. 401; see also Alexander Perera Chandrasekera v. The King, A. I. R. 1937 P. C. 24; 166 I. C. 330; 1937 A. L. J. 420, Muhammad Allahdad v. Muhammad Ismail, (1888) 10 A. 289; R. v. Pitamber, (1877) 2 B. 61 at 64.

21. R. v. Ashootosh, (1878) 4 C. 483 at 491 (F. B.) per Jackson, J.

In *State of Punjab v. Sohan Singh*,²² Subba Rao, J. has observed:

‘It has been acknowledged generally with some exceptions that the Indian Evidence Act consolidate the English Law of Evidence. In the case of doubt or ambiguity over the interpretation of any of the sections of the (Indian) Evidence Act, the Court can with profit look to the relevant English Common Law for ascertaining the true meaning.’

The Evidence Act is, as it was intended to be, a complete Code of the Law of Evidence for India.²³ The Act is a complete Code repealing all rules of evidence not to be found therein. There is, therefore, no scope for introducing a rule of evidence in criminal cases unless it is within the four corners of the Act. So a person in India cannot avail himself of the English Common Law maxim, *nemo tenetur accusare* ‘no one is bound to criminate himself.’²⁴

3. Interpretation of Statutes. (a) *Headings.* The headings prefixed to sections or sets of sections are regarded as preambles to those sections.²⁵ The headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them as a preamble to a statute may be looked to, to explain its enactments, but as affording a better way to the construction of the sections which follow, than might be afforded by a mere preamble.¹ But, the headings or sub-headings cannot either restrict or extend the scope of the sections when the language used is free from ambiguity.² Heading cannot be used to cut down the clear words of the section.³

In the arrangement of the sections of an enactment, the headings play an important part. Prefixed to sections, or a set sections, they may be considered as a part of the sections. They fulfil the object and serve as a key to constructing, in case of logical defects, the meaning, scope and intention of the sections. They cannot control the plain words of the statutes but may explain ambiguous words. If there is any doubt they help to resolve that doubt.⁴

22. A. I. R. 1961 S. C. 493; 1961 Mad. L. J. (Cri.) 731; (1961) 2 Mad. L. J. (S.C.) 203; (1961) 2 S. C. R. 371; (1961) 2 N. W. R. (S.C.) 203.

23. R. v. Kartick, (1887) 14 C. 721 at 728 (F.B.).

24. H. H. Advani v. State of Maharashtra, (1970) 1 S. C. R. 521 (1970) 2 S. C. A. 10; (1970) 2 S. C. J. 192; 1970 M. L. J. (Cr.) 490; 1971 Mah. L. J. 274; A. I. R. 1971 S. C. 44, 55 and 56.

25. Maxwell on Statutes, 11th Ed., p. 48.
1. Eastern Counties v. Companies v. Marriage, (1860) 9 H. L. C. 32; Dworkin v. S. (1877) 11 C. 267; 39 I. C. 64; A. I. R. 1917 C. 715, per Woodroffe, J.

2. Durga v. Narain, 1931 All. 597;

1931 A. L. J. 875 (F.B.); Mrs. Savitri Devi v. Dwarka Prasad, A. I. R. 1939 All. 305; I. L. R. 1939 All. 275; 182 I. C. 845; 1939 A. L. J. 71; Har Prasad Singh v. District Magistrate, Ghazipur, A. I. R. 1949 All. 403; 50 Cr. L. J. 657; Suresh Kumar Sohan Lal v. Town Improvement Trust, 1975 M. P. L. J. 413; 1975 Jab. L. J. 468; A. I. R. 1975 M. P. 189.

3. Gurudas v. Charu Panna, A. I. R. 1977 Cal. 110 at 114 (F.B.).

4. Bhandari v. Charan Singh, A. I. R. 1959 S. C. 960; 1959 A. L. J. 527; K. Mukundan v. The Circle Inspector, Neyyattinkara and others, 1976 Cr. L. J. 1438 at 1441 (Kerala).

(b) *Interpretation clauses.* Legislative definitions or interpretations, being necessarily of a very general nature, not only do not control but are controlled by subsequent and express provisions on the subject-matter of the same definition; they are by no means to be strictly construed, they must yield to enactments of a special and precise nature, and like words in Schedules, they are received rather as general examples than as overruling provisions.⁵ The effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places of the Act in which that word occurs, wherever that word appears, it must, unless the contrary plainly appears, be understood in accordance with the meaning put upon it by the interpretation clause. But an interpretation clause is not to be taken as substituting one set of words for another or as strictly defining what the meaning of a term must be under all circumstances but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended.⁶ It cannot, therefore, be said that the interpretation clause must necessarily apply, wherever the word 'interpreted' is used in the statute in spite of the fact that there are indications in the statute and in the sections where it occurs to control and modify and explain the meaning of the word in a different sense than what is borne out by the interpretation clause.⁷ While the construction of the definition of a term in a statute should be such as not to be repugnant to the context, it must equally be such as would aid the achievement of the purpose that is sought to be served by the Act.⁸ Again, it is by no means the effect of an interpretation clause that the thing defined shall have annexed to it every incident which may seem to be attached to it by any other Act of the Legislature.⁹

The word 'include' or the phrase "shall be deemed to include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute, or where it is intended that while the term defined should retain its ordinary meaning its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative and exhaustive and when it is so used these words or phrases must be considered as comprehending not only such things as they specify according to their natural import, but also those things which the interpretation clause declares that they shall include.¹⁰ Where a definition "includes" certain persons or things, it does not, therefore, necessarily exclude other persons and things not so included; for when a definition is intended to be exclusive it would seem the form of words (as in the definition of 'fact') is "means and includes".¹¹ Where a particular expression has for a long time previously acquired a special technical signification, that special sense in the absence of a defining clause in the Act

5. *Uda v. Imam-ud din*, (1878) 2 A. 74, 86; *Dwarris on Statutes*, 2nd Ed. (1848) at p. 509; *R. v. Justice of Cambridgeshire*, 7 A. & E. 480, 491.
6. *Craies on Statute Law*, 4th Ed. (1936) at p. 195.
7. *Per Dor. J.* in *Pratap Singh v. Gulzari Lal*, A. I. R. 1942 All. 50 at p. 65; I. L. R. 1942 All. 185; 199 I. C. 57; *Union Medical Agency v. State of Gujarat*, (1973) 31 S. T. C. 396.

8. *K. V. S. Vasan Bros. v. Official Liquidator* A. I. R. 1952 T. C. 170.
9. *Uma Churn v. Ajadunnissa*, (1885) 12 C. 430, 432, 433; see also *R. v. Ashootosh*, (1878) 4 C. 483 at p. 492 (F.B.).
10. *Chandia Mohan v. Union of India*, A. I. R. 1953 Assam 193; I. L. R. 1953 Assam 326 (F.B.).
11. *R. v. Ashootosh*, (1878) 4 C. 483 at 493 (F.B.).

may be attached to that expression.¹² Where a phrase has been introduced and then defined, the definition *prima facie* must entirely determine the application of the phrase,¹³ but the definition must itself be interpreted before it is applied, and interpreted, in case of doubt, in a sense appropriate to the phrase defined and to the general purpose of the enactment.¹⁴

Illustrations, if any, which are considered as a part of the statute itself.¹⁵ They are only a help, sometimes, in the construction of the section.¹⁶ But as illustration only illustrates the section, it does not restrict or modify the sense of the section, nor enlarge its plain meaning.¹⁷ Where an illustration is in conflict with the section, it must give way to the section.¹⁸ But it is not to be readily assumed that an illustration is repugnant to the section, and should not be rejected.¹⁹ The illustrations appended to a section are valuable guides in ascertaining the meaning of a section and they should only be rejected as repugnant to the section, as the last resort of construction.²⁰

The words of the section are not limited to the illustrations given. Illustrations ought never to be allowed to control the plain meaning of the section itself, and certainly they ought not to do so, when the effect would be to curtail a right which the section in its ordinary sense would confer.²¹ Illustrations, although attached to the Act, do not form part of the Act and are not admissible evidence in the courts.²² They merely go to show the intention of the framers of the Act, and in that and other respects they may be useful, provided they are correctly used. The practice of looking more at the illustration than at the words of the section of the Act is a mistake.²³ The illustrations are only intended to assist in construing the language of the Act.²⁴

Id. of words used. A foreign word is not strictly part of a section, but it is now well established that the Court may look, and indeed should look, to the meaning of the word to determine what the effect of the section is or what is being intended by the Legislature in enacting a particular section.²⁵ On the assumption that the word and note is not put there by the Legislature

12. *Ruckmahove v. Fulloobhoy*, (1852) 5 M. L. A. 234; *Futter-shangji v. Dessai*, (1874) 21 W. R. 178.

13. *Chandrasekhar v. State of Mysore*, A. I. R., 1939 P. C. 63; 180 I C. 971 (P. C.).

14. *Balla Mai v. Abad Shah*; A. I. R., 1918 P. C. 249.

15. *Bengal Nagpur Railway v. Rutanji Ramji*, L. R., 65 I. A. 66; 173 I. C. 15; I. L. R. (1938) 2 C. 72; A. I. R. 1938 P. C. 67.

16. *Junna Maspl v. Kodimaniandra*, (1962) 2 S. C. A. 422; (1962) 2 S. C. J. 303; A. I. R. 1962 S. C. 847; (1962) 1 Ker. L. R. 309; (1962) 2 M. L. J. (S. C.) 90; (1963) 1 Andh L. T. 119; (1962) 2 An. W. R. (S. C.) 90.

17. *Mahomed Syed Ariffin v. Yeoh Ooi Gork* (1916) 2 A. C. 575 (P. C.); *Murthidhar v. International Film Co.*, A. I. R. 1943 P. C. 34; 70 I. A. 35; 206 I. C. 1; 1943 A. I. J. 357; *Junna Maspl v. K. A. Devnath*, A. I. R. 1953 Mad. 637; I. L. R. 1953 Mad. 427; *Kumara-swami v. Karuppaswami*, A. I. R.

1953 Mad. 380; I. L. R. 1953 Mad. 488.

18. *Koylash v. Sonatun*, (1881) 7 C. 1; *State of Mysore v. State of Mysore*, *empla illustrant non restringunt legem*, Co. Lio., 21(a).

19. *Nanak v. Melun*, (1887) 1 A. 487, 495, 496; see *Dubev v. Ganeshu*, (1875) 1 A. 34, 36.

20. *Shakh Om d v. Nadhee*, (1874) 22 W. R. 367; see also *R. v. Rahimut*, (1876) 1 B. 117, 155; *Soorjo v. Bissanbhur*, (1875) 23 W. R. 11; *Gujju Lal v. Fateh Lal*, (1880) 6 C. 171, 185, 187 (F.B.) illustration referred to, to show meaning of word in S. 13, (post); *R. v. Chidda*, (1881) 3 A. 575, 575 (F.B.).

21. *M. S. Kumar & Co. v. Government assignee of Bombay*, A. I. R. 1953 Bom. 38; *Dattatraya v. More v. State of Bombay*, A. I. R. 1953 B. 311; I. L. R. 1953 B. 842; 52 Bom. L. R. 323; *Indian Aluminium Company v. Kerala State Electricity Board*, (1975) 2 S. C. C. 414; A. I. R. 1975 S. C. 1957.

On the assumption, that the marginal note is not put there by the Legislature or is assented to by them, it was held, that the marginal note does not form part of the Act and cannot be used for the construction of the Act.²² But, it was found that in modern statutes marginal notes are assented to expressly or tacitly by the Legislature and it was therefore held that the marginal note inserted by, or under the authority of, the Legislature, forms part of the Act, and, as such, like the headings of chapters or the headings of groups of sections, can properly be regarded as giving a *contemporaneous exposition* of the meaning of a section when the language of the section is obscure or ambiguous.²³ As Maxwell points out,²⁴ the rule regarding the rejection of marginal notes for the purposes of interpretation is now of imperfect obligation and as was observed by Collier, M. R. in *Buchell v. Hammond*,²⁵ "the side note, although it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section." The marginal note cannot control the meaning of the body of the section, if the language employed therein is clear and unambiguous²⁶ but, when the words used in the section are ambiguous, there should be no objection to looking at the marginal note to understand the drift of the section.²⁷ The marginal note however, cannot be permitted to create an ambiguity in the section.²⁸

Marginal notes are not strictly a part of the section. When the language of a section is clear and unambiguous, they cannot control the meaning of the body.²⁹ For, in such case, there is a possibility that there is an accidental slip in the marginal note rather than that the marginal note is correct and the accidental slip is in the body of the section itself.³⁰ There can be no justification for restriction or differently interpreting the plain contents of the section by the marginal note and they are clearly inadmissible for cutting down the plain meaning of a section³¹ though in case of doubt they will be given due weight as to the meaning and purpose of the section.³²

22. Balraj (Kunwar v. Jagatpal Singh, 31 I. A. 132; 26 All. 393 at 406 followed in Commissioner of Income-tax, Bombay v. Ahmed Bhai Umar Bhai, A. I. R. 1950 S. C. 134 at 141; 52 Bom. L. R. 719; 1950 S. C. J. 374; 1950 S. C. R. 335.

23. Ramsaran Das v. Bhagwati Prasad, A. I. R. 1929 All. 53 at 58; I. L. R. 51 All. 411; 113 I. C. 442; *Immun. Co. v. State of Bihar*, 1955 S. C. 661 at 676; (1955) 2 Mad. L. J. (S.C.) 168; I. L. R. 34 Pat. 905.

24. Maxwell, *Interpretation of Statutes*, p. 45.

25. (1904) 2 K. B. 563; 73 L. J. K. B. 1005.

1. Nalinakha Bysack v. Shyam Sunder Haldar, A. I. R. 1953 S. C. 148; 1953 S. C. A. 191; 1953 S. C. J. 201; 1953 S. C. R. 533; *Immun. Co. v. State of Bihar*, A. I. R. 1954 All. 742; 1954 A. I. J. 433; I. T. Officer v. K. P. Varghese, 1973 Ker. L. T. 1 (F.B.); 1972 K. L. R. 749.

2. State of Bombay v. Heman Sant Lal, A. I. R. 1952 Bom. 16; 53

Bom. L. R. 837; State v. Jannabai, A. I. R. 1955 Bom. 280.

3. Nalinakha Bysack v. Shyam Sunder Haldar, *supra*.

4. Western India Theatres, Ltd. v. Municipal Corporation, 1959 S. C. A. 145; 1959 S. C. J. 390; A. I. R. 1959 S. C. 586; 61 Bom. L. R. 954; (1959) 2 S. C. A. 145; 1959 S. C. 390.

5. Nalinakha Bysack v. Shyam Sunder, *supra*; 1953 S. C. 148; 1953 S. C. A. 191; 1953 S. C. J. 201; 8 D.L.R. (S.C.) 194.

6. Per Venkatatama Ayyar, J., in *Immun. Co. v. State of Bihar*, (1955) 2 S. C. R. 603; A. I. R. 1955 S. C. 661; I. L. R. 34 Pat. 905; (1955) 2 Mad. L. J. (S. C.) 168; 1955 S. C. A. 1140; 1955 S. C. J. 672; Balraj Kumar v. Jagatpal Singh, I. R. 31 I. A. 132; I. L. R. 26 A. 393; Subhas Chandra Roy v. Madan Kulkarni, 1975 Mah. L. J. 214; 77 Bom. L. R. 517; A. I. R. 1975 Bom. 244.

7. Per Das, C. J., Bhagwati and Imam, JJ., in *Bengal Immunity Co. v. State of Bihar*, *supra*.

(e) *Intention of Legislature.* Where the language of an enactment is plain and clear, the normal rule of construction, that the intention of the legislature should be gathered from the words used, should be followed, and no extraneous matter should be considered in the interpretation of its provisions.⁸ But where the language is doubtful, or ambiguous, the constitutional principles and practice, with surrounding circumstances and the proceedings of the legislature can be looked into for ascertaining the object or purpose of the legislature in enacting a particular provision, for the understanding of the circumstances under which the statute in question was passed and the reasons which necessitated it.⁹

(f) *Provisos.* A proviso is a part of the section itself. It is attached to the main clause for the purpose of explaining,¹⁰ varying, subtracting, or adding to the particular matter referred to therein. It should be read along with the main clause, whose operation it restricts, controls, or modifies, and be interpreted with reference to it.¹¹ It is an important appendage which cannot be ignored. Its proper function is to accept and deal with a case, or classes of cases, which otherwise would fall within the general ambit of the main clause.¹² Its effect, must, however, be confined to those specific cases which are specifically referred to in it and not beyond.

A proviso is always subordinate to the main clause to which it is appended, either to allay unfounded fears, or as a condition precedent to the enforcement of that clause, or for explaining what particular matters are not within the meaning of the main clause, or for providing exceptions and qualifications to the provision contained in the main clause. A proviso should not be construed so as to attribute to the legislature an intention to give with one hand and take back with the other.¹³ It embraces only the field which is covered by the main clause and carves out something out of it, but never destroys it as a whole; and it carves out an exception to that main provision only to which it is enacted as a proviso and to no other.¹⁴ But even a proviso can exist in the nature of substantive provision.¹⁵

8. *Administrator-General v. Prem Lal*, L. R. 22 I. A. 107; I. L. R. 22 C. 788, 798, 799; *Income-tax Commissioner v. Sodra Devi*, M. P. and Bhopal, A. I. R. 1957 S.C. 832; (1957) 32 I. T. R. 615; 1958 1 M. L. J. S.C. 1; 1958 S. C. J. 1; (1958) 4 All. W. R. S.C. 1.

9. *Charanjit Lal v. Union of India*, 1950 S. C. R. 869; A. I. R. 1951 S.C. 41; 1951 Bih. L. J. R. S.C. 40; 1951 C. W. N. S.C. 235; 1951 M. W. N. 111; 64 L. W. 47; 53 Bom. L. R. 499; 1951 S. C. J. 29; 1950 S. C. R. 869, per Fazal Ali, J., see also *Income-tax Commissioner v. Sodra Devi*, supra; *Express Newspapers Ltd. v. Union of India*, 1958 S. C. A. 952; 1958 S. C. J. 1113; A. I. R. 1958 S. C. 578; 1958 59 I. T. R. 211; 1959 S. C. R. 12.

10. *Local Government Board v. South Stoneham Union*, 1909 A. C. 57

H. L.

11. *Tahsildar Singh v. State of U. P.*, 1959 S. C. J. 1042; A. I. R. 1959 S. C. 1012; (1959) 2 Andh. W. R. S. C. 201; 1959 2 M. L. J. S.C. 201; 1959 Cr. L. J. 1231; 1959 All C. R. 447.

12. *Duncan v. Dixon*, 44 Ch. D. 211; 13. *Chellamal v. Vallamal*, (1971) 1 M. L. J. 439.

14. *Ram Narain & Sons, Ltd. v. Assistant Commissioner, S. T.*, (1955) 2 S. C. R. 483; A. I. R. 1955 S. C. 765; (1955) 2 Mad. L. J. S. C. 302; 1955 S. C. J. 808; (1955) 6 S. T. C. 627; *Income-tax Commissioner v. I. M. Bank, Ltd.*, (1960) 1 S. C. A. 111; 1960 S. C. J. 605; A. I. R. 1959 S.C. 713; 1959 Ker. L. J. 477; (1959) 36 I. T. R. 1. 15. *State of Madras v. State of M. P.*, A. I. R. 1975 M. P. 125; 1975 M. P. L. J. 877; (1975) Jab. L. J. 537.

A proviso to a section should be interpreted with reference to the preceding parts of the clause to which it is appended and as a subordinate to the main clause. Where a proviso is directly repugnant to the purview of it, the proviso speaks for itself and shall be deemed to be a repeal of the purview as it speaks the language of intent of the makers. If a substantial enactment is repealed, that which comes by way of a proviso is impliedly repealed.

A proviso is generally used to indicate that the general provision to which the proviso is added is not applicable to instances set out in the proviso which are in effect cut out of the general provision. A proviso is sometimes added to remove a misapprehension that might be caused as the effect of rights referred to in the proviso by the general provisions enacted. If a provision is ambiguous, a proviso may sometimes be used to resolve the doubt. But a proviso cannot be so interpreted as to extend its application to the provision to which it relates.¹⁸

4. **General Construction.** General observations on this matter are contained in the Introduction to which the reader is referred. The modern general rule is that statutes must be construed according to their plain meaning, neither adding to, nor abstracting from, them¹⁷ when the terms of an Act are clear and plain, it is the duty of the Court to give effect to it, as it stands,¹⁸ but many cases may be quoted in which, in order to avoid injustice or absurdity, words of general import have been restricted to particular meaning¹⁹

(a) *Reasonable construction*—The Courts will put a reasonable construction upon an Act and will not allow the strict language of a section to prevent their giving it such a construction.²⁰ Courts are inclined in favour of an interpretation which has the effect of promoting a remedy and advancing the cause of justice.²¹ The Court must interpret an Act with reference to context and other provisions of the Act.²² In considering the rules of evidence, it is necessary to look to the reason of the matter.²³ All rules must be construed with reference to their object.²⁴ A construction, effecting a most important depart-

16. Bell, General Principles of Legal
Interpretation, 1911, 1920, 1921,
1922, 1923, 1924, 1925, 1926, 1927, 1928,
1929, 1930, 1931, 1932, 1933, 1934, 1935,
Bezwada Municipality, 71 I. A. 113;
A. I. R. 1944 P. C. 71 at 73;
Ministry of Education, Howrah
Municipality, 1 I. R. (Cal. 69),
1914 Bezwada Crown A. I. R.
1914 N. 124 I. R. 1906 N. 8
802.

17. CONFIDENTIAL NOI ALL 1991

[illegible]

19 R. B. K. [unclear] supra. Bama-
son [unclear] Vener. 1640 13 B
I. S. 180. L. W. R. 180, Wells v.
I. I. S. R. V. to [unclear] etc. 1877 5
C. D. 126, 130; Eastern Counties v.
Marriage (1860) 9 H. L. C. 35

20. *Gandhiji v. Mohan* supra 130:
is to "test" propositions of law,"
see *Levan v. Damodaraya*, (1876) 1
M. 158.

21. **Shila Prasad v. Bane Bahore, 1974**
 ALL J 181, 1974 A W R 48
 F B , A I R 1974 All 197.

M. S. Gammone India Ltd., v. Union of India, 1974 1 S.C. 596 (1974) 1 S. C. W. R. 715; A. I. R. 1974 S. C. 500. (1974) 1 Lab. L. J.

29. *Gorda Island Hatch, (1880) 6 C*
1882 (F B)

24. Per Felt, J. in *Phelps v. Prew*, (1854) 3 F. and B. 430, 441. So also *Couch, C. J.*, in *Beharee Lall v. Kaminee Soonduree*, (1870) 14 W. R. 519, 520, in dealing with the subject matter of S. 92, *post*, said, "in applying the rule we must always consider what is the reason of it."

ture from the English rule of evidence, was considered in the underrmentioned cases^{24, 1}

(i) *Meaning of words.* Whatever be the meaning of a word in one portion of a section, the meaning of the same word in another portion must, according to the principles of construction, be the same²⁵. So also, the same word should be given the same meaning wherever it occurs in the Act unless the context excludes the application of that principle.¹ The meaning of a word may be ascertained by reference to the words with which it is associated, and its use in particular sense in subsequent parts of the Act² and to its allocation in a section with other conditions of a certain character.³ A construction making surplusage should be avoided⁴. It is well settled rule of interpretation hallowed by time and sanctioned by authority that the meaning of an ordinary word is to be found not so much in strict etymological propriety of language, not even in popular use, as in the object which is intended to be achieved⁵. It is the duty of the Court to take an Act as a whole and to look to the purpose of legislation to find the meaning of words not defined in the Act.⁶ Words should be given their plain and natural meanings.⁷ A word of every day use must be construed in its popular sense.⁸ If the meaning is not clear and some words are necessary to be added to make the meaning clear that is permissible to make obvious what is latent.⁹ If language is plain and unambiguous, hardship or inconvenience cannot alter meaning.¹⁰ In order to arrive at a conclusion on a question of construction, it is relevant that the Indian Evidence Act was passed by the Legislature under the direction of a skilled lawyer; that the construction of the Act is marked by careful and methodical arrangement, and that many of the more important expressions used in it are plainly interpreted. It would be wholly inconsistent with the plan of such an enactment that a specific rule contained in one part of it should, at the same time, be con-

- 24.1. *Ranchodas v. Bapu Nathar*, (1886) 10 B. 439; *Gujja Lal v. Fattch*, (1880) 6 C. 171, 189 (intention to depart entirely from English rule); *Fatehchand v. Ashamdar Paner*, (1884) 8 B. 303, 321 (F.B.); *R. v. Gupta Doss*, (1884) 8 M. 271, 279, 283 (F.B.) (construction from consideration of citation called for in English Law of Evidence, ibid., 279). See remarks of Lord Herschell as to the construction of clauses in bank of England v. Vagliano Brothers, (1891) 1 F. R. App. Cas. 157 at pp. 144, 145, cited ante, in Introduction; *Collector of Gorakhpur v. Palakdhari*, (1889) 12 A. 1, 14 (F.B.); so with reference to ss. 26 and 80 of this Act the Court in *R. v. Nagla Kala*, (1896) 22 B. 235, 238, observed that it would be unreasonable to hold that the Legislature used the same word in different senses in the same Act; *Fat Chand v. Rajna Kishan*, (1977) 2 S. C. C. 88; A. I. R. 1977 S.C. 789.
1. *Per Das J.* in *Aswini Kumar Ghose v. Ardandra Bose*, 1952 S.C. 369 at 392; 1952 S. C. A. 683; 1952 S. C. J. 568; 1953 S. C. R. 1.

2. *Gujja Lal v. Fattch Lal*, (1880) 1. L. R. 6 C. 171 at p. 186, 187.
3. *In re Pyari Lal*, (1879) 4 C. L. R. 504, 506.
4. *Gujja Lal v. Fattch*, *supra*, 183; *In re Pyari Lal*, *supra*, 506-508; *Margamonjori v. Sonamoni*, (1882) 8 C. 637, 640, 642 (no clause, sentence or word shall be superfluous, void or insignificant); *Mohi Shukla v. R.*, (1895) 21 C. 392, 399, 400.
5. *Santa Singh v. The State of Punjab*, (1975) 1 S. C. J. 47, 1976 S. C. C. (Cr.) 546; (1975) 4 S. C. C. 130; A. I. R. 1976 S.C. 2386; 1976 Cr. L. J. 1975; 1977 M. L. J. (Cr.) 41.
6. *Chitan J. Vaswani v. State of West Bengal*, (1976) 1 S. C. J. 525.
7. *Singheshwar Singh v. State of Bihar*, 1976 Pat. L. J. R. 243.
8. *Ramdat v. Dinesh*, 1976 Mah. L. J. 565.
9. *Fakhruddin v. State*, 1976 All. Cr. C. 116 (F.B.); 1976 All. L. J. 245.
10. *Babu Singh Ram Singh v. Additional Collector, Indore*, 1977 M. P. L. J. 550.

tain part of a sentence, but in other rules relating apparently to topics quite distinct, the word 'may' has at the same time so expressed as to include not merely a matter in question, but also matters which that may, taken as a whole, be properly excluded. A construction may be adopted by which the word 'may' is confined to other sections¹²

(c) 'May' in a Statute is sometimes used for the purpose of giving effect to the intention of the Legislature interpreted as equivalent to 'must' or 'shall', but in the absence of proof of such intention, it is construed in its natural and therefore in a permissive and not in an obligatory sense¹³. In construing, however, the Court will read the word 'may' as 'must' when the expression is used in furtherance of the interest of a third person for whom the Legislature has provided. Permissive words are always potential and never imperative, and are not to be read as obligatory. They are read as compulsory where they are used to effectuate a legal right¹⁴. It is not for a Court to read a statute which was intended by the Legislature in passing a law, for the Court must be bound by the view of the law judicially constructed. The intention of the Legislature must be ascertained from the words of a statute and not from any general references to be drawn from the nature of the subject-matter of the statute. The Court knows nothing of the intention of the Legislature from the words which it is expressed, applied to the facts existing at the time¹⁵. In case of doubt or difficulty over the interpretation of any provision of the Act, reference for help should be made to the law which existed before the passing of the Act, and to the principles, which represent the common consensus of juristic reasoning.¹⁶

(d) Except in a provision which is inserted in a main provision itself to secure against infringement of an individual right which would otherwise have been infringed on account of the construction of the main provision in the enactment. Where in the same section express ex-

11. *Garhi Lal v. State of Punjab*, 1 I. L. R. 6 C. 171 at p. 183, 184.

12. *Madhoo Singh v. State of Punjab*, 12 I. L. R. 123, 125.

13. *Debi and Leela Devi v. Chandra* (1877) 5 C. 47 (P.C.); 4 I.A. 127; see also *R. v. Samuel S. Aloo*, (1847) 3 M. I. A. 488, 492, 493; *Anund Chandar v. Punchoo Lall* (1870) 14 W. R. (F.B.) 33, 36; *Jones v. Llewellyn*, 1 K. 5 App. Cas. 214; *Ram Dayal v. Madan Mohan*, (1899) 21 A. 425, 432 (F.B.); *Mohamediniya Md. Sadik v. State of Gujarat*, (1975) 1b G. L. R. 583.

14. *Province of Bombay v. Khusnal Das*, 1950 S. C. J. 703; 53 Bom. L. R. 1; 1950 S. C. J. 451; 1950 M. W. N. 802; 86 C. L. J. 330; 1950 S. C. R. 621 per Das, J.

15. *Mohesh v. Madhub*, (1870) 13 W. R. 85; *Crawford v. Spooner*, 4 M. I. A. 179, 187; *Barloor v. Shumsoonnissa*, (1867) 11 M. I. A.

16. *Eastern Counties, etc. v. Marriage*, 9 H. L. C. 32, 40 (Judgment of the House of Lords on the basis of the Legislature); *Sahdeo Choudhry v. State of Punjab*, 1976 Pat. L. J. R. 85.

16. *Nanak v. Mehin*, 1 A. 487, 496; *Fordyce v. Bridges*, (1847) 1 H. L. Cas. 1, 4.

17. *Logan v. Courtown*, 13 Beav. 214; see *Crawford v. Spooner*, (1846) 4 M. I. A. 179, 187, 188, per Lord Brougham; as to cases dealing with the intention under this Act see, e.g., *Gujja Lall v. Fatch*, (1880) 6 C. 179, 181; *In re Pyare Lall*, (1879) 4 C. L. R. 504, 505; *Mohansingh*, (1843) 18 B. 263, 278, 279 (identity of language used in section with that employed in Taylor on Evidence; *R. v. Gopal*, (1881) 3 M. 271, 279, 283 (F.B.).

18. *Ganesh v. Gopalpur v. Palakdhari*, (1889) 12 A. 1, 37, 38.

ceptions from the operating part of the section are found, it may be assumed, unless it otherwise appears from the language employed, that these exceptions were necessary, as otherwise the subject-matter of the exceptions would have come within the operative provisions of the section.¹⁹

The exceptions operate to affirm the operation of the provision to all cases, except those expressly excluded by the exceptions and they must be construed strictly and must be confined within their own limits and the subject-matter embraced within them. They have to be taken very strongly against the party for whose benefit they are attached to the main provision. The enactment of exceptions to a provision excludes, by implication, all other cases, not expressly covered by those exceptions.

When the rules of exclusion and the exception to them are definitely laid down, the exception is not extended to cases not properly falling within it.²⁰

(c) *Some rules of interpretation.* Where a clause in an Act which has received a judicial interpretation is re-enacted in the same terms, the Legislature is to be deemed to have adopted that interpretation.²¹

It is an elementary rule of construction that a thing which is within the letter of a statute is not within the statute unless it be also within the meaning of the Legislature.²²

In the undermentioned case,²³ Lord Esher, M. R. said :

"To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops."

No Act should be construed as having a greater retrospective action than its language plainly indicates.²⁴

5. Interpretation of the Act with reference to English Law. Since the Evidence Act is a complete Code it is not permissible to import principles of English common law contrary to the specific provisions of the Act.²⁵ It

19. *Government v. Hormusji*, 1 R. 74; 1 A. 103; 1 L. R. 1947; Kar. 377 (P. C.); A. 1 R. 1947 P. C. 200.

20. *R. v. Jora*, (1874) 11 Bom. H. C. R. 242.

21. *Re Campbell*, 5 Ch. App. 703; cf. following sections of this Act with those of Act II of 1855: 18, 32, 37, 57, 81, 83, 84, 118, 120, 123, 124, 126, 129, 131, 162, 167 and 25, 26, 27 with Ss. 148-150 Act XXV of 1861.

22. *R. v. Bal Krishna*, (1893) 17 B. 573, 577.

23. *Duke of Devonshire v. O'Connor*,

L. R. (1890) 24 Q. B. D. 478.

24. *Gadgil, S. S. v. Lal and Co.*, (1964) 53 L. 1 R. 231; (1964) 2 L. J. 301; (1964) 2 S. C. J. 499; (1964) 8 S. C. R. 72; A. I. R. 1965 S. C. 171 at 177; see *Bindra's Interpretation of Statutes*, p. 655.

25. *Hina H. Adram v. State of Maharashtra*, A. I. R. 1971 S. C. 44; (1970) 2 S. C. A. 10; (1969) 2 S. C. C. 262; (1970) 1 S. C. R. 821; (1970) 2 S. C. J. 192; 1971 Cr. L. J. 5; 1970 M. L. J. (Cr.) 490; 73 Bom. L. R. 112; (1970) 2 Um. N. P. 890; (1971) Mah. L. J. 359.

may, however be taken as settled that in case of doubt or ambiguity over the interpretation of any of the provisions of this Act, the Court can with profit look to the relevant English common law for ascertaining their meaning.¹ It is part of judicial prudence to decide an issue arising under a specific statute by confining the focus to that statutory compass as far as possible. Diffusion into wider jurisprudential areas is fraught with unwitting conflict or confusion.²

1. *State of Punjab v. S. S. Singh*,
(1961) 2 S. C. R. 371 : (1961) 2
S. C. J. 691 : (1961) 1 S. C. A. 481.
A. I. R. 1961 S. C. 193 : 1961 Mad
L. J. (Cri.) 731:- (1961) 2 A. N.

R.

W. R. S. C. 203.
2. *State of M. P. v. Orient Paper
Mills, A. I. R. 1977 S. C. 687 at
690*. (1977) 2 S. C. C. 77.

PART I

RELEVANCE OF FACTS

CHAPTER I

PRELIMINARY

1. *Short title.*—This Act may be called the Indian Evidence Act, 1872.

Extent. It extends to the whole of India, except the State of Jammu and Kashmir, and applies to all judicial proceedings in or before any Court, including courts of appeal, and to all courts of appeal convened under the Arms Act, the Navy Discipline Act or • • • the Indian Navy Discipline Act, and to the Air Force Act] but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator.

Commencement of the Act.—This Act shall come into force on the first day of September, 1872.

3. Subs. by the A. O., 1950, for "all the Provinces of India" which had been subs. by the A. O., 1948, for "the whole of British India" and amended by Act III of 1951.
4. This Act has been extended to Berar by the Berar Laws Regulation, 1929 (4 of 1929) and has been declared to be in force in the Sonthal Parganas Settlement Regulation (3 of 1872), S. 3; in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (1 of 1929); in the Khondmals Law Regulation, 1936 (4 of 1936), S. 3 and Sch.; and in the Angul District, by the Angul Laws Regulation, 1929 (1 of 1929); and in the Angul District, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874); in the following Scheduled Districts, namely, the Districts of Hazaribagh, Lohardaga, Palamau, Ranchi District; see Calcutta Gazette, 1899, Pt. I, p. 44; and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singh

bhum, see Gazette of India, 1881, Pt. I, p. 504 (the Lohardaga or Ranchi District included at this time the Palamau District, separated in 1894); and the Tarai of the Province of Agra, 1876, Pt. I, p. 505; see also the A. O., 1904 (Pt. I, p. 720).

5. Ins. by the Repealing and Amending Act, 1919 (18 of 1919), S. 2 and Sch. I, see S. 127 of the Army Act (41 and 45 Vict., c. 58).
6. Ins. by the Repealing and Amending Act, 1934 (35 of 1934), S. 2 and Sch.
7. The words "that Act as modified by" rep. by the A. O. 1950.
8. Ins. by the Repealing and Amending Act, 1934 (35 of 1934), S. 2 and Sch. I.
9. As to practice relating to affidavits, see the Code of Civil Procedure, 1908 (Act 5 of 1908), S. 30 (c) and S. 100, and the Code of Criminal Procedure, 1973 (Act 2 of 1974), Ss. 295, 296 and 297.

SYNOPSIS

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|---|---|--|---|
| 1 | Short title. | (d) Administration Evacuee Property Act. | |
| 2 | Extent of Act | (e) Railway Rates Tribunal. | |
| | (a) "India." | (f) Industrial Tribunals, proceedings before. | |
| | (b) Territory of India. | (g) Rent Acts. | |
| | (c) Adaptation by Pakistan, Burma and Ceylon. | (h) Proceedings before arbitrator. | |
| 3 | Retrospective operation. | (i) Inquiries before Claims Officer or Settlement Officer. | |
| 4 | "Judicial proceedings." | (j) Proceedings under other Acts. | |
| 5 | "Judicial", meaning of : | 9 | No compulsion to give sample of blood for test. |
| | (a) Land Acquisition Act, enquiry under. | 10 | Court. |
| | (b) Proceeding of other Tribunals, etc. | 11. | Court-martial : |
| | (c) Enquiry, when judicial. | | Court-martial and Marine Courts. |
| 6 | Quasi-judicial Tribunals— | 12 | Affidavits : |
| | (i) Departmental enquiries. | | (a) Interlocutory motions. |
| | (ii) Domestic Tribunals. | | (b) Statements on information and belief. |
| 7 | Departmental proceedings. | | (c) Contempt proceedings. |
| 8 | Proceedings under different Acts: | 13 | Arbitration. |
| | (a) Commissions of Inquiry Act. | 14. | Opportunity to give evidence. |
| | (b) Income tax authorities, proceedings before. | | |
| | (c) Election petitions, proceedings on. | | |

1. Short title. "While it is admissible to use the full title of an Act to throw light upon the progress and scope, it is not legitimate to give any weight in this respect to the short title which is chosen merely for convenience, its object being identification and not description". The full title, however, must not be neglected or disregarded and it might be some guide to the meaning.¹⁰

2. Extent of Act. The Act originally extended to the whole of "British India"¹² which meant the territories vested in Her Majesty by the first section of 21 and 22 Vict., c. 106, with the exception of the Straits Settlements, which under the provisions of 29 and 30 Vict., c. 115, ceased to form **portion of British India.**¹³ The Act, therefore, applied to the **Scheduled Districts**¹⁴ and had been declared to be in force by notification under the Scheduled Districts Act in the districts of Hazaribagh, Lohardaga, Manbhoom and Pargana Dhalbhoom and the Kolhan in the district of Singhbhoom¹⁵ and the Tarai of the Province of Agra (now in U. P.)¹⁶ The Act had also been declared to be in force in Upper Burma generally except the Shan States¹⁷ in the Hill

10. Per Lord Moulton in *National Telephone Co. Ltd. v. Postmaster-General*, (1913) A. C. 546; 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 661; 29 L. T. R. 637.

11. *Debendra Narain Roy v. Jogendra Narain Deb*, A. I. R. 1936 Cal 593; 64 C. L. J. 212.

12. For definition of "British India", see S. 3(5) of the General Clauses Act, X of 1897.

13. See Act X of 1897, Act I of 1903, and Act X of 1914.

14. Vide Acts XIV and XV of 1874. As

to Act XIV of 1874 (Scheduled Districts; see Act XXXVIII of 1920, Act II of 1893, and earlier amending Acts. As to Act XV of 1874 (Laws Local Extent), see Act I of 1903 and earlier amending Acts, Bengal Act II of 1913, B. & O. I of 1913.

15. Gazette of India, Oct. 22, 1881, Pt. I, p. 504.

16. Ibid., Sept. 23, 1876, Pt. I, p. 505.

17. Act XIII of 1898, S. 4 (Burma Code, Ed., 1898, p. 364), and Act IV of 1909.

District of Arakan¹⁸ in British Baluchistan,¹⁹ in the Baluchistan Agency territories,²⁰ in the Santal Parganas,²¹ and in the Angul District²² and had been applied to certain Native States in India or places therein. The Act had been made applicable by Her Majesty in Council in certain places beyond the limits of India for the purposes of cases in which Her Majesty had jurisdiction and had been adopted by certain Native States of India as their law.

By the Indian Independence Act²³ which came into force on the 15th of August 1947, what was "British India" was split up into two separate Dominions: (1) Pakistan comprising the former British Indian Provinces of Sind, Baluchistan, West Punjab, the North West Frontier Province and East Bengal, and (2) India comprising the rest of the former British India.

(a) "*India*." Now under Section 3(28) of the General Clauses Act²⁴ "*India*" means—

(a) "As respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas;

(b) "As respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that Dominion; and

(c) As respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India."

(b) *Territory of India.* In Section 3 of the Evidence Act itself as amended by the Part B States (Law) Act, III of 1951, India is defined as meaning "the territory of India excluding the State of Jammu and Kashmir."

Under Article I (3) of the Constitution the territory of India shall comprise :

(a) the territories of the States,

(b) the territories specified in the First Schedule, and

(c) such other territories as may be acquired.

(c) *Adaptation to Pakistan, Burma and Ceylon.* The Act has, with suitable amendments, been adopted by Pakistan, Burma and Ceylon²⁵

18. Reg. I of 1916, S. 2

19. Reg. II of 1919, S. 1, Reg. VIII and IX of 1896; Reg. II of 1919 (B.I.S.)

20. Baluchistan Agency Rules 1890, S. 47 *ibid.*, p. 157.

21. Reg. III of 1877, as amended by Reg. III of 1890, S. 3.

22. Reg. III of 1890, S. 3.

23. 10 and 11 Geo. 6, c. 30

24. X of 1897.

25. Evidence Act, part I, "*India*" omitted by Pak. A. O. 1949, Para. 2, and the section reads: "It extends to all the Provinces and the capital of the Federation, and applies to all judicial proceedings in Pakistan and.... of 1934....an arbitrator." Burma In para I, "*Indian*" and "1872" omitted by A.O. 1937, Para.

3. Retrospective operation. The Law of Evidence is an adjective law and, as such, has retrospective effect. The Act came into force in the territory of Goa, Daman and Diu on 1st June, 1964 and applied to pending proceedings in that territory.¹

An inquest proceeding before the Coroner under the Coroner's Act, 1871, is not a judicial proceeding for the purpose of the section. To such a proceeding the provisions of the Evidence Act do not apply.²

4. "Judicial proceedings." The Act applies to all judicial proceedings in or before a Court. The expression "judicial proceeding" is not defined in the Act. Under Section 2(9) of the Criminal Procedure Code,³ it "includes any proceeding in the course of which evidence is or may be legally taken on oath." In the earliest case in which the question of the meaning of a 'judicial proceeding' arose, Scotland, C. J., said: "It is nothing more nor less than a step taken by the Court in the course of the administration of justice, in connection with a case pending."⁴ The question there arose in a civil suit. Extending the definition to meet the case of criminal proceedings, Mayne defined a judicial proceeding as "any step in the lawful administration of justice, in which evidence may be legally recorded for the decision of the matter in issue in the case, or of any question necessary for the decision or final disposal of such matter."⁵ In *Queen v. Golam Ismail*,⁶ Spangue, J. defined it as "any proceeding in the course of which evidence is or may be taken or in which any judgment, sentence, or final order is passed on recorded evidence."

5. "Judicial," meaning of. Courts have two distinct and separate duties to discharge, namely, judicial and administrative duties, in both of which it is necessary to bring to bear a judicial mind. As observed by Lopes, L. J., in *Dawkins v. Lord Rokeby*,⁷ "the word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge, by justices in Court, or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in Court, and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them, for instance, levying a rate." But a proceeding in which only administrative duties are discharged is not a judicial proceeding within the meaning of this section.

2 of the section reads: "It applies to all judicial proceedings in or before any court, including Courts-martial other than Courts-martial convened under any Act relating to the Army, Navy or Air Force, but not to affidavits presented to any court or officer, nor to proceedings before an arbitrator" (A. O. 1937 and A. O. 1948).

Ceylon—"1. This Ordinance may be cited as the Evidence Ordinance, 1964. 2(1). This Ordinance shall apply to all judicial proceedings in or before any Court other than Courts-martial, but not to proceedings be-

fore an arbitrator."

Manoj Kumar v. Premnath, 1967 Cr. L. J. 473; A. I. R. 1967 Goa 51 (F.B.), 57; *Data v. The State*, 1967 Cr. L. J. 52; A. I. R. 1967 Goa 4 (F.B.).

2. *Tanaji Rao v. H. J. Chinoy*, 71 Bom. L. R. 732.

3. Act 2 of 1974.

4. *Reg. v. Venkatachellum Pillai*, 2 Mad. H. C. R. 43 at pp. 55, 56.

5. *Mayne's Treatise on Law of Evidence*, 2nd Ed., p. 565.

6. 1 All. 1 (F.B.) at p. 13.

7. 8 Q. B. 255.

Again in *R v Pore*,⁸ Mr. Justice Blackburn made a distinction between an enquiry as to certain matters of fact in a case in which the Commissioners had no discretion to exercise and no judgment to form, but were enjoined to do a certain thing in a certain event as a matter of duty, and an enquiry in a case in which the Legislature authorised them to form a judgment and to grant or withhold a certificate on that judgment. In the latter case the enquiry was regarded as judicial.

(a) *Land Acquisition Act, enquiry under.* An enquiry by the Land Acquisition Collector under the Land Acquisition Act,⁹ as to the value of the land and the compensation to be paid for its acquisition, has been held to be an administrative and not a judicial proceeding.¹⁰

(b) *Proceedings of other Tribunals, etc.* A Sub-Divisional Officer hearing an Election Petition under Rule 25 of U. P. Panchayat Raj Rules (1947), is merely a Tribunal, and hence the provisions of this Act are not applicable.¹¹ An Industrial Tribunal should not be astute to discover technicalities of the Evidence Act and apply them.¹² The Evidence Act does not apply to departmental proceedings which are neither civil nor criminal proceedings. But ordinary principles of proof and the rules of natural justice must be applied. The decision cannot rest on speculation or surmises or be rendered without witnesses being called.¹³ Though the proceedings in contempt in Section 3 of the Contempt of Courts Act (1952), are judicial proceedings, the enquiry is in a summary nature and hence the provisions of the Evidence Act do not apply to reception of materials against the contemner in a contempt proceeding.¹⁴ A commission appointed under the Commissions of Enquiry Act, LX of 1952 is a fact-finding body to instruct the Government and is not a Civil Court. Neither are its proceedings judicial nor even quasi-judicial. The provisions of the Evidence Act do not apply to its proceedings.¹⁵ A Commissioner appointed under Act XXXVII of 1850 is not a Court.¹⁶

It is the object to which an enquiry is pointed that determines the nature of it. A policeman before he arrests a person often has to make an enquiry, but is not therefore a judge.¹⁷

(c) *Enquiries, when Judicial.* An enquiry is judicial if the object of it is to determine a legal relation between one person and another, or a group of

⁸ I. R. 1900 O. C. 18. See also with approval in *Aichayya v. Gangayya*, 15 Mad. 138 at 143 (F.B.).

⁹ 1 of 1894.

¹⁰ *Ezra v. Secretary of State*, 32 I. A. 93; 32 Cal. 605 (P.C.).

¹¹ *Mahesh v. Sub-Divisional Officer*, A. I. R. 1959 All. 43.

¹² *Hindustan Tea Estate v. Labour Appellate Tribunal*, A. I. R. 1959 Cal. 650.

¹³ *N. M. G. v. Divisional Operating Superintendent*, 113 C. W. N. 702, State of Andhra Pradesh v. Kam

Chawla, I. I. R. 1957 Andhra 80; A. I. R. 1957 A. P. 794.

¹⁴ *In the matter of Basanta Chandra Ghosh*, A. I. R. 1960 Pat. 430 (F.B.).

¹⁵ *Allen Berry v. Vivian Bose*, I. L. R. 1960 1 Punj 416; A. I. R. 1960 Punj. 86.

¹⁶ *Brasaraman Sutha v. Jyoti*, A. I. R. 1956 S. C. 66; 1956 Cr. L. J. 156; 1956 S. C. J. 155; 1956 S. C. A. 1956 All. L. J. 164, 1956 B. I. J. R. 175.

¹⁷ *R v. Ismail*, I. L. R. 11 B. 659.

persons, or between him and the community generally; but, even a judge, acting without such an object in view, is not acting judicially.¹⁸

6. Quasi-judicial Tribunals. The extent to which administrative quasi-judicial tribunals are bound by rules of evidence is a matter, assuming great importance in forcing countries on account of the growth of administrative tribunals. The law is the same in India, England and America.

The consensus of opinion is that administrative quasi-judicial tribunals are fact-finding bodies, and the method of fact-finding varies from that sanctioned by law in courts. They collect, in an expert way, much of the evidence on which they act instead of depending on the testimony brought to them. If the Act applies, the strict rules of exclusion and the rules requiring proof of documents, etc., would make 'unavailable this gathering of evidence in an expert manner, and it is the essence of the fact finding bodies that they must keep open the channels for the reception of all relevant evidence which will contribute to an informed result. At the same time, it does not mean that these tribunals can be arbitrary and capricious. On the other hand, they have to follow the substantial rules of evidence which are the essential principles of natural justice. The Supreme Court has held, in a series of decisions, that administrative and quasi-judicial proceedings are no doubt not fettered by technical rules of evidence, and that the tribunals conducting them are entitled to act on materials which may not be accepted as evidence in a court of law. But, at the same time, as pointed out by Justice Venkatarama Aiyar in *The Union of India v. T. R. Varma*,¹⁹ rules of natural justice require that a party should have an opportunity of adducing all relevant evidence on which he relies, that evidence of the opponent should be taken in his presence and that he should be given an opportunity of cross-examining witnesses examined by the opposite party, and that no materials should be relied upon against him without his being given an opportunity of explaining them. If these rules are satisfied, an inquiry is not open to attack on the ground that the procedure laid down in this Act was not strictly followed. These principles have been laid down in the other decisions of the Supreme Court.²⁰

18. *R. v. Tulja*, 1. L. R. 12 B. 36 at 42.

19. *A. I. R. 1957 S. C. 882* at p. 885; *Inwangiao Kabir v. Union of India*, 1968 Lab. I. C. 1145 (Manipal).

20. *Dhakeswari Cotton Mills v. Commissioner of Income-tax West Bengal*, A. I. R. 1955 S. C. 66, 1955 S. C. R. 941, 1955 S. C. J. 122 (1955) 1 Mad. L. J. S. C. 90; *Mehta Parikh and Co. v. The Commissioner of Income-tax*, A. I. R. 1956 S. C. 544, 1956 S. C. R. 626, 1956 S. C. J. 678, 58 Bom. L. R. 1015; *Pannalal v. Union of India*, A. I. R. 1957 S. C. 397, 1957 S. C. R. 238; *Raghubar Mandal v. State of Bihar*, A. I. R. 1957 S. C. 810, 1958 S. C. 722; *Mehoga Ram v. Labour Appellate Tribunal of India*, A. I. R. 1956 All. 644; *State of Mysore v. Shivabasappa*, (1964) 1 Lab. L. J. 24 A. I. R.

1963 S. C. 375; *C. L. Subramaniam v. Collector of Madras*, (1969) 1 Lab. L. J. 67, 73; 1969 Lab. I. C. 1269 (Ker.), see also *R. v. Dy. Industrial Injuries Commissioner*, (1965) 2 W. L. R. 89, (1965) 1 All. E. R. 81, 95 (per Diplock L. J.) and *K. Mahesh v. Collector of Customs and Central Excise*, 1967 Ker. L. T. 549. For England see Report of the Committee on Administrative Tribunal and Enquiries: The Summary of Recommendations p. 22, para. 90. For America see Wigmore Evidence, 3rd Edn. (1940) 4 a b pp. 25-43; Davis, Administrative Law, pp. 447-478; Report of the Attorney General's Committee on Administrative Procedure (1941) p. 70. See also critical note on *Burrakar Coal Co., Ltd. v. Labour Appellate Tribunal of India* and another in Journal of Indian Law Institute, Vol. I, No. 2, p. 293.

Departmental Enquiry In a departmental enquiry, the delinquent concerned is entitled to:

to an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted against him, which he can only do, if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against him, tentatively proposes to inflict, and communicates the same to the delinquent.²¹

In case these rules of natural justice are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in this Act for taking evidence was not strictly followed. This was reiterated in *State of M. P. v. Chintaman*.²²

In a departmental proceeding the principle that an accomplice is unworthy of credit, has no application.²¹

Domestic Tribunals. A domestic enquiry before domestic tribunals, is not a trial before a Court of law and rules of evidence do not strictly apply to such an enquiry;²⁴ but substantive rules which form part of principles of natural justice cannot be ignored by the domestic tribunals.²⁵ In the course of a domestic enquiry leading questions may be put to a delinquent. Too much legalism cannot be expected of a domestic enquiry.²⁶

7. **Departmental proceedings.** Departmental proceedings are not in the same category as criminal prosecutions or even civil proceedings in court. The provisions of this Act are not applicable to these departmental inquiries.

2) *Food and Nutrition Division of India*
Journal of Research, 1958, Vol. 1, No. 1, p. 105.
 S. C. Chandra, S. I. Anand, W. R.
 (S.C.) 169: (1958) 1 Mad. L. J.
 S. C. Chandra, A. W. H. C.
 1958, 1959, 1960, 1961, 1962
 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619

1956. 156.
Orissa v. Sailabehari, I. L. R.

I. C. 1447 at 1454 (M.P.).

2) Central Bank of India v. Pankaj
Chand, 9 Fao L R 191: 1960

Lab. I. C. 1880 (1969) 2 Lab. I. J. 477; A. I. R. 1969 S. C. 983; Khairah and Co., Ltd. v. Their Workmen, A. I. R. 1964 S. C. 719 at p. 722, M/s Kesoram Cotton Mills, Ltd. v. Gangadhar, A. I. R. 1964 S. C. 708, Adam Hassan v. Chief Commissioner, Manipur, A. I. R. 1966 Manipur 18, 21; R. D. Siquira v. Govt. of A. P., 1975 Lab. I. C. 170 at 175 (A.P.). Employees of Firestone Tyre and Rubber Co. (P) Ltd. v. The Workmen (1968) 1 S. C. R. 307 (1968) 2 S. C. J. 83; (1968) 1 S. C. W. R. 58 (1968) 2 Andh. W. R. (S.C.) 29; (1967) 2 Lab. I. J. 715; 1968 Lab. I. C. 212; 14 Law Rep. 435 (1968) 2 M. L. J. (S.C.) 29, A. I. R. 1968 S. C. 236, 239.

The reason is, apart from what has been stated above in regard to administrative tribunals, the officers conducting departmental inquiries are not expected like trained lawyers to decide whether the evidence adduced is in strict conformity with the rules laid down in this Act or sift the same in a strictly legal manner. But, at the same time, ordinary principles of proof and also rules of natural justice must be applied. It is the duty of the prosecution to prove charges and a delinquent need not prove any part of it. The delinquent must be given an opportunity to test the evidence and prove his own case. The officers conducting departmental inquiries should not base their decision upon statements made by witnesses behind the back of persons against whom inquiries are made.² Mere conjectures and surmises cannot take the place of legal proof in such proceedings.³

8. Proceedings under different Acts. (a) *Commission of Enquiry Act* Section 4 of the Commission of Enquiry Act, 1952, gives certain powers to the committees to call for certain documents as provided for by the Code of Civil Procedure. Really, it merely applies certain provisions of that Code only for certain purposes. By the application of those provisions the commission neither becomes a Court nor do the proceedings before it become judicial proceedings, as defined in this section. Therefore, the provisions of this Act do not, in terms, apply to proceedings before the Commission.⁴

(b) *Income tax authorities, proceedings before* It is only in respect of certain specified matter that under Section 37, Income Tax Act, 1922 [now Section 131 of Income Tax Act, 1961 (43 of 1961)] that the Income tax authorities are invested with the powers exercisable by a Civil Court; and it is only for a limited purpose that a proceeding before them is declared to be deemed to be a judicial proceeding. It naturally follows that in all other matters not covered by this section, the Income-tax authorities cannot exercise the powers of a Civil Court, nor can the proceedings before them be deemed to be judicial.⁵ Hence this Act does not apply to such proceeding.⁶

Income tax authorities are not strictly bound by the rules of evidence. But the report of an Investigating Commission cannot be ignored. It has evidentiary value and can be taken into account.⁷

(c) *Election petition, proceedings on* Under Section 90 of the Representation of the People Act,⁸ subject only to the provisions of that Act, the provisions of this Act have been made applicable in all respects to the trial of an election petition.

2. State of Andhra Pradesh v. Kameshwara Rao, A. I. R. 1957 Andh. Pra. 794; 1 I. L. R. 1957 Andh. Pra. 80.
3. Harmandar Singh v. G. M. Northern Ry., 1974 Lab. I. C. 755 (Punjab).
4. State of Jammu and Kashmir v. Anwar Ahmed Aftab, A. I. R. 1965 J. & K. 75.
5. Gurmukh Singh v. Commissioner of Income-tax, 1944 L. 353 (2): (1944)

- 18 R. Lab. 81; 1 I. L. R. 1945 L. 173; 220 I. C. 339 (F. B.).
6. Anraj Narain Dass v. Commissioner of Income tax, Delhi, 1952 Punj. 46; (1951) 20 I. T. R. 562.
7. C. I. T. v. Bengal v. East Coast Commercial Co., Ltd., (1967) 1 S. C. R. 821; (1967) 1 S. C. J. 433; (1967) 1 I. T. J. 240; 63 I. T. R. 449; 11 Law Rep. 580; A. I. R. 1967 S. C. 768, 772.
8. XLIII of 1951.

(d) *Administration of Evacuee Property Act, proceedings under.* Proceedings held by the Custodian under the Administration of Evacuee Property Act⁹ have been held to be of a quasi-judicial nature¹⁰

(e) *Railway Rates Tribunal, proceedings before.* Under Rule 51, Railway Rates Tribunal Rules, 1949, this Act is applicable to proceedings before the Railway Rates Tribunal, provided that in the discretion of the Tribunal any of its provisions may be relaxed.

(f) *Proceedings before Industrial Tribunal.* Under this section, the Act of its own force applies to all judicial proceedings in or before any Court. Under Section 11(3) of the Industrial Disputes Act, 1947, every Board, Court, Labour Court, Tribunal and National Tribunal have the same powers as are vested in a Civil Court under the Code of Civil Procedure when trying a suit, in respect of certain matters, and every enquiry or investigation by a Board, Court, Labour Court, Tribunal, or National Tribunal is deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. Section 11(a) of the Industrial Disputes Act further provides that every Labour Court, Tribunal or National Tribunal shall be deemed to be a Civil Court for the purposes of Sections 480 and 482 of the Code of Criminal Procedure. The above sections show that Industrial Tribunals are authorised to take evidence and may be treated as Court within the meaning of Section 3 of this Act. But proceedings before such tribunals are to be deemed as judicial proceedings only within the meaning of Sections 193 and 228 of the Penal Code, and such tribunals are to be deemed as Civil Courts only for the purposes of Sections 480 and 482 of the Code of Criminal Procedure. For all other purposes, the tribunals are not deemed to be Civil Courts and the proceedings before them are not treated as judicial proceedings in the sense that they call for a decision on a question of legal rights in dispute between the parties, involving either a finding of fact or application of a fixed rule or principle of law or involving both. Since the proceeding before an Industrial Tribunal is not wholly a judicial proceeding but merely a quasi-judicial proceeding, this section does not make the Act applicable of its own force to such a proceeding. An Industrial Tribunal is entitled to proceed on the basis of oral and documentary evidence which may not be strictly admissible in evidence under this Act¹¹. In *G. M. Parry v. Industrial Tribunal*¹² the Madras High Court held that the tribunal exceeded its jurisdiction when it rejected the evidence which had been acted upon by the enquiry officer.

Strict rules of evidence do not apply to industrial adjudication and so long as the rules of natural justice are observed and documents on which the workmen rely are put in evidence in the presence of the employer, it is the

9. XXXI of 1950.

10. *Ebrahim Aboobaker v. Tek Chand Dolwani*, 1953 S. C. 298; 1953 S. C. J. 411; 1953 S. C. R. 691; 1954 S. C. A. 1121; 56 Bom. L. R. 6.
11. *Harchura Tea Estate v. Labour Appellate Tribunal*, A. I. R. 1959 C. 650; (1961) 1 Lab. L. J. 174;

L. B. Leonard B. Workers' Union v. Second Industrial Tribunal, A. I. R. 1962 C. 375; 65 C. W. N. 1029.

12. (1974) 1 Lab. L. J. 422; 1975 Lab. I. C. 1001; 45 F. J. R. 329; 29 Fac. L. R. 231.

duty of the latter to rebut any inference reasonably arising on a perusal of the contents of the documents.¹³

(g) *Rent Acts* The Evidence Act does not apply to proceedings under the East Punjab Rent Restriction Act 3 of 1949.¹⁴

(h) *Proceedings before Arbitrator* In arbitration proceeding the rules of evidence under the Act are not binding on the arbitrators.¹⁵ In an industrial adjudication an arbitrator is not restricted to the pleadings of the parties and the evidence that may be adduced. He is not hampered by any strict rules of evidence, or pleadings or technicalities of procedure.¹⁶

(i) *Inquiries before Claims Officer or Settlement Officer.* Having regard to Section 1 of the Act, it does not strictly apply to inquiries before a Claims Officer or a Settlement Officer under the Displaced Persons (Claims) Act, 1950 and the Displaced Persons (Claims) Supplementary Act, 1954. Hence if copies of revenue records are exchanged between the Governments of India and Pakistan copies of the Pakistani record, even if not authenticated as required by the Evidence Act, is not such evidence as he would not be entitled to consider. Though strict rules of evidence do not apply to the enquiries before the officers aforementioned, they are bound to decide cases on the well-settled principles of appreciating evidence, any departure from which cannot be justified by the contention that the matter is within their jurisdiction and their decision is final.¹⁷

(j) *Proceedings under other Acts* Enquiry under Section 15(1) of the A. P. (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) being not a judicial proceeding will not be governed by the Evidence Act.¹⁸ Proceedings under Section 15 of Orissa Land Reforms Act, 1965 are judicial, as such Evidence Act applies.¹⁹

For instances of judicial proceedings, see Commentary under Sections 33 and 80 post.

9. No compulsion to give sample of blood for test. There is no provision of law in the Civil Procedure Code, Evidence Act or elsewhere under which an application for directing a person to appear before a Civil Surgeon for a blood group test can be made or granted, or which compels a person to give a sample of his blood for analysis or for blood grouping test, or even

13. *Employers, Messrs. Hind. Steel Rolling Mills v. Messrs. Hind. Steel Rolling Mills Mining Corporation, Ltd.*, Bermo v. Raj Kishore Prasad, 31 F. J. R. 186; (1967) 1 Lab. L. J. 108; 1967 B. L. J. R. 461; A. I. R. 1967 Pat. 12, 14.

14. *Dwarka Das v. Ram Lakhai* (1969) 71 Pun. L. R. 68, 72.

15. *A. Shah Nauchand v. Vegetable Products*, 1 I. R. 255, 256.

16. *Haralal Sadasheorao Bande v. State*

Industrial Court, Nagpur, 68 Bom. L. R. 731; 1966 Mah. L. J. 1060, (1971) 1 Lab. L. J. 168; A. I. R. 1967 Bom. 174, 186.

17. *Hashomal Mulchand v. J. S. Bajaj*, 68 Bom. L. R. 375, at pp. 377, 378.

18. *Yenji Singh Appell v. Samhara Laxminarayana*, (1972) 2 Andh. L. T. 30.

19. *Laxmidhar Pringrahi v. State of Orissa*, A. I. R. 1974 Orissa 127.

Code of Procedure, the affidavit is governed by Order XIX, C. P. Code, the Court may allow the affidavit to be proved by affidavit.¹⁰

An affidavit is not admissible in evidence in a suit for a civil offence unless it is specifically authorised by a provision of law.¹²

It is only in cases where an affidavit is verified in accordance with the provisions of Section 193, Cr. Code, or Section 293, Cr. P. Code, that an affidavit received by him and proved by him in accordance with Order XIX, C. P. Code, has no application to such an affidavit.¹³

An affidavit, which is not proved or examined in court, is not admissible in evidence.¹⁴

(b) *Swearing by witnesses and belief.* The Civil Procedure Code regulates the manner in which affidavits must be confirmed. These are such facts as the deponent is able to prove on his own knowledge to prove, except on interlocutory applications, where the deponent's belief may be admitted, provided that the facts are not of a character which require proof.¹⁵ For identical facts admitted by deponent on his own knowledge and information.¹⁶ The exception here is that the deponent is not bound to prove the facts which are not of a character which require proof. In interlocutory applications, the Court may accept the deponent's statement and belief because no other evidence is available at the time a notice is given.¹⁷ So, too, in interlocutory applications, the deponent's statement and belief may be accepted because it would be impossible to require the deponent to produce evidence, which is impossible.¹⁸ The Court may also accept the deponent's statement and belief on matters of fact or argument, if the deponent is able to prove the facts from documents, unless the Court is satisfied that the deponent is not competent to do so. The safe course is to require the deponent to produce evidence in the production of the witness. The Court may also accept the deponent's statement and belief on matters of fact or argument, if the deponent is able to prove the facts from documents, unless the Court is satisfied that the deponent is not competent to do so.

10. See *Firm Rajkumar v. Bharat Oil Mills*, A. I. R. 1964 Bom. 38.

11. *M/s. Parekh Brothers v. Kartick Chandra Saha*, A. I. R. 1968 Cal. 532, 537.

12. *Dominion of India v. Rupchand*, A. I. R. 1953 Nag. 169, 171, *Satnam v. Venkataswami*, A. I. R. 1919 Mad. 680, at p. 690; *Kamakshya Prasad Dalal v. Empson*, A. I. R. 1959 Cal. 657, at p. 658, *M/s. Parekh Brothers v. Kartick Chandra Saha*, A. I. R. 1968 Cal. 532, 537.

13. *Shanti Prasad Jain v. The Union of India*, (1965) 68 Bom. L. R. 431.

Navigation Co., Ltd., I. L. R. 1914 16 Assam 395; A. I. R. 1967 Assam 74, 77.

17. Civ. Pr. Code, O. XIX, r. 3 (1); see *Whitley Stokes*, 33 Cr. Code, s. 539. In the matter of the petition

of *Iswar Chander*, 14 C. 655; on evidence by affidavit, *V. Powell, Esq.*, 9th Ed., 695-697; *Best, Esq.*, 101, ss. 118, 121 et seq.; *Taylor Esq.*, s. 1934 et seq.; *Governor of Bengal v. Motilal*, (1914) 41 C. 173 (S.B.); 20 I. C. 81; A. I. R. 1914 C. 69.

16. *Federal India Assurance Co. v. Anandrao Dixit*, A. I. R. 1944 N. 161, I. L. R. 1944 Nag. 436; 216 I. C. 184; 1944 N. L. J. 134.

17. *Gilbert v. Endean*, L. R. (1878) 9 Ch. Div., 259; *Taylor Esq.*, s. 1936.

18. *Gilbert v. Endean*, L. R. (1878) 9 Ch. Div., 259 at p. 266 per Jessel M. R.; see also *Chard v. Jervis*, 9 B. D. 178, 180; *Bonnard v. Young Manufacturing Co.*, (1900) 2 Ch. 753; and *Lumely v. Osborne*, (1901) 1 K. B. 532.

19. Civ. Pr. Code, O. XIX, rr. 1, 2.

20. Civ. Pr. Code, O. XIX, rr. 1, 2.

21. O. XIX.

duty of the latter to rebut any inference drawn from the use of the contents of the documents.¹³

(2) *Rent Acts.* The Evidence Act does not apply to proceedings under the East Punjab Rent Restriction Act 5 of 1949.¹⁴

(3) *Proceedings before arbitrators.* In proceedings before arbitrators the rules of evidence under the Act are not binding on the arbitrator.¹⁵ In industrial adjudication an arbitrator is not restricted by the evidence of the parties and the evidence that may be obtained. He is not governed by any strict rules of evidence, or findings of technical facts of procedure.¹⁶

(4) *Inquiries before Claim Officer or Settlement Officer.* Having regard to Section 1 of the Act, it does not strictly apply to inquiries before a Claims Officer or a Settlement Officer under the Industrial Disputes Act 1947 and the Disputed Persons' Claims Settlements Act 1944. Hence if copies of revenue records are excluded by an order of the Government of India and Pakistan copies of the Pakistan records are not available it is required by the Evidence Act that such copies be submitted to be allowed to consider. Though strict rules of evidence are not binding on the officers before the officers' attendance and they are bound to follow the generally settled principles of questioning evidence, the fact that they are not bound by the strict rules of evidence is not a ground for questioning the validity of their decision is final.¹⁷

(5) *Proceedings under Order 4.* Proceedings under Section 17 of the A. P. Andhra Pradesh Evidence Act 1958 and under the Mysore Evidence Act (26 of 1948) being not a Code of procedure, the Evidence Act does not apply. Proceedings under Section 17 of the Orissa Evidence Act, 1965 are judicial, as such Evidence Act applies.¹⁸

For instances of judicial decisions on the application of the Act, see Sections 33 and 80 post.

9. **No compulsion to give sample of blood for test.** Section 3 of the Indian Evidence Act, 1872, which provides for the taking of a sample of blood for a blood group test, can be read in conjunction with Section 47 of the Indian Evidence Act, 1872, which provides that a person is not bound to give a sample of his blood for a blood group test, unless he is a person

13. *Employers, Messrs. Hind Strip Mining Corporation, Ltd., Bermo v. Raj Kishore Prasad*, 31 F. J. R. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

14. *Dwarka Das v. Ram Lalhai*, (1969) 71 Pun. L. R. 68, 72.

15. *A. Shah Nauchand v. Vegetable products*, I. L. R. (1973) 2 Cal. 255.

16. *Haralal Sadasheorao Bande v. Su...*

Industrial Court, Nagpur, 68 Bom. L. R. 731; 1966 Mah. L. J. 1060, (1971) 1 Lab. L. J. 166; A. I. R. ...

68 Bom. L. R. 375, at pp. 377, 378. 18. *Yejjipurapu Appadu v. Sambara Iaxminaravana*, (1972) 2 Andh. L. T. 30.

19. *Laxmidhar Panigrahi v. State of Orissa*, A. I. R. 1974 Orissa 127.

Code.¹⁰ Subject to the limitations contained in Order XIX, C. P. C., the Court, may at any time order any fact to be proved by affidavit.¹¹

An affidavit does not, *per se*, become evidence in a suit but it could become evidence only by consent of the party or where it is specially authorised by a provision of law.¹²

It is open to a deponent of an affidavit in verification of a petition under Section 398 of the Companies Act, 1956, to verify it on information received by him and believed to be true since Order XIX, C. P. C., has no application to such an affidavit.¹³

The affidavit of a person who, though alive, is not produced for examination in court, is not admissible in evidence.¹⁴

(b) *Statements on information and belief.* The Civil Procedure Code regulates the matters to which affidavits must be confined. These are such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which a statement of his belief may be admitted, provided that reasonable grounds thereof be set forth.¹⁵ But identical facts cannot be verified both on knowledge and information.¹⁶ The exception here mentioned does not apply to any proceeding which, though interlocutory in form, finally decides the rights of the parties.¹⁷ In interlocutory applications, the Court acts on evidence given on information and belief because no other evidence is obtainable at so short a notice.¹⁸ So, too, in interlocutory proceedings cross-examination will not be allowed in affidavit because it would defeat the object of the whole proceedings, which is dispatch.¹⁹ The costs of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter or copies of, or extracts from, documents, are (unless the Court otherwise directs) payable by the party filing the same.²⁰ The safeguards for truth in affidavits are the provisions for the production of the witness for cross-examination²¹ and the provisions of the Penal Law relating to the

10. See *Emm. R. v. R.* (1842) 10 M. & W. 421; *Mills, A. I. R.* 1964 Bom. 38.

11. *M/s. Chokh Brothers v. Kartick Chandra Saha, A. I. R.* 1968 Cal. 532.

12. *Devi v. Ramji, A. I. R.* 1953 Nag. 169; *M. Satyam v. Venkataswami, A. I. R.* 1919 Mad. 689, at p. 690; *Kamakshya Prasad Dalal v. Emperor, A. I. R.* 1939 Cal. 657, at p. 658; *M/s. Parekh Brothers v. Kartick Chandra Saha, A. I. R.* 1968 Cal. 532, 537.

13. *Shanti Prasad Jain v. The Union of India*, (1965) 68 Bom. L. R. 431, 442.

14. *N. v. Lal Ramji v. River Steam Navigation Co., Ltd., I. L. R.* (1964) 16 Assam 395; *A. I. R.* 1967 Assam 74, 77.

15. Civ. Pr. Code, O. XIX, r. 3 (1); see *Whitley Stokes* 33 Cr. Code, s. 539. In the matter of the petition

of Iswar Chander, 14 C. 653, on evidence by affidavit, *V. Powell, Ev.*, 4th Ed., 646, 667. *Best Ev.* 101, ss. 118, 121 et seq.; *Taylor Ev.*, s. 1934 et seq.; *G. v. G. or B. v. B.* (1914) 11 C. 178 (S.B.); 20 I. C. 81; *A. I. R.* 1914 C. 69.

16. *Federal India Assurance Co. v. Anandrao Dixit, A. I. R.* 1944 N. 161; *I. L. R.* 1944 Nag. 436; 216 I. C. 184; 1944 N. L. J. 134.

17. *Gilbert v. Endean, L. R.* (1878) 9 Ch. Div., 259; *Taylor Ev.*, s. 1936.

18. *Gilbert v. Endean, L. R.* (1878) 9 Ch. Div., 259 at p. 266 per *Jessel M. R.*; see also *Chard v. Jervis*, 9 Q. B. D. 178, 180; *Bonnard v. Perryman*, 1891 2 Ch. 269, at p. 271; *Young Manufacturing Co.*, (1900) 2 Ch. 753; and *Lumely v. Osborne*, (1901) 1 K. B. 532.

19. Civ. Pr. Code, O. XIX, rr. 1, 2.

20. Civ. Pr. Code, O. XIX, rr. 1, 2.

21. O. XIX.

giving of false evidence²². Affidavits are also specifically excluded. Though they are sworn statements and received as evidence of the truth of the statements contained therein, they are not governed by the Act. In an affidavit, there can be statements not merely based on knowledge, but also on information and belief, which would be strictly hearsay. Such statements are however allowed, because reliance is placed upon affidavits only in interlocutory matters and not in the final disposal of the litigation before courts. For example, an application for stay or execution of a decree pending disposal of an appeal. The orders passed on applications supported by affidavits, are to be effective, only during the pendency of the main proceedings—a suit or appeal, and do not operate as a final disposal of the matters agitated. A famous English Judge, is reported to have said “Truth will leak out even in an affidavit” and in Charles Reader’s *Closter and the Hearth* we get the statement “The fact spoken the truth! And in an affidavit!”

(c) *Contempt proceedings*. Even if contempt proceedings are treated as proceedings within the meaning of this section, they are outside the scope of it and have always been treated as such. Contempt proceedings are usually decided on the basis of affidavits and it is not illegal to find a person guilty on the strength of affidavits alone²³. But a statement on information and belief is not legal evidence in a case of contempt²⁴. An alleged contemner is not a person accused of an offence within the meaning of Article 20(3) of the Constitution and, if he has voluntarily filed an affidavit, he can be cross-examined on it.²⁵

13. Arbitration. Proceedings before arbitrators are now regulated by the Arbitration Act¹, which has repealed² the Indian Arbitration Act, 1899, and Section 89, Section 104(1), clauses (a) to (f) and Schedule II of the Code of Civil Procedure, 1908, by which they were formerly regulated. This Act purports to be a complete codification of the Law of Evidence, and, by the present section, it is expressly said not to apply to arbitrations. This can only mean that the arbitrators are not bound by those strict rules of evidence which are applicable to Courts of law. But they must observe the principle if not the letter of these rules. They should not adopt any means of deciding the case which is contrary to natural justice. The rule of “natural justice” has been interpreted to mean that a tribunal which is to apply “natural justice” must act honestly and impartially.³ But an arbitrator may be a most respectable and honest man and yet he may be guilty of legal misconduct vitiating his award, if his conduct cannot be reconciled to general principles.⁴

22. Penal Code, Ch. XI.

23. *Shelton v. Shelton*, 10 F. 107, All. 638; see also *State v. Padma Kant Malviya*, A. I. R. 1954 All. 523; 1954 A. L. J. 378 (F.B.). See also *Basanta Chandra*, In the matter of, A. I. R. 1960 Pat. 430 (F.B.).

24. *Gokulchandra Ghosh v. Murali Ghosh*, 1914 Cal. 69; 41 Cal. 173; 20 I. C. 81 (S.B.).

25. *State v. Padma Kant Malviya*, A. I. R. 1954 All. 523; 1954 A. L. J. 378 (F.B.).

1. X of 1940.

2. S. 49, Arbitration Act, 1940.

3. *Chandrabhan v. Gandat Rai and*

Sons, 1944 Cal. 127; I. L. R. (1943) 1 Cal. 126; 28 I. C. 95 (relying on the observations of Lord Shaw in *Local Govt. Board v. Arlidge*, 1915 A. C. 120 at 138; 84 L. J. K. B. 72; 111 L. T. 905).

4. *Payyavula Vengamma v. Payyavula Kesava*, 1953 S. C. 21; 28 S. C. J. 630; 1953 S. C. A. 16; (1953) 1 M. L. J. 73; 5 M. L. J. 73; see also the observations of Lord Langdale, M. R. in *Harvey v. Shelton*, (1844) 7 Beav. 455 at 462 and of Lord Justice Knight Bruce in *Haigh v. Haigh*, 31 L. J. Ch. New Series, 420 at 423.

fees and however late the proposed evidence, it should be allowed if that can be done without injustice to the other side. There is no injustice if the other side can be compensated by costs.²³

2. **Repeal of enactment.** [Repealed by the Repealing Act, 1938 (1 of 1938), Section 2 and Schedule.]

SYNOPSIS

- | | |
|-------------------------------|---------------------------|
| 1. Repeal of enactments. | 4. Rules left unaffected. |
| 2. Repeal of section. | 5. Effect of repeal |
| 3. Scope of repealed section. | |

1. **Repeal of enactments.** The repealed section ran as follows :

"2. On and from that day the following laws shall be repealed :

- (1) All rules of Evidence not contained in any Statute, Act or Regulation in force in any part of British India ;
- (2) All such rules, laws and regulations as have acquired the force of law under the 25th section of the Indian Councils Act, 1861²⁴ in so far as they relate to any matter herein provided for ; and
- (3) The enactments mentioned in the schedule hereto to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed."²⁵

2. **Repeal of section.** As the provisions of this section were spent or otherwise rendered unnecessary, the section and the Schedule of the enactments repealed by it were repealed by the Repealing Act I of 1938.

3. **Scope of repealed section.** Sub-section (1) of the repealed section repealed all rules of evidence which were not contained in any Statute, Act or Regulation then in force. Such were the rules of English common laws¹ and of the Hindu² and Mohammadan³ laws, which were then in force. Such were also rules which had origin in principles of equity, justice and good conscience.⁴ All such rules ceased to have any force on this Act coming into force.

Sub-section (2) repealed all those rules, laws and regulations which acquired the force of law in the non-regulated provinces under the 25th section of the Indian Councils Act, 1861,⁵ but only in so far as they related to any matter provided for in this Act.

23. *Rupendra Deb v. Ashrumati Debi*, 34 C. L. J. 313 ; A. I. R. 1951 Cal. 286; *Balwant Singh v. Firm Raj Singh*, A. I. R. 1969 Punj. 197.

24. 24 and 25 Vict. c. 67. Clause (2) repeals rules relating to evidence enacted in "Non-Regulated Provinces" prior to the statute and which entered the force of law under the 26th section thereof.

25. Sec. 2 of the Ceylon Evidence Ordinance runs thus : "All rules of evidence not contained in any written law so far as such rules are inconsistent with any of the provisions of this Ordinance, are

hereby repealed."

1. *Sriish Chandra Nandy v. Rakhala-nanda Thakur*, 41 C. W. N. 1103 ; 65 C. L. J. 520 s. c. on appeal 1941 P. C. 16 ; 68 I. A. 34 ; I. L. R. (1941) 1 Cal. 468 ; 193 I. C. 220 (P. C.) ; *King v. Nga Myo.*, 1937 Rang. 177 ; 175 I. C. 465 (F. B.).
2. *Dhondo Bhikaji v. Ganesh Bhikaji*, 11 Bom. 435.
3. *Munir Farhan v. Abdul Wahed*, 1921 A. 175 ; 43 All. 673 ; 63 I.C. 286.
4. *Muz Jungse v. Chottey Sahab*, 8 I. C. 1124 ; 6 N. L. R. 161.
5. 24 and 25 Vict. c. 67.

Subsection (3) repealed previous enactments relating to evidence⁶

4. Rules left unaffected. The proviso to the repealed section left unaffected all rules of evidence contained in any Statute, Act and Regulation not expressly repealed by the Act. There are also several laws relating to the subject of evidence which supply the omissions in the Act and supplement its provisions. For instance, see—

- (1) Bankers' Books Evidence Act, XVIII of 1891
- (2) Civil Procedure Code, 1908, Order XXVI.
- (3) Commercial Documents Evidence Act, XXX of 1949
- (4) Criminal Procedure Code, 1898, Sections 509, 510 (See now Cr. P. C., 1973, Sections 291, 292 et seq.).
- (5) Divorce Act, 1869, Sections 7, 12, 14.
- (6) Limitation Act, 1908, Sections 19, 20. (See now Limitation Act, 1963, Sections 18, 19).
- (7) Patni Regulation, VIII of 1819, Section 8.
- (8) Registration Act, 1908, Sections 17, 49, 50.
- (9) Stamp Act, 1899, Section 35.
- (10) Succession Act, 1925, Section 63.
- (11) Transfer of Property Act, 1882, Sections 59, 123.

This shows that the Act, though intended to be a Code⁷ is exhaustive only in respect of matters expressly provided for in the Act. It does not, however, contain the whole Law of Evidence.

But the Act deals with the particular subject of evidence including admissibility of evidence, and is a "special law" within the meaning of the Code of Criminal Procedure. Hence no rule about the relevancy of evidence in the Act is affected by any provision in the Criminal Procedure Code unless it is so specifically stated in the Code⁸ or it has been repealed or altered by another statute¹⁰. Even the parties cannot contract themselves out of the provisions of the Act. If evidence is tendered, what the Court is to see is whether it is admissible under the Act and not whether in tendering it some breach of contract has been committed.¹¹

6. For a list of the enactments repealed see the schedule which has also been repealed by the Repealing Act I of 1938.

7. For a complete list of provisions, see Whitley Stokes's Anglo-Indian Codes Vol. II pp. 822-827.

8. The Collector v. Palakdhari, 12 All., 35; King v. Nga Myo, 1933 Rang.

177; 175 I. C. 465 (F.B.).

9. Ram Naresh v. Emperor, 1939 All. 242; 1, L. R. 1939 All. 181 I. C. 646.

10. Ram Naresh v. King Emperor, 1939 I. C. 646; 1, L. R. 7 Lah. 84; 94 I C. 901.

11. Sago R. v. Ram Ch. Singh, 1942 Pat. 105; 196 I.C. 645.

5. Effect of repeal. The repeal of this section does not have the effect of re-enacting the rules which it repealed.¹²

3. Interpretation clause. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :

"Court" "Court" includes all Judges,¹³ and Magistrates,¹⁴ and all persons, except arbitrators, legally authorised to take evidence.

"Fact". "Fact" means and includes—

- (1) anything, state of things, or relation of things, capable of being perceived by the senses ;
- (2) any mental condition of which any person is conscious

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

"Relevant". One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue". The expression "facts in issue" means and includes any fact from which, either by itself or in connection with other facts the existence, non existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

12. *King v. King*, 1945 A. 190, 1, 1, R. 1945 A. 620: See also S. 7, General Clauses Act (Act X of 1897).

13. Cf. the Code of Civil Procedure, 1908 (Act 5 of 1908), S. 2 the Indian Penal Code (45 of 1800), S.

19 and for a definition of "District Judge", the General Clauses Act, 1897 (10 of 1897), S. 3(17).

14. Cf. the General Clauses Act, 1897 (10 of 1897) S. 3 (32) and Code of Criminal Procedure, 1973 (Act 2 of 1974).

Explanation—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure,¹⁵ any court records an issue of fact, to be asserted or denied in the answer to such issue, is a fact in issue.

Illustrations

A is accused of the murder of B.

At his trial the following facts may be in issue

that A caused B's death ;

that A intended to cause B's death ;

that A had received grave and sudden provocation from B ;

that A, at the time of doing the act which caused B's death, was by reason of unsoundness of mind, incapable of knowing its nature

Document . Document¹⁶ means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used or which may be used for the purpose of recording that matter.

Illustrations

A writing¹⁷ is a document ;

¹⁸Words printed, lithographed or photographed are documents.

A map or plan is a document ;

An inscription on a metal plate or stone is a document.

A caricature is a document.

"Evidence". "Evidence" means and includes—

(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, **such statements are called oral evidence ;**

(2) all documents produced for the inspection of the court—**such documents are called documentary evidence.**

Proved—A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

15. See now the Code of Civil Procedure, 1908 (C. of 1908) as to the settlement of issues, see Sch. I, Order XIV.

16. Cf. the Indian Penal Code (Act 45 of 1860), S. 29, and the General Clauses Act, 1897 (10 of 1897) S. 3

(18).

17. Cf. definition of "writing" in the General Clauses Act, 1897 (10 of 1897), S. 3 (65).

18. Cf. definition of "writing" in the General Clauses Act, 1897 (10 of 1897), S. 3 (65).

"Disproved". A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved". A fact is said not to be proved when it is neither proved nor disproved.

"India" means the territory of India excluding the "State of Jammu and Kashmir."

- 1 s. 1 (Proceedings before Arbitrators)
- s. 3 ("Evidence").
- 2 s. 3 (Relevant fact)
- s. 3 (Fact in issue).
- 3 s. 3 ("Fact").
- 4 s. 3 (Document produced for inspection of Court).

5. Ch. IV (Oral Evidence)
Ch. V (Documentary Evidence)
s. 60 (Direct Evidence)
ss. 62, 64, 165 (Primary Evidence)
ss. 63, 65, 66 (Secondary Evidence).
6. Part II (On Proof)
Ch. VII (of the Burden of Proof)
Part III (Production and Effect of Evidence).

SYNOPSIS

- 1 Unless a contrary intention appears from the context.
- 2 "Court".
- "Legally authorised to take evidence"
- 3 "Fact".
 - (a) External and internal facts.
 - (b) Physical and Psychological facts.
 - (c) Theory, opinion and feeling.
 - (d) Events and states of things.
 - (e) Positive or affirmative and negative facts.
 - (f) Matter of fact and matter of law.
 - (g) Principal and evidentiary facts.
- 4 "Relevant".
 - (a) Logical and legal relevancy.
 - (b) Relevancy and admissibility.
 - (c) Meaning of "relevant" in the Act.
- 5 Facts in issue.
- Explanation.
- 6 "Document".
 - (a) Difference between English and Indian Law.
 - (b) Matter described upon any substance, letters, figures or marks.
 - (c) "For the purpose of recording that matter"
 - (d) "Writing".
- 7 Evidence.
 - (a) Meaning of evidence.
 - (b) Technical terms. Evidence to explain meaning of.
 - (c) Instruments of evidence.
 - (d) Oral evidence.
 - (e) "Personal evidence".

- (f) Documentary evidence.
- (g) "Original" and "hearsay" evidence.
- (h) Real evidence
 - (i) Autoptic preference.
 - (j) Justification of definition.
- (k) Direct and circumstantial evidence.
- (l) Presumptive and conclusive evidence.
- (m) Exclusion of circumstantial evidence by direct evidence.
- (n) Value and cogency of direct and circumstantial evidence.
- (o) Positive evidence.
- (p) Primary and secondary evidence.
- (q) Accused, if witness.
- (r) Affidavits as evidence.
8. "Proved".
 - (a) Proof and evidence, distinction between.
 - (b) Proof how effected.
 - (c) Test of proof.
 - (d) Proof not affected by incidence of burden of proof.
 - (e) Prima facie case.
 - (f) Matters before the "Court".
 - (g) Local investigation.
 - (h) Statement of accused.
 - (i) Guilt-conscious conduct of the accused.
 - (j) Evidence to be considered as a whole.
 - (k) Personal knowledge of judge.
 - (l) Proof in Civil and Criminal cases.

- (m) Legal proof and legal conviction.
 - (n) Test—"Beyond" reasonable doubt.
 - (o) English and Indian law, difference between.
 - (p) Evidence creating reasonable doubt. Accused entitled to acquittal.
 - (q) Presumption of innocence.
 - (r) Adherence to formalities.
 - (s) Standard of proof in civil cases.
 - (t) Standard of proof varying with enormity of crime.
 - (u) *Corpus delicti*, proof of.
 - (v) Proof in quasi-criminal cases.
 - (w) *Prima facie* proof in such cases.
 - (x) General rules with regard to proof in criminal cases.
 - (y) Standard of proof in matrimonial cases.
 - (z) Circumstantial evidence. Rules as to.
 - (aa) Cases covered by S. 118(a). Negotiable Instruments Act.
 - (bb) Presumption under Section 4(1). Prevention of Corruption Act.
 - (cc) Mode of proving previous conviction.
9. Appreciation of evidence by trial Court.
- (a) Circumstantial Evidence. Principles applicable.
 - (b) There must be evidence.
 - (1) General.
 - (2) Hearsay evidence.
 - (3) Witness whether must be cross-examined.
 - (c) Evidence to be scrutinised on merits.
 - (1) General.
 - (2) Credibility of witnesses.
 - (d) Number of witnesses.
 - (1) General.
 - (2) The English Rule of Common Law.
- (x) Rule in India.
 - (y) Rule in criminal cases.
- (e) Interested witnesses.
- (a) Faction cases.
 - (g) Occupation, caste, calling, status and locality or sex of witnesses.
 - (h) Chance witnesses.
 - (h-1) Hostile witnesses.
 - (i) Coincidences.
 - (j) Eye-witnesses.
 - (k) Child witnesses.
 - (l) Identification evidence.
 - (m) Medical evidence.
 - (m-1) Expert witness.
 - (n) Tape Recorder.
 - (o) Demeanour of witnesses.
 - (p) Acceptability of evidence.
 - (q) ~~Examination~~ witnesses of the locality.
 - (r) Discrepancies.
 - (s) Contradictions and omissions.
 - (t) ~~Examination~~ Necessity of.
 - (u) ~~Examination~~ and accepting part of the testimony.
 - (v) Judge adopting intermediate theory.
 - (w) Party should put his case in cross-examination of witnesses.
 - (x) Confession of co-accused.
 - (y) Examination of witness through interrogatories.
 - (z) Presumptions.
10. Appreciation of evidence by appellate Court.
- (a) General.
 - (b) Civil appeals.
 - (c) Criminal appeals.
 - (d) Appeals against acquittals.
 - (e) Supreme Court appeals.
11. Additional evidence in appeals.
12. Review. "Strict proof".
13. "Proved".
14. "Disproved" and "not proved".
15. Miscellaneous.

1. Unless a contrary intention appears from the context. Where the Legislature defines particular words used in a particular statute these words must be given the meaning given to them by the Legislature unless, by doing so, any repugnancy would be created in the subject or context.²⁰ But, an interpretation clause is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term, where the circumstances require that it should be so comprehended.²¹ It is not to be understood that the interpretation clause must necessarily apply wherever the word "interpreted" is used in the statute, and, in spite of the fact that there are indications in the statute and in the section, where it occurs, to control and modify and explain the meaning of the word in a different sense than what is borne out by the interpretation clause.²² That is why

20. Per Iqbal Ahmad C. J. in *Pratap Singh v. Gulzan Lal*, 1942 All. 50 at 54; I. L. R. 1942 All. 185; 199 I. C. 57 (F.B.).

21. Cartes on Statute Law, 4th Ed. 1886, p. 195.

22. *Pratap Singh v. Gulzan Lal*, *supra*, per Dar J. at p. 65.

words like "unless there is anything repugnant in the subject or context" or "unless a contrary intention appears from the context" are usually inserted in the interpretation clause. But even if no such words are inserted, little weight attaches to the omission, for some such words are to be implied in all statutes which expressions which are interpreted by a definition clause, are used in a number of other contexts. The definition given is, therefore, normally to be taken to apply wherever that word occurs in the statute. But, it will not apply if the word occurs in a subject or context which makes the application of the definition repugnant and repugnant to the meaning of the context in which it occurs.²³ It is not permissible in interpreting one Act to travel beyond words specially defined (except in the General Clauses Act) of other Acts.²⁴

2. "Court" The word "court" originally meant the King's Palace, but it has also acquired the meaning of—

(1) a place where justice is administered, and

(2) the person or persons who administer justice.¹

It is in the latter sense that the word is used in this section. The definition of "Court" is confined only for the purposes of the Act itself and should not be extended beyond its legitimate scope. Special laws must be confined in their operation to their special object.² The definition is not meant to be exhaustive.³ It is inclusive definition.⁴ The word means not only the Judge in court but also a person who takes both Judge and jury.⁵ A Commissioner is a person duly authorized to take evidence, and therefore the provisions of the Act will apply to Commissioners to take evidence under the Civil Procedure Code.⁶ A Deputy Collector holding an enquiry under the Forest and Land Registration Act for the purpose of registering the names of landholders, is a Court within the meaning of this Act and the enquiry held by him is a judicial enquiry.⁷ Commissioner appointed to hold

23. *Knightbridge Estates Trust, Ltd. v. Byrne*, 1940 A. C. 613 at 621; 109 L. J. Ch. 200; 162 L. T. 388; (1940) 2 All E. R. 401, per Viscount Maugham. See also *Karnick Chandra Mullick v. Rani Harshmukhi Dasi*, 1913 Cal. 345; 208 I.C. 461; 77 C. L. J. 252; 47 C. W. N. 582 (F.B.); *Mohammad Manjural Haque v. Bissessar Bantjee*, 1943 Cal. 361; 210 I. C. 479; 47 C. W. N. 408; 77 C. L. J. 32.

24. *Pratt v. Attorney General*, [1950] 1 All E. R. 100; 150 L. J. 100; 1950 Cal. 524; 54 C. W. N. 586.

25. *Jai Narain Ramkisan v. Motiram Gangaram*, 1949 N. 34; 1 I. L. R. 1948 N. 327; 1948 N. L. J. 195.

1. *Pratt v. Attorney General*, [1950] 1 All E. R. 100; 150 L. J. 100; 1950 Cal. 524; 54 C. W. N. 586.

2. *Pratt v. Attorney General*, [1950] 1 All E. R. 100; 150 L. J. 100; 1950 Cal. 524; 54 C. W. N. 586.

188 I.C. 686; A.I.R. 1940 Cal. 286; *R. v. Tulja*, (1887) 12 B. 36; *Attorney General v. Moore*, L. R. (1878) 3 Ex. Div. 276; *R. v. Ram Lal*, (1895) 15 A. 141; but see *Atchayya v. Gangayya*, (1891) 15 M. 138, 144, 147, 148; and *In re Sardhari Lal*, (1874) 13 B. L. R. App. 40; 22 W. R. Cr. 10.

3. *R. v. Ashootosh*, (1878) 4 C. 483 (F.B.); *Mst. Dirji v. Sm. Goalin*, *supra*.

4. *The Queen v. Legisetty Ramayya*, (1974) An. L. T. 372; (1974) 2 A. P. L. J. 805; (1975) 1 An. W. R. 153; 1975 M. L. J. (Cri.) 155; 1975 Cri. L. J. 144 (F.B.).

5. *R. v. Ashootosh*, *supra* at p. 490. C. P. Code O. XXVI, rr. 1-10, Cr. P. Code ss. 254-288. See *Atchayya v. Gangayya*, *supra*.

7. *Rama v. Harakdhari*, 47 I. C. 710.

an inquiry under the Public Servants Inquiries Act XXVIII of 1899 is a Court within the meaning of this section, as he is given all the powers of a court regarding the summoning of witnesses and other matters. The fact that he can give no final decision but has merely to draw up a report giving his findings, is not sufficient to make the Commissioner anything other than a court.⁸

Election Tribunals under the U. P. Municipalities Act take the courts and the provisions of the Evidence Act are applicable to them. They cannot, therefore, admit hearsay evidence.⁹ It is not open to a court or tribunal determining a matter judicially to insist on a particular mode of proof whatever the probative value unless the law requires it particularly where the persons concerned cannot obtain the proof insisted upon.¹⁰ The P. O. is the Presiding Officer of the Motor Accidents Claims Tribunal, but the Tribunal itself is a Tribunal falls within the definition of 'court'.¹¹

An Industrial Tribunal, though not a court within the ordinary meaning of ordinary courts, is vested with the judicial power of a court and performs judicial functions.¹² Such a Tribunal set up under Section 10 of the Industrial Disputes Act, 1947, is a court in the wider connotation in that it is a body defined in this section and the Act entitles it to judicial proceedings and is covered by Section 3 of the Evidence Act defining a Court by excluding arbitrators from the definition of this term. An arbitrator can be regarded as a person who, by the rules of natural justice or by his own discretion, is authorised to receive evidence and to pass any documents or books before it.¹³

Rent Controller under Andhra Pradesh's Buildings (Rent and Eviction) Control Act is legally authorised to take evidence and his position in law of Rule 8 (2) is a "Court".¹⁴

When by a statute a person is designated as a court or is given a function not otherwise than in a judicial capacity and nothing is said about the finality or otherwise of the decision, it is intended to create a court and not as a person designated as a court. There is a court if the statute so provides in the statute.¹⁵

'Legally authorised to take evidence'. The words 'legally authorised' contemplate a positive authorisation. It is not to be construed as not an

8. *Kapur Singh v. Jagannathan*, 1951 *Punj. L. J.* 49: 52 *Cr. L. J.* 950: 53 *P. L. R.* 178.

9. *Prem Chand v. Sri O. P. Trivedi*, 1967 *A. L. J.* 5, 7.

10. *A. N. Saxena v. Dy. Registrar, Co-operative Societies, U. P.*, 1969 *A. L. J.* 652, 656.

11. *The Municipal Committee, Jullundur v. Shri Romesh Saggi*, 71 *P. L. R.* 452, 456 (see *Motor Vehicles Act IV of 1939*, section 110).

12. *Bharat Bank, Ltd. v. Employees*, 1950 *S. C. R.* 188: 86 *C. L. J.* 250; *A. I. R.* 1950 *S. C.* 188; *Associated Cement Companies, Ltd. v. P. N. Sharma*, (1965) 1 *S. C. A.* 725: (1965) 11 *Fac. L. R.* 77: (1964-65) 27 *F. J. R.* 204; (1965) 1 *Lab. L. J.* 433; *A. I. R.* 1965 *S.*

C. 1595.

13. *Bharat Bank, Ltd. v. Employees*, supra; *Raghu Singh v. The Buraikur Coal Co., Ltd.* (1966-67) 30 *F. J.* 2: 134; *A. I. R.* 1966 *Cal.* 504 at pp. 507, 508.

14. *Harbans Singh Ghai v. B. D. Khanna*, 1975 *Chand. L. R.* (Cri.) 274 at 277; 1974 *Punj. L. J.* (Cr.) 352.

15. *G. Bulliswamy v. Smt. C. Annapurna*, *A. I. R.* 1976 *A. P.* 270 at 272.

16. *The Public Prosecutor (A. P.) v. Legisetty*, 1975 *Cr. L. J.* 144 at 149 (F.B.); (1974) *An. L. T.* 372; (1974) 2 *A. P. L. J.* 505; (1975) 1 *An. W. R.* 133; 1975 *M. L. J.* (Cri.) 155.

incident of an appellate court; wherever an appellate court possesses the right to receive the evidence, it is by virtue of express enactments, such as those contained in Section 428, Criminal Procedure Code and Order 41, Rule 27, Civil Procedure Code. A District Magistrate, hearing an appeal under Section 160 of the U. P. Municipalities Act, is not legally authorised to take evidence, and is not, therefore, a "court" within the meaning of this section.¹⁷ As under the Coroner's Act, the Coroner is "legally authorised to take evidence" during the course of an inquest held by him, a Coroner is a "court".¹⁸

3 "Fact". "All rights and liabilities are dependent upon and arise out of facts, and facts fall into two classes—those which can, and those which cannot, be perceived by the senses. Of facts, which can be perceived by the senses it is superfluous to give examples. Of facts, which cannot be perceived by the senses; intention, fraud, good faith, and knowledge may be given as examples. But each class of facts has, in common, one element, which entitles them to the name of facts—they can be directly perceived either with or without the intervention of senses."¹⁹

(a) *External and internal facts.* The first clause refers to external facts the subject of perception by the five "best marked" senses, and the second to internal facts the subject of consciousness.²⁰ (a), (b) and (c) are illustrations of the first clause; (d) and (e) of the second.

(b) *Physical and psychological facts.* Facts are thus (adopting the classification of Bentham) either physical, e.g., the existence of visible objects, or psychological, e.g., the intention or *animus* of a particular individual in doing a particular act. The state of a man's mind is as much a fact as the state of his digestion.²¹

As is clear, the latter class of facts are incapable of direct proof by the testimony of witnesses; their existence can only be ascertained either by the confession of the party whose mind is their seat, or by presumptive inference from physical facts.²² This constitutes their only difference. When it is affirmed that a man has a given intention, the matter affirmed is one which he and only he can perceive; when it is affirmed that a man is sitting or standing, the matter affirmed is one which may be perceived not only by the man himself but by any other person able to see and favourably situated for the purpose. But the circumstance that either event is regarded as being, or as having been, capable of being perceived by someone or other, is what we mean, and all that we mean, when we say that it exists or existed, or when we denote the same thing by calling it a fact.

(c) *Theory, opinion, and feeling.* The word 'fact' is sometimes opposed to theory, sometimes to opinion, sometimes to feeling, but all these modes of using it are more or less rhetorical.²³ In *Ram Bhawan v. Rameshwar Prasad Singh*,²⁴ it was held, that a statement is a 'fact', as defined in Section 3, and

17. *State of Uttar Pradesh v. Ratan Shukla*, 1956 All. 258; I. L. R. 1956 A. 656.

18. *Tanajirao v. H. J. Chinoy*, 71 Bom. L. R. 732.

19. See Draft Report of Select Committee, dated 31st March, 1871; Gazette of India, July 1, 1871, Part V, p. 273.

20. Steph. Introd., 19-21; Norton, Ev., 93, Steph. Dig., Art. 1. Fact is

anything that is the subject of testimony; Ram on Facts, 3.

21. 1 Benth, Jud. Ev., 45.

22. *Sabhapati v. Huntley*, 1938 P. C. 91; 173 I. C. 19; 47 L. W. 409; see also *Empire v. Ramanna Ayyangar*, 1935 M. 528; I. L. R. 58 M. 642; 158 I. C. 764 (F.B.).

23. Bent., Ev., 6, 7.

24. Steph. Introd., 20, 21.

25. 1938 Oudh 26; 171 I. C. 481.

could be relevant under clause (1) of Section 11 and reliance was placed on illustration (c) of Section 6. The illustration, however, deals only with statements which are parts of *res gestae*. The fact that a statement was made, is no doubt a fact and it can be proved as such whenever it may be relevant under any provision of the Act.

(d) *Events and states of things*. Facts may also be either events or states of things. By an 'event' is meant "some motion or change considered as having come about either in the course of nature or through the agency of human will, in which latter case, it is called an 'act' or 'action'." The fall of a tree is an 'event', the existence of the tree is a 'state of things' both are alike facts.¹

(e) *Positive or affirmative and negative facts*. The remaining division of facts is into positive or affirmative and negative. The existence of a certain state of things is a positive or affirmative fact,—the non-existence of it is a negative fact. "This distinction, unlike both the former ones, does not belong to the nature of facts themselves, but to that of the discourse which we employ in speaking of them."² A negative fact is generally proved by placing the relevant circumstances before the Court and leaving it to the Court to draw the necessary inference from the proved fact, as it may not ordinarily be possible to prove those facts by evidence *aliunde*.³

(f) *Matter of fact and matter of law*. "Matter of fact" has been defined to be anything which is the subject of testimony, 'matter of law' is the general law of the land of which Courts take judicial cognisance.⁴ Questions of law and of fact are sometimes difficult to disentangle.⁵ The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted is necessarily a pure question of fact.⁶ In *British India Steam Navigation Co. v. British India Shipping Authority*,⁶ Denning, L. J., stated the distinction between law and fact in these words:

"Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of the thing itself, such as original documents. Their determination is essentially a question of fact for the tribunal and the only question of law that can arise on them is whether there was any evidence to support the

1. Best, Ev., 7; 1 Benth. Jud. Ev., 47, 48.

2. 1 Benth., Jud. Ev., 49; Best, Ev. 7.

3. *Amritya Reddy v. Ganga Reddy*, I. L. R. 1959 Mys. 777, followed in *Donaiah v. Nagappa*, A. I. R. 1965 Mys. 102.

4. Best, Ev., 19.

5. *Nafar Chandra Pal Chowdhury v.*

Shukur Sheikh, 1918 P. C. 92, 45 I. A. 183; 46 Cal. 189; 51 I. C. 760; see also *Suwalal Chhogalal v. ...*, 1949 N. 249; I. L. R. 1948 Nag. 837 (F. B.).

6. (1949) 1 K. B. 454 at pp. 471-2; (1949) 1 All E.R. 21,

In practice, therefore, it is preferable to use the terms "relevant" and "admissible" simply, meaning by the former that which is logically probative and by the latter that which is legally receivable, whether logically probative or not. "The one principle appears to be that, in the absence of statutory provisions, nothing that is not logically relevant is admissible, but that many facts that are logically relevant are excluded for various reasons based on practical considerations as to the reasonable and fair way of administering justice."¹⁴

Irrespective of the means or the manner by which evidence is secured,¹⁵ admissibility is dependent on the question of relevancy and such evidence can not be ruled out on the ground that it had been procured by improper means or illegally.¹⁶ The fact that a document was produced by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved. But examining the proof given as to its genuineness, the circumstances under which it came to be produced in court are to be taken into consideration.¹⁷

(c) *Meaning of "relevant" in the Act* Under this section itself "relevant" means "connected in any of the ways referred to in the provisions of this Act relating to the relevancy of facts; that is, in Sections 5 to 53." The scheme of the Act seems to be to make all relevant facts admissible and the dictum of Lord Hobhouse¹⁸ that "relevant in this Act means admissible" seems to express the effect rather than a definition of the word.

5. **Facts in issue.** Facts may be related to a fact and liabilities in any one of the two ways:

- (a) They may by themselves or in connection with other facts constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B, there arises, of necessity, the inference that A is, by the law of England the heir at law of B and that he has such rights as that status involves. From the fact, that A caused the death of B under certain circumstances, and with a certain intention or knowledge, there arises, of necessity, the inference that A murdered B, and is liable to the punishment provided by law for murder. Facts, thus related to a proceeding, may be called facts in issue unless their existence is undisputed.

14. Phipson, 11th Ed., p. 69.

15. See *Kuruma v. The Queen*, 1955 A. C. 197 (P.C.): (1955) 1 All E. R. 236 at p. 50, quoting with approval *Rex v. Leatham*, (1861) 8 Cox C.C. 498; where Crompton, J., said, "It matters not how you get it; if you steal it even it would be admissible"; "If evidence is relevant, it is admissible and the court is not concerned with how it is obtained",

per Lord Goddard, C. J., at p. 239 of (1955) 1 All E. R., *supra*.

16. *M. K. Annamalai Chettiar & Co. v. Dy. Commercial Tax Officer*, (1965) 2 M. L. J. 406; 78 M. L. W. 702; 1966 M. W. N. 46; (1965) 16 S. T. C. 687.

17. *Magraj Patodia v. R. K. Birla*, A. I. R. 1971 S. C. 1295, 1303.

18. *Edwin Crand v. Seod Singh*, (1889) 5 C. W. N. cclxviii.

- (b) Facts which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue and be used as the foundation of inferences respecting them: such facts are described in the Evidence Act as relevant facts.¹⁹

All the facts with which it can in any event, be necessary for Courts of Justice to concern themselves are included in these two classes. What facts are in issue, in particular cases, is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, civil or criminal.²⁰ A judgment must be based upon facts declared by this Act to be relevant and duly proved.²¹

Facts which tend to render more probable the truth of witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue.²²

Explanation. The Explanation refers to Order XIV of the Code of Civil Procedure,²³ under Rule 1 of which:

"Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other."

"Material" propositions are those propositions of law or fact which a plaintiff must affirm in order to show a right to sue or a defendant must allege in order to constitute his defence."

"Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue."

"Issues are of two kinds, (a) issues of fact, (b) issues of law."

6. "Document." The term "document" has been defined in two other Acts of the Indian Legislature.²⁴ There is practically no difference in the definition given in these Acts except that, in the definition given in the Penal Code, the words "as evidence of that matter" occur in place of the words "for the purpose of recording that matter" used in this section.

(a) *Differences between English and Indian law.* The definition of "document" in the Indian Acts differs from the definition of the word in English law. In *Rex v. Dyer*,²⁵ Dyer, J., defined a document as "any writing or printing capable of being made evidence in a matter on what interested it

19. For example, in the case of an issue as to whether a fact is a relevant fact, see *Kaung v. San*, 3 L. B. R. 90.

20. See *Principles of the Law of Evidence*, 316, et seq., Best. 20; Steph. Dig., 2.

21. S. 165, post.

22. *Rescoe v. Evidence*, 1270 F.R. p. 75.

23. V of 1908.

24. S. 3 of Indian Penal Code, Act XLV of 1860, and S. 3 (18) of the General Clauses Act, X of 1897.

25. (1908) 2 K. B. 333.

may be inscribed." Citing this case, Best says that under the term "are properly included all material substance on which the documents, if such are represented by writing, or any other species of character, or mark, or symbol."¹ Section 64 of the English Evidence Act enacts that "document" includes books, maps, plans, drawings and photographs. Thus, in English law, the word "document" applies to the material, on which the writing is written, whereas in Indian law it is the writing on the material that is referred to.² A document need not necessarily be something which is signed, sealed or executed.³

(b) *Matter described upon any substance, letters, figures or marks.* "Matter described" means matter delineated, e.g., as map, plan, or a picture "upon any substance," e.g., stone, tree⁴ or clay by means of letters, figures or marks, i.e., whether in language, numbers, pictures or symbols.⁵

(c) *"For the purpose of recording that matter."* In the definition in Section 29 of the Indian Penal Code the words ascribing to any of these words are "as evidence of that matter." But the term "evidence" is not to be used in the sense of admissible or legal evidence. It is rather used in a larger sense as denoting matter which is a written memorial of certain facts to which reference might be made to recall them. It implies evidence as to the truth of the matter expressed or described, but merely of its existence. Thus, if it is submitted, is exactly what is meant by "for the purpose of recording that matter." Perhaps these words have been used in this way to avoid confusion that might arise by using the word "evidence" which has been given special meaning in this Act as will be presently seen.

(d) *Writing.* Under section 2(67) of the General Clauses Act, the expression referring to "writing" should be construed as embracing references to printing, lithography, photography and other modes of reproducing words in a visible form, and as the term "writing" in this section shows, a writing is a document.

7 Evidence. (a) *Meaning of evidence.* The word "evidence" signifies in its original sense, the state of being evident or manifest or notorious.⁶ The meaning of the term is not restricted to evidence before a judicial tribunal.⁷ Best says:

"But by an almost universal application of the term, it is now taken to denote that which tends to render evident or manifest a fact or state of fact. This is

1. Best, Ev., s. 215.

2. Law Commissioner's 1st Report on Indian Penal Code, S. 88; see also *Dharmendra Nath Shastri v. Rex*, 1949 A. 553; 50 Cr. L. J. 550; 1949 A. L. J. 183.

3. *Emperor v. Krishappa Khandappa*, 1925 B. 327; 87 L. C. 838.

4. *Emperor v. Krishappa Khandappa*, supra.

5. *A. V. Joseph v. K. E.*, 1, L. R. 3 Rang 11; A. I. R. 1925 Rang

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6. *Dharmendra Nath Shastri v. Rex*, supra; see also *Madapusi Srinivasa v. R.*, (1881) 4 Mad 393.

7. X of 1897.

8. *Johns Dict.*, cited in Best, Ev., s. 11; see also *Dharmendra Nath Shastri v. Rex*, 1949 All. 353 at 355; 50 Cr. L. J. 550.

9. *Madapusi Srinivasa v. R.*, (1881) 4 Mad 393.

the sense in which it is commonly used in our law books . . . Evidence, thus understood, has been well defined as, any matter of fact the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the evidence of some other matter of fact.¹⁰

According to Stephen, the word "evidence" as generally employed is ambiguous. (a) It sometimes means the words uttered and things exhibited by witnesses before a Court of Justice; (b) at other times, it means the facts proved to exist by those words or things, and regarded as the groundwork of inferences as to other facts not so proved; (c) again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under enquiry.¹¹ The word in this Act is used in the sense of the first clause. As thus used, it signifies only the instruments by means of which relevant facts are brought before the Court (viz., witnesses and documents), and by means of which the Court is convinced of these facts.^{12,13}

If a witness deposes to a fact of which he has no personal knowledge (possession in the instant case) or any means of knowledge about the fact deposed to by him, his testimony would not be evidence under any principle of law.¹⁴ If a witness says that accident would not have occurred had any one of the drivers moved the vehicle to his left, it is not evidence but a mere expression of opinion.¹⁵ Conclusion of witnesses including police are not legal evidence in a case.^{16,17} Report of medical officer is not evidence unless the medical officer is examined as a witness.¹⁸⁻¹⁹

(b) *Technical terms* Evidence to explain meaning of Evidence adduced to explain meaning of technical terms would be evidence within the meaning of this section, if it consists of statements permitted or required to be made before the Court by witnesses in relation to matters of fact under enquiry.²⁰

(c) *Instruments of evidence* Instruments of evidence, or the media through which the evidence of facts either disputed or required to be proved, is conveyed to the mind of a judicial tribunal have been divided into

10. Best, Ev., 6. 11. citing 1 Benth, Jud. Ev., 17.

11. Steph. Introd., 3, 4. See also Gobarsa v. Emperor, 1930 Nag. 242, 125 I. C. 673; 26 N. L. R. 229 (F.B.).

12-13 Norton, Ev., 95; as to instruments of evidence, see Best, Ev., 125.

14. Dwarika Das v. H. P. Karmayya, (1969) 71 Punj. L. R. 68, 71.

15. T. Subba Rao v. State, (1972) 1

An. L. T. 205 at 207

16-17. F. Hussainsab v. State of Karnataka, 1975 Mad. L. J. (Cri.) 399 at 402.

18-19. R. S. G. v. J. S. Singh, 1975 Hudu L. R. 22 at 23 (Punj.); Udhav Charan v. State, 1975 (39) Cut. L. T. 303

20. See Baldwin & Francis, Ltd. v. United Aircraft Corporation, 1969, 2 All E. R. 433.

- (i) witnesses ;
- (ii) documents ;
- (iii) real evidence, including evidence furnished by things as distinguished from persons, as well as evidence furnished by persons considered as things, e.g., in respect of such properties as belong to them in common with things.²¹

(d) *Oral evidence*. The expression "oral evidence" has been used in Sections 59, 60, 91, Explanation 1 and Section 144, Explanation, post.

(e) *Personal evidence*. Personal evidence is that which is reported by witnesses.

(f) *Documentary evidence*. The expression "documentary evidence" occurs only in the headings to Chapters V and VI.²²

(g) *"Original" and "hearsay" evidence*. Another division of evidence is that into "original" or "primary" and "hearsay" or "mediate". The former is that which a witness reports himself to have seen or heard through the medium of his own senses, the latter that which is not arrived at by the personal knowledge of the witnesses.²³

(h) *Real evidence*. Real evidence may be (a) reported, or (b) immediate.²⁴ Clause (a) properly falls under the first class of instruments (witnesses). Clause (b) describes that limited portion of real evidence of which the tribunal is the original percipient witness, e.g., where an offence of contempt is committed in the presence of a tribunal, it has direct real evidence of the fact.²⁵

The demeanour of witnesses,¹ the demeanour, conduct and statement of parties,² local investigation by the Judge,³ a view by jury or assessor⁴ are all instances of real evidence. Clause (b) thus also includes material things other than documents produced for the inspection of the Court (called in the Draft Bill "material evidence"), e.g., the property stolen, models, weapons or other

21. Best Ev., s. 197; Goodwin v. Ly., 11.

22. Whitley Stokes, § 2.

23. See Narain v. Ly., 29 B. & L. 27, 31.

24. Best Ev., s. 197; Goodwin v. Ly., 11, 12, 14, 16.

25. Best Ev., s. 197.

1. Cr. Pr. Code, O. XXIII, r. 12; Cr. Pr. Code, S. 280. As to the importance of observation of demeanour, see R. v. Madhoo v. Govt., 1874 21 W. R. Cr., 14; Markie v., 818 B. & L. 6; R. v. Bertrand, 1867 L. R. 1 P. C. 100; Borthwick Cotton Manufacturing Co. v. R. B. Motilal, 1915 P. C. 1; 42 I. A. 110; 39 Bom. 386; Kyi Oh v. Ma Thei Pon., 1926 P. C. 29; 94 I. C. 916; L. L. R. 4 Rang. 15. In all cases in which the evidence is conflicting it is the duty of a Court of Appeal to have great regard to the opinion

formed by the Judge in whose presence the witnesses gave their evidence as to the degree of credit to be given to it; Woomesh v. Rashmonee, 1893 1 C. 2, 9; Shammugaroya v. Manikka, (1909) 32 M. 400 (P. C.); Imdad v. Pateshri, 1909 32 A. 241 (P. C.).

2. Whitley Stokes, § 52.

3. Cr. Pr. Code, O. XXVI, r. 9; Cr. Pr. Code, S. 510; Joy v. Ben Choudh, 1887 9 C. 23; Gommot Patil v. Bhuge, (1970) 13 W. R. 50; Harkashore v. Abdul (1894) 21 C. 92; Lakshmi v. Bhamp (1911) 35 B. 317; 10 I. C. 914; 13 Bom. L. R. 313.

4. Cr. Pr. Code, 1898, S. 293. See R. v. Chatterdhar (1866) 5 W. R. C. 59, 60; Behari Narain Singh, In re (1877) 1 C. L. R. 143; Karash v. Ram (1899) 26 C. 869.

things to be proved, and which are required to be transmitted to the Court. This "real evidence" does not form part of the evidence as defined in the Act, inasmuch as the Court is not bound to accept the evidence of a witness, and further, in the case of "material evidence", it is not necessary to be witnessed; it falls properly under the first branch of the definition. The things so produced are relevant facts to be proved by the testimony of those who know of them.⁷ The Court is not bound to accept the evidence of material things for its inspection.⁸

The definition of "evidence" in *Wagoner*⁹ discards the phrase "real evidence" and substitutes "direct perception", explaining that a fact is "evidence" when it is offered for direct perception by the senses of the tribunal.

The definition has been objected to¹⁰ for inaccurate, as it, in its terms, it does not include the whole material of a case, but only the facts in issue. Thus in so far as a statement by a witness only is "evidence"—

... it is not evidence until it is used in Court by way of answering questions by the Judge,¹¹

... a person affecting himself and his co-accused,¹²

(c) the real evidence abovementioned, and

... the evidence of the facts in issue by the evidence of producible witnesses or evidence,¹³

are not "evidence" according to the definition given.

The main reason for this objection, however, is that this clause is an interpretation of the word "evidence" and only explains by it what it intended to denote. The word "evidence" is used in the Act.¹⁴ This definition must be confined to the meaning of the word "evidence" as used in the Act. It seems to follow that the law does not require a fact to be proved and the law expressly authorises the Court to accept the evidence of a witness for a certain purpose. If the fact in question is "evidence" the result has not been explained. If it is not evidence it must be used

7. Cf. Pr. Code, S. 209 (c). See Whitley Stokes, 831; s. 60 Prov. (2), 65 (d) post.

8. Steph., *Introd.*, 15.

9. *Norton, Ev.*, 95.

10. *s. 60 proviso (2), post.*

11. *Wagoner, Ev.*, s. 24.

12. *Whitley Stokes, 831; Norton, Ev.*, s. 1808; 263; Whitley Stokes, 852.

13. *v. s. 165, post.*

14. *v. s. 30, post.*

15. *v. s. 114 ill (g), post.*

16. *R. v. Ashootosh*, 4 C. 483, 492 (F.B.).

17. *Joy v. Bundhoolal*, 9 C. 363; see *R. v. Ashootosh*, 4 C. 483, 492; *Bhola Prasad v. Mahant Laxmi Narayan*, 1924 Nag. 385; 79 I. C. 609.

in the same way as everything else that is evidence."¹⁶ Thus, an oral admission in Court and the result of a local enquiry instituted by a Munsiff is matter before the Court which may be taken into consideration¹⁷ and the confession of a prisoner affecting himself and another person, charged with the same offence, is, when duly proved, admissible as evidence against both. (See next section)¹⁸

(k) *Direct and circumstantial evidence* Evidence has been further divided into direct evidence and circumstantial evidence¹⁹ Direct evidence is the testimony of a witness to the existence or non-existence of a fact or facts in issue. This meaning of the word "direct" must not be confounded with that in which it is used in Section 60, post, which does not exclude circumstantial evidence²⁰ but is opposed to hearsay evidence. In the latter sense circumstantial evidence must always be "direct", i.e., the facts from which the existence of the fact in issue to be inferred must be proved by direct evidence²¹ By circumstantial evidence is meant the testimony of a witness to other facts (relevant facts) from which the fact in issue may be inferred²² Thus "A is indicated for the murder of B, the apparent cause of death being a wound given with a sword. If C saw A kill B with a sword his evidence of the fact would be direct. If, on the other hand, a short time before the murder, D saw A walking with a drawn sword towards the spot where the body was found, and after the lapse of a time long enough to allow the murder to be committed saw him returning with the bloody sword, these circumstances are wholly independent of the evidence of C (they derive no force whatever from it) and, coupled with others of a like nature, might generate quite as strong a persuasion of guilt."²³

So, although it is generally difficult to adduce direct evidence to prove that a woman is leading an adulterous life, yet it may be proved that she has been absenting herself from her house for a number of days at a stretch and that she has been seen more than once with a total stranger to her husband's family when no explanation is given by her for having been seen in the company of

16. Per Jackson J. in *R. v. Ashootesh*, 4 C. 483, 492.

17. *Joy v. Bundhoolal*, 9 C. 565.

18. *R. v. Ashootesh*, 4 C. 483 referred to in *R. v. Krishna Bhai* (1885) 10 B. 519 at p. 526; *R. v. Dada Anz*, 1886 15 B. 42, 45; v. s. 30 post; see also generally as to evidence the following sections: 88, 5 (evidence of fact in issue and relevant facts); 54, 60 (oral); 60 must be direct; 61, 100 (documentary); 91-100 (exclusion of oral by documentary); 114 (evidence inadmissible but not producible); 191-195 (production and effect of); 118-166 (witnesses); 167 (improper admission or rejection of evidence) as to the meaning of "evidence to go to the jury," see *Parrat v. Blunt and Cornfoot*, (1847) 2 Cox C. C. 242; *Jewell v. Parr*, (1853) 13 C. B. 909,

915; *Kader v. Webbwell*, 1883 1 R. 4 Ex. 32, 38; *Steward v. Young*, 1870 1 R. 3 C. P. 122; *R. v. Vaidya*, 1891 16 B. 424 as to verdict against evidence *R. v. Dada Anz* supra.

19. See William Wells, Essay on Circumstantial Evidence, 4th Ed., 1867; A. M. Bennett's Treatise on Circumstantial Evidence, 1868; Phillips Famous Cases of Circumstantial Evidence, 4th edition, (1879) also a treatise on circumstantial evidence by Arthur P. Wells, 1890; *Neel v. Jaggobindhu*, 1884 12 B. L. R. App. 18.

20. See Steph. Int. d. s. 71; Best, Ev. II, 103, 125; Wills' Circumstantial Ev., 6th Ed., 19, 20.

22. v. post, Introduction to Chap. II.
23. Best, Ev. s. 294; *Nibaran v. R.* (1907) 11 C. W. N. 1085.

able suspicion, always calling for an acquittal. But with circumstantial evidence, as with evidence of any other kind, the real test is quality and not quantity. The chain need not be long and complicated, and may consist of two or three links, but the links should fit in and should be strong.⁶

The term 'presumptive' is frequently used as synonymous with 'circumstantial' evidence, but they differ as genus and species.

Classification of circumstantial evidence. Circumstantial evidence is of two kinds, conclusive and presumptive. Conclusive, when the connection between the principal and secondary facts is the *lex in praesentia* and *factum praesens*. It is a necessary consequence of the laws of nature; as where, it necessarily, the accused shows that at the moment of crime, he was at another place, etc., 'presumptive', when the inference of the principal fact from the evidentiary fact is only probable, whatever be the degree of persuasion which it may generate.⁷

Admissibility of circumstantial evidence by direct evidence. As regards admissibility of direct and circumstantial evidence, while directly speaking, on the score of relevancy and testimony, whether in pursuance of *probationem* or the *inductio*, the evidence is equally admissible. It has been said that evidence of circumstantial facts can never be direct, but is direct in effect except where evidence of direct facts is not of a *prima facie* nature, direct in law.⁸ But, in the present case, it is not true that the best evidence must of itself always be given, for its technical directness may be affected by its content or affect the weight of that which is produced. All admissible evidence is in general equally admissible. Thus circumstantial evidence is not to be excluded by direct, and when direct evidence cases the *corpus delicti*, may indirectly be established by other evidence or, indeed, by the defendant's mere admissions out of court.⁹

In *probatum*, *probatum* must be of experience and efficiency is not expected, but of direct and indirect evidence, the latter is not required from the accused, except in the case of a *prima facie* case. Examiners of the evidence in view of the *probatum* must be of direct and indirect evidence, and of the *probatum*.¹⁰

Classification of direct and circumstantial evidence. As to the several kinds of direct and circumstantial evidence, much has been both written and said, but both terms point at every source of probability. A direct evidence is one which is of direct evidence, and a circumstantial evidence is one which is of indirect evidence.

6. *Maya Basuva*, 1950 M. P. 10; 1960 M. P. L. J. 1226.

7. See Phipson Ev., 9th Ed., p. 2.

8. Best, Ev., s. 293.

9. Best, Ev., s. 294.

10. Wills' Circ. Ev., 6th Ed., 39, 40, 303.

12. Phipson Ev., 11th Ed., 61; see also

Maya Basuva, 1950 M. P. 10; 1960 M. P. L. J. 1226; *R. v. Bhagirath*, 3 All. E. R. 383; and (In re) *Maya Basuva*, 1950 M. 452; (1950) 1 M. L. J. 428; 1950 M. P. L. J. 1226.

13. *Akbar Shah v. State*, (1965) 2 Cl. L. J. 711; A. I. R. 1965 J. and K. 126, 127.

to be borne in mind, on one source of error, **fallibility of testimony**, while the latter, as an additional, **fallibility of inference**.¹⁴ But when circumstances connect themselves closely with each other, when they form a large and strong body, so as to carry conviction to the minds of a jury, it may be proof of a more satisfactory sort than that which is direct. When the proof arises from the cumulative force of a number of circumstances, which we cannot conceive to be fraudulently brought together to bear upon one point that is less fallible than any one circumstance, direct evidence may be.¹⁵ It may be noted here that in the definition of the term "proved" in this section no distinction is drawn between circumstantial evidence and other evidence.¹⁶ It has been said that "facts cannot lie"¹⁷ but men can. And as we only know facts through the medium of witnesses, the truth of the fact depends upon the truth of witness.¹⁸ "If men have been convicted erroneously on circumstantial evidence, so have they on direct testimony, but is that a reason for refusing to act on such testimony?"¹⁹

Circumstantial evidence is merely direct evidence indirectly applied. When the direct evidence to prove a fact is found to be unreliable, the circumstantial evidence bearing upon the fact may be looked into.²⁰

In this connection it may be borne in mind, as pointed out by Dr. Kenny, that the circumstantial element often plays a large part in what would pass off for a direct evidence. Thus, a witness may depose that he saw A point a rifle at B and fire it, saw a smoke, heard the crack, etc. As B is 100 yds. then, when going to him, he saw a bullet hole in his leg. But he did not see A's bullet strike B, so, this fact (the really essential one) depends entirely on circumstantial evidence, that is, it has to be merely inferred from these other facts which he actually saw. An amusing and vivid illustration is given by Dr. Kenny in an old case under unpopular

14. Phipson, Ev., 11th Ed., § Norton, Ev., pp. 14, 18, et seq., 71; Phillips' Famous Cases of Circumstantial Evidence, 4th Ed., Introduction; Best, Ev., s. 295; Taylor's Ev., ss. 65—69; Wills' Circ. Ev., 6th Ed., 43; see remarks of Alderson, B., in R. v. Hodges, 2 Lewin, C. C. 227. "Probatio per evidentiā rei omnibus est potentior et inter omnes ejus generis major est illa, quæ fit, per testis de visu." (Mascardus De probationibus, v. 1, q. 3 n. 8). So also Menochius who displays a partiality for that circumstantial proof, which is the subject of his treatise, yet says "probatio seu fides quæ testibus fit, cortius excellit" (De proesumptionibus, L. 1, q. 1); Phillips, op. cit. Buirill, op. cit.

15. Per Lord Chief Baron Macdonald in R. v. Patch and R. v. Smith, cited

in Wills' Circ. Ev., 6th Ed., 46, 47, 439—52; Norton, Ev., 18, et seq.; Cunningham, Ev., 16, and Surrindra v. R., (1911) 39 C. 522; see also charge of Bullen, J., in the trial of Captain Donnellan, cited and criticised in Phillips' Circ. Ev., xv.

16. Miran Baksh v. Emperor, 1931 L. 529; 133 I. C. 446.

17. Per Baron Legge in the trial of Mary Blandy, State Trial, (1752).

18. Phillips' Circ. Ev., xiv, xvii.

19. Greenleaf, Ev., 1 C. 4. As to the disregard of circumstantial evidence by Mofussil juries, see remarks in R. v. Elahi Bux, (1886) B. L. R. Sup., Vols. 481, 482.

20. Gulabchand v. Kudilal, 1959 Jab. L. J. 78; A. I. R. 1959 Madh. Pra. 151 (F.B.); Madhu Sudan v. Mst. Chandrabati, A. I. R. 197 P.C. 30, distinguished.

game laws. A man is justly accepted the hypothesis of the poacher's counsel that the gun fired by his client was not loaded with shot and that the peasant died of fright, and the superior court did not set aside this court's verdict, though it had full power to do so²¹. Direct and circumstantial evidence arise from the facts and in addition to common factors between incidental and all testimonial evidence, whether circumstantial or direct, viz. that their acceptance depend upon the accuracy of the witness's original observation and the events he describes, the correctness of his memory and his veracity. In the case of circumstantial evidence, we have to depend further on the cohesion of each circumstance in the evidence with the rest of the chain of circumstances of which it forms a part and logical accuracy in deducing inferences from this chain of facts. In the oft-repeated language of Baron Alderson "the more ingenious the juryman, the more likely is he to strain his facts to fit his theory", for every fact has two faces, though circumstances cannot lie, they can mislead.

No distrust of circumstantial evidence has been shown either by English law or by the Indian Courts, High Courts and Supreme Court²². It is settled law that in a case dependent on circumstantial evidence, in order to justify inference of guilt the incriminating facts must be incompatible with the innocence of the accused or guilt of any other person, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The circumstances from which the guilt is sought to be drawn against the accused must be proved beyond reasonable doubt and must be closely connected with the facts sought to be inferred from them. No link in the chain forged should be missing.

(a) *Positive evidence*. Sometimes the expression "Positive Evidence" is used in contradiction to circumstantial evidence, and is defined as meaning

21. *R. v. Payne*, (1791) 4 T. R. 468.
 22. *Govindu Reddy v. State of Mysore*, A. I. R. 1960 S. C. 29; 1960 Cr. L. J. 137; *Perashadi v. U. P. State*, A. I. R. 1957 S. C. 211; 1957 Cr. L. J. 328; *Manak Lal v. Dr. Prem-chand*, A. I. R. 1957 S. C. 425; 1957 S. C. R. 197; 1957 S. C. A. 79; 1957 S. C. J. 29; 1957 M. L. J. 1 S. C. Cr. 4; *Prasanna v. State of Hyderabad*, A. I. R. 1956 S. C. 316; 1956 Cr. L. J. 559; *Wasim Khan v. State of U. P.*, 1956 S. C. R. 191; 1956 S. C. J. 437; 1956 S. C. A. 549; A. I. R. (1956) 2 A. 127; A. I. R. 1956 S. C. 400; 1956 Cr. L. J. 590; 1956 All. L. T. 543; 1956 All W. R. 371; 1956

B. L. J. R. 431; (1956) 2 Mad. L. J. S. C. 9; 1956 All. J. 137; 59 Mad. L. W. 849; *Deonandan v. State of Bihar*, A. I. R. 1955 S. C. 801; 1955 Cr. L. J. 1647; 58 Punj. L. R. 171; (1955) 1 Mad. L. J. S. C. 31; 1955 B. L. J. R. 77; 1956 All. J. 9; 1956 All W. R. (Sup.) 17; 1956 S. C. J. 1; 1956 S. C. A. 339; 1956 Mad. W. N. 863; *Keddi Nath v. State of West Bengal*, A. I. R. 1964 S. C. 660; 1964 Cr. L. J. 1159; *Mangaleshwar Prasad v. State of Bihar*, A. I. R. 1954 S. C. 715; 1954 Cr. L. J. 1797; *Narayani Amma v. State of Kerala*, A. I. R. 1961 Kerala 250.

evidence which goes expressly to the very point in question, and that which, if believed, proves the point without aid from inference or reasoning, as the testimony of an eye witness to an occurrence, as distinguished from indirect or circumstantial evidence."²³

(c) *Primary and secondary evidence*. Primary evidence is that which from its own production shows to admit of no further or superior source of evidence. Secondary evidence is that which from its production, implies the existence of evidence superior to itself.²⁴ As commonly used, these terms apply to the kind of evidence that may be given of the contents of a document, irrespective of the purpose for which such contents, when proved, may be received.²⁵ 'Primary Evidence' is defined in Section 62 and 'secondary evidence' in Section 63, post. In *James v. Watson*,²⁶ Lord Fisher remarked:

"Primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of that better evidence, and the law requires to be given first when a proper explanation is given of the absence of the better evidence. This law, however, is only approximately true for the law in some cases allows the production of the primary evidence to be optional."²⁷

(d) *Admission of a confession*. An accused, by making a false confession, is not a witness for purposes of the definition of "evidence" in this section.²⁸

(e) *Admission of evidence*. All facts are not included in the definition of "evidence" in this section. Once a primary, they are expressly excluded by Section 1 of the Act. Therefore, what is cannot be used as evidence under any of the provisions of this Act, though they can be used as evidence unless by consent of parties or they are specially authorised by a particular provision of law, for instance, Order XIX of the Code of Civil Procedure.²⁹ They should not be considered if they contain large proportion of inadmissible material.³⁰

23. *Governor of Bengal v. Motilal*, 1914 Cal. 69 at 109; 41 Cal. 173; 20 L.C. 81 (S.B.), per Jenkins, C., J.

24. *Best, Ev.*, ss. 70, 416.

25. *Stephen, Arts.*, 67, 74.

1. (1892) 2 Q. B. 113, 116.

2-5. See ss. 65 and 77, post.

6. *Public Prosecutor v. Kuraba Sanjeevamma*, A. I. R. 1959 A. P. 567; (1959) 2 Andh. W. R. 326; 1959 Cr. L. J. 1279.

Shankar Lal Rattan v. Bharat

Oil Mills, I. L. R. 1963 B. 436; A. I. R. 1964 B. 38; 65 Bom. L. R. 584; *Dominion of India v. Rupchand*, A. I. R. 1953 Nag. 169; *M. Satyam v. Venkatasami*, A. I. R. 1949 Mad. 689, 690; *Kamakshya Prasad Dalal v. Emperor*, A. I. R. 1939 Cal. 657, 658; *M s. Parekh Bros. v. Kartick Chandra Saha*, A. I. R. 1968 Cal. 532, 537.

8. *Rossage v. Rossage*, (1960) 1 All E. R. 100; 1961 L.C. 118.

The affidavit of a person not produced is not admissible in evidence.⁹ An affidavit required to be filed in verification of a petition under Section 398 of the Companies Act, 1956, is not an affidavit directed by court to be filed under Order XIX, C. P. C. Such an affidavit can be therefore on personal knowledge as well as on information received and believed to be true.¹⁰ Where a special power under Order XXIX, Rule 1, C. P. C. is vested in the court to decide interlocutory applications on affidavit and the power has been expressly given to it, the conditions and limitations prescribed under Order XIX, C. P. C. for the exercise of a general power will not be attached to the exercise of the special power. Either party, therefore, cannot claim or urge that it has a right to cross-examine the deponent of an affidavit.¹¹

8. "Proved." The following correlative expressions occur in the Act: 'Proving', Sections 68, 104, 111; 'to prove', Sections 22, 50–101; 'must prove', Section 101; 'proof', Sections 4, 101, 102, 105; 'produced in proof', Section 77; 'given in proof', Section 91; 'admissible in proof', Section 82. The expression 'disproved' occurs only in Sections 3 and 4; the expression 'not to be proved,' or 'not proved' does not occur at all.¹²

(a) *Proof and evidence: distinction between.* Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist; and it is obvious that the basis of the Court in the existence of a given fact ought to proceed upon ground is altogether independent of the relation of the fact to the object and nature of the proceedings in which its existence is to be determined. Evidence of a fact and proof of a fact are not synonymous terms. Proof in strictness marks merely the effect of evidence.¹³

(b) *Proof how effected.* Proof considered, as the establishment of material facts in issue in each particular case by proper and legal means to the satisfaction of the court, is effected by—

(a) evidence or statements of witnesses, admissions or confessions of parties, and production of documents,¹⁴

(b) presumption,¹⁵

9. *Niranjan Lal Ratankumar v. River Steam Navigation Co., Ltd.*, I. L. R. (1964) 16 Assam 395; A. I. R. 1967 Assam 74, 77.

10. *Shankar Prasad Tiwari v. State of India*, (1965) 68 Bom. L. R. 431, 441.

11. *Kanbi Manji Khimji v. Kanbi Manji Bhikaji Gopalji*, A. I. R. 1964 Bom. 38; *ing Shamsunder Rajkumar, a firm v. Bharat Oil Mills, Nagpur*, A. I. R. 1964 Bom. 38; *B. N. Munibasappa v. G. D. Swamigal*, A. I. R. 1953

Mys. 139, 142.

12. *Whitley Stokes*, 853.

13. *Steph.*, *Intro.*, 13; *id.*, *Dig.*, 65, Art. 58; *Goodeve, Ev.*, 3, 4; *judg.*, *proved, v. s.*, 165, *post*, *burden of proof, v. ss.*, 101–114.

14. *See ss.*, 3, 5, 55, 58, 59, 60 (*oral evidence*); *ss.*, 32, 33 (*statements under ss. 32, 33*); *R. v. Ashootosh*, (1878) 4 G. 483, 492; *v. ante* "Evidence".

15. *Ss.*, 4, 79–90, 112–114, *post*.

(c) judicial notice,¹⁶

- (d) inspection which has been defined as the substitution of the eye for the ear in the reception of evidence¹⁷ as in the case of observation of the demeanour of witnesses,¹⁸ loyal investigation¹⁹ or in the inspection of the instruments used for the commission of a crime.²⁰

The extent to which any individual material of evidence aids in the establishment of the general truth is called its probative force. This force must be sufficient to induce the Court either—

- (i) to believe in the existence of the fact sought to be proved or
- (ii) to consider its existence so probable that a prudent man ought to act upon the supposition that it exists²¹. The proof must rest on evidence. The Court must not base its conclusion on mere conjectures and surmises²². It must take all facts into consideration. To attempt to isolate a particular fact from the surrounding circumstances to discuss its logical inference is wholly out of place in judicial decisions. The judge's experience of life is undoubtedly an important factor in evaluating the evidence placed before him, but he must judge the action and reactions of the characters before him from their standard.²³

(c) *Test of proof.* The test is of probabilities upon which a prudent man may base his opinion²⁴ in other words, it is the estimate which a prudent man makes of the probabilities, having regard to what must be his duty as a result of his estimate²⁵. Thus, it has been held that in this country, the proof necessary to establish a will is not an absolute or conclusive one but such a proof as would satisfy a reasonable man¹. So if after examining a fair number of samples taken from different portions of a bulk it is found that the samples are all of inferior quality, the probability that the bulk is of the same quality is so great that every prudent man would act upon the

16. *See* 56, 57, *post*.

17. *Wharton, Ev.*, s. 345; *Phipson, Ev.* 5th Ed., 3; *Best, E.*, 5; *v. ante*; *v. 60*.

18. *Civ. Pr. Code, O. XVIII, r. 12; Cr. Pr. Code, s. 280* (*v. ante*); as to demeanour of witnesses and discrepancies see remarks of Lord Langdale in *Johnson v. Todd*, 5 *Beav.* 601.

19. *v. Civil Procedure Code, O. XXVI, r. 9; Joy v. Bundhoolal*, 9 *C.* 363, *supra* remarks in *Leach v. Schwedor*, 43 *L. J. Ch.* 487; *Cr. Pr. Code, s. 310* (*v. ante*).

20. *s. 60, proviso 2 post; Cr. Pr. Code, s. 269* (*v.*).

21. *See Bhairon Prasad v. Mahant* (Lucknow Nagar), 124 *Nag.* 385; 79 *I. C.* 609 (where this passage has been relied upon); 1 *L. J. R.* 1974 *Cal.* 410.

22. *State of Orissa v. Khetra Mohan Singh*, 1 *L. J. R.* 1955 *Orissa* 120.

23. *State of Mysore v. Dyaivegowda A. I. R.* 1962 *Mys.* 124; 1963 *M. L. J.* (Cri.) 5.

24. *Parshadi v. State*, 1955 *A.* 443; 56 *Cr. L. J.* 1125.

25. *Government of Bombay v. Sakur*, 1947 *Bom.* 38; 228 *I. C.* 251; 48 *Cr. L. J.* 708; 48 *Bom. L. J.* 746 (*S. B.*).

1. *Jeff v. Braxson*, 1911, 89 *C.* 245.

supposition that it is of such quality, and, if that is so, the Court ought to hold that the fact that the goods are of inferior quality is proved in such a case.²

"The true question, in trials of fact, is not, whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are shown by competent and satisfactory evidence."³ When there is sufficient evidence of a fact it is no objection to the proof of it that more evidence might have been adduced.⁴

(d) *Proof not affected by incidence of burden of proof.* The incidence of the burden of a fact means that the person on whom it lies must prove the same. But the meaning of "proved" in this section is not affected by the incidence of the burden of proof.⁵

It is open to an accused to say that his defence may be false but that cannot make the case true or rather such as, if accepted, would constitute an offence for which he is sought to be made liable.⁶

(e) *Prima facie case.* A *prima facie* case is not the same thing as "proof" which is nothing but belief according to the conditions laid down in the Act. It is a fallacy to say that because a magistrate has found a *prima facie* case to issue process, therefore he believes the case to be true in the sense that the case is proved.⁷

(f) "*Matters before the court.*" The expression "matters before it" includes matters which do not fall within the definition of "evidence" in the third section. Therefore in determining what is evidence other than "evidence" in the phraseology of the Act the definition of "evidence" must be read with that of "proved." "It would appear, therefore, that the Legislature intentionally refrained from using the word 'evident' in this definition, but used instead the words 'matters before it'. For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not."⁸

2. *Boisogomoff v. Nahapiet*, (1902) 6 C. W. N. 495 at p. 505; 39 Cal. 323.

3. Greenleaf on Ev., 5th Ed., p. 4, cited in Goodeve, Ev., 6, Probability in the words of Locke, is likeliness to be true—see Ram on Facts, Ch. VIII. As to the probabilities of a case, see *Bunwarce v. Hetnarain*, 7 M. I. A. 148; 4 W. R. 128; *Raghunadha v. Brojo*, 3 I. A. 154; 1 M. 69; *Mudhoo v. Suroop*, 4 M. I. A. 431 s. c., 7 W. R. 37; *Lallah Jha v. Tullematool*, 21 W. R. 436; *Meer v. Imaman*, 1 M. I. A. 19 s. c., 5 W. R. 26; *Edun v. Bechun*, 11 W. R. 345; *Uman v. Gandharp*, 15 C. 20, 23; *Best Ev.*, ss. 24, 100;

see also *Wills' Circ. Ev.*, 6th Ed., 7; *Steph. Introd.*, 46; *Glassford's Essay on the Principles of Evidence* 105.

4. *Ramalinga v. Sadasiva*, 9 M. I. A. 506, 510.

5. *Mahommed v. Emp.*, 50 C. 318; 1923 Cal. 517, 519.

6. *Ravishankar v. State of Gujarat*, (1966) 1 Lab. L. J. 71; 1966 Cr. L. J. 429; A. I. R. 1966 Guj. 293, 300. *Shree Singh v. Jendranath Sen*, 1931 Cal. 607; 134 I. C. 1045; 33 Cr. L. J. 5; 36 C. W. N. 16; 54 C. L. J. 253.

8. *Per Mitter, J., Jov v. Bundhoolal* (1882) 9 C. 363; see *R. v. Ashoo-tosh*, 4 C. 483, 492, *supra*.

(g) *Local investigation.* So, the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court though not 'evidence' within the definition given by the Act⁹. But the Judge cannot base his judgment solely on the impressions formed by him at the time of his local inspection and come to a conclusion contrary to the evidence in the case.¹⁰

(h) *Statement of accused.* The statements of the accused recorded by the committing Magistrate and the Sessions Judge¹¹ are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial.¹²

A statement of the accused under Section 313 (old Section 342) Cr. P. C., though not evidence as defined in this section can be used against him in aid of the prosecution case relying on that definition but it cannot be used against the accused under Section 30, *post*, assuming a statement at the trial can be regarded as a confession.¹³

(i) *Guilt conscious conduct of the accused.* In a criminal trial, suspicion or conjecture cannot take the place of legal proof. Apparently guilt conscious conduct should be heavily weighed against an accused. When rumours are afloat connecting a man with a grave offence, a quite innocent person may behave very foolishly, quite like a guilty man. He may even attempt to fabricate evidence in order to see that he is not made to undergo the torture and suspense of a trial.¹⁴

(j) *Evidence to be considered as a whole.* The judgment must be based on facts before the court relevant and duly proved¹⁵ upon a consideration of the whole of the evidence and the probabilities of the case¹⁶. The evidence should not be considered merely as a number of bits of evidence, but the whole of it together and the cumulative effect of it must be weighed¹⁷. No distinction should be made between circumstantial evidence and direct evidence.¹⁸

(k) *Personal knowledge of Judge.* The judgment must not be based on the personal knowledge of the Judge, or on materials which are not in evidence or have been improperly admitted¹⁹. The knowledge and belief of a judge is

9. *ib.* For local inspection by Judge see *Rank Ltd. v. Karamdhani* (1912) 15 C. L. J. 138; 14 I. C. 377.

10. *Palnissan Bai v. Subapathi* (1959) 2 M. L. J. 284; 1959 M. W. N. 723; 50 L. W. 148; see also *Amratilal v. The Assistant Officer* (1945) B. L. R. 4; *Bani I. R. v. Indo Mahal v. Emperor* 1912 P. 150; 199 I. C. 218; 43 Cr. L. J. 537; *Abdulla K. Shere v. Emperor*, 1938 P. 185; 174 I. C. 635; 39 Cr. L. J. 442; I. L. R. (1974) Him. Pra. 509.

11. See Sec. 165, 166 and 167 Cr. P. Code.

12. *H. C. v. S. v. M. P.* 1953 S. C. 468; 1953 Cr. L. J. 1938;

M. B. L. R. 1952 Cr. 1.

13. *State v. Jodo Saldhana*, 1968 Cr. L. J. 992, 995 (Goa).

14. *Forre v. Mirudan v. I. R.* 1960 M. 370; 1960 Cr. L. J. 1102.

15. S. 165, *post*.

16. See remarks of Mitter, J. in *Forre v. Mirudan v. I. R.* (1875) 10 W. R. 102; see notes to s. 165, *post*.

17. *Dukharam Nath v. Commercial Credit Corporation Ltd.* 1960 Cr. L. J. 35; I. L. R. 15 Luck. 191; 184 I. C. 521; 1939 O. W. N. 1114.

18. *Miran Baksh v. Emperor*, 1931 Lah. 529; 133 I. C. 466; 32 P. L. R. 461.

19. *Durga v. Ram Dayal* (1910) 33 C. 153, *per Woodroffe, J.*

not evidence."²⁰ The Judge may not, without giving evidence as a witness, import into a case his own knowledge of particular facts²¹ and should decide the rights of the parties litigating *secundum allegata et probata* according to what is averred and proved.²² But a Judge is entitled to use his general knowledge and experience, in determining the value of evidence, and to apply them to the facts in dispute.²³ The Court should abstain from looking at what is not strictly evidence. In this connection may be noted the dicta of two English Judges: "In this case I have found myself upon two different occasions where it has come before me, in that difficulty into which a Judge will always bring himself when his curiosity or some better motive disposes him to know more of a cause than judicially he ought."²⁴ Again, "I shall decline to look at what is not regularly in evidence before the Court. The proceedings before the Commissioners are, in my opinion, no evidence of an act of bankruptcy. I purposely abstain in all these cases from looking at the proceedings for my mind is so constituted that I cannot in forming my judgment on any matters before me separate the regular from the irregular evidence."²⁵

(d) *Proof in Civil and Criminal cases.* Certain provisions of the Law of Evidence are peculiar to Criminal trials e.g., the provisions relating to confessions¹ and character,² and the character of the prosecutrix in rape cases³ and others are peculiar to Civil cases e.g., the provisions relating to admission⁴ character⁵ and estoppel⁶ but apart from these the rules of evidence are the same in Civil and Criminal cases.⁷ But there is a strong and marked difference as to the effect of evidence in Civil and Criminal proceedings.⁸ The Court is not entitled to require from any party conclusive proof of any fact; it cannot require a standard of proof higher than that required by this Act.⁹ "The circumstances of the particular case" must determine whether a prudent man ought to act upon the supposition that the facts exist from which liability is to be inferred. What circumstances will amount to proof can never be a matter

20. *Abdul Malak v. The Collector of Dharmapuri*, (1968) 1 M. L. J. 9, 14 of a member Board of Revenue dealing with an appeal on the question whether a loudspeaker is nuisance or not).

21. *Hurpurabhad v. Sheodyal*, 3 I. A. 259; *Meethun v. Busheer*, 11 M. L. A. 213; s. c. 7 W. R. 27; *Sooraj v. Khodee*, 22 W. R. 9; *Kanhya v. Ram*, 24 W. R. 81 (arbitrator), R. v. Ram, 24 W. R. Cr. 28 (assessor jury) v. s. 294, Cr. Pr. Code, 1898; *Rousseau v. Pinto*, 7 W. R. 190; see note to s. 21, post.

22. *Fshen v. Shama*, 11 M. L. A. 7; 6 W. R. P. 57; see *Ramdayal v. Ajoodhia*, 2 C. L. J. 1; *Joytara v. Mahomed*, 8 C. L. J. 1; *Rangachari v. Vagari Dikshitur*, 13 M. 524; *Chova v. Isa Bin*, 1. B. 209; *Mukhoda v. Ram*, R. C. 871; *Ashghar v. Hyder*, 16 C. 287; *Thiruthasami v. Gopala*, 13 M. 32; *Best, Ev.*, ss. 78, et seq. notes to S. 165 post.

23. *Lakshmayya v. Varadaraja*, (1915)

W. M. 168 See also on L. A. 107, p. 176.

24. Per The Chancellor in *Rich v. Jackson* 100 to 1 Ves. 384.

25. Per Sir John Cross in ex parte Foster, 3 Deacon, 18.

1. Ss. 24, 30, post.

2. Ss. 53, 54, post.

3. S. 155 (4), post.

4-22. Ss. 18 to 20.

23. Ss. 52 and 55.

24. Ss. 115-117.

25. *R. v. Murphy*, (1837) 8 C. & P. 297, 306.

R. v. Burdett (1820) 4 B. & A. 95, 112. per Best, J. *Leach v. Simson* (1839, 5 M. and W. 309, 312, per Parke, B.; *Trial of William Stone* 10 L. J. 181; *Trial of Lord Melville*, 29 Ed. 764; *Best, Ev.*, s. 94.

1. *Best, Ev.*, s. 95.

2. *Edara Venkata Rao v. Edara Venkayya*, 1943 M. 38 (2); 207 I. C. 163; (1942) 2 M. L. J. 427; 55 L. W. 772.

of general definition? But with regard to the proof required in Civil and Criminal proceedings there is this difference, that in the former a mere preponderance of probability is sufficient;³ and the benefit of every reasonable doubt need not necessarily go to the defendant⁴ but in the latter (owing to the serious consequences of an erroneous condemnation both to the accused and society) the persuasion of guilt must amount to 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt'.⁵ These principles apply also in regard to the proof necessary to set aside elections under Section 116A of the Representation of People Act, 1951. The test in weighing the evidence in such cases is similar to the one in criminal cases.⁷

(c) *Legal proof and moral conviction.* One must keep the line clear between 'legal proof' and 'moral conviction'. But once the evidence comes before the court and stands the test of severe legal scrutiny the effect of that evidence constitutes the legal proof. Then the dividing line vanishes.⁸

(d) *Test: Beyond reasonable doubt.* Strictly speaking, the test of legal proof is not the absence of reasonable doubt, though that is often a convenient way of expressing what is meant by 'proof'. The test is really the estimate which a prudent man makes of the probabilities, having regard to what must be his duty as a result of his estimate. In each case whether proof of the case for the prosecution or proof of the defence set up by the accused, it is the estimate of probabilities arrived at from this practical standpoint by a prudent man.

(e) *English and Indian law, difference between.* It has been laid down in England, in particular in the decision in *Rex v. Carr Briant*,⁹ that even in cases where the law presumes some matter against an accused person "unless the contrary is proved" the jury should be directed that the burden on the accused is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is

3. Starkie, Ev., 865; differences in the proof required in the one fact in different cases very often arise out of the circumstances of the case, *R. v. Madhub*, (1874) 21 W. R. Cr. 13, 17; see Arthur P. Wills' *Treatise on the Law of Circumstantial Evidence* (1896), Ch. IV (quantity of evidence necessary to convict).

4. *Cooper v. Slade*, (1858) 6 H. L. Cas. 461; per Willes, J. *Starkie* 18, 88.

5. *Edara Venkata Rao v. Edara Venkayya*, *supra*.

6. Per Parke, B., in *R. v. Sterne*, cited in *Best, Ev.*, 76; *Starkie, Ev.*, 817, 865; *Taylor, Ev.*, s. 112; *Mancini v. D. P. P.*, 1942 A. C. 111; *Woolmington v. D. P. P.*, 1935 A. C. 462 Cf. *Thorne v. Motor Trades Association*, 1937 A. C. 797, 808; *R. v. White* (1865) 4 Fost &

Litt. 383; see same principle laid down in *R. v. Madhub*, 1874 21 W. R. Cr., 13, 19, 20; *R. v. Hedger*, 1875 pp. 152, 18; per Sir Lawrence Peel, C. J., quoting and adopting *Starkie, Ev.*, 817, 818; *R. v. Sorob*, (1866) 5 W. R. Cr. 28, 31; *R. v. Beharee*, (1865) 3 W. R. 23, 25 (prisoner not to be convicted on surmise); *Bhairon Prasad v. M. L. L. Goksham Narayan Dass*, 1924 Nag. 385; 79 I. C. 609.

7. *Rulia Ram v. Chaudri Multan Singh*, I. L. R. 1959 Punj. 2084; A. I. R. 1960 Punj. 45; (1973) 52 E. L. R. 333 (Raj.).

8. *Kedar v. Emperor*, 1944 All. 94, 95; 212 I. C. 309.

9. (1943) 1 K. B. 607; 112 L. J. K. B. 581; 169 L. T. 175; (1943) 2 All. E. R. 156.

called on to establish. But in the Section 105 of this Act and the definition of the word 'proved' in Section 3 make it impossible to adopt the principle that the burden on the accused is less than that required of the hands of the prosecution. It may well be that in practice, the standard of proof required to bring a case within one of the exceptions is lower than the standard of proof required of the prosecution to establish its own case. But that is not so, because the standard laid down in the Act itself is lower, for because the standard in every case is the requirements of the prudent man, and the prudent man must well consider it his duty to act upon circumstances in the one case when he may or not consider to be a justification for action in the other case. The test, either way is the estimate of probability by the prudent man and the result on the prudent man's mind as to what his duty really is in all the circumstances of the particular case, and this should be the nature of the Judge's duty, and the duty of the jury, to say that the accused should prove his case, and the standard of proof is the burden on him is necessarily less than the burden on the prosecution.

Whenever there is an allegation of crime is made, it is the duty of Jury to quote Lord Kenyon's words, "at the scales of justice being like even, to throw into them some weights of mercy, or as it is more commonly put, to give the prisoner the benefit of any reasonable doubt, not the benefit of every doubt, but only the doubt for which reasons can be given for everything relative to human affairs and the evidence on human evidence is open to some possible inaccuracy or misapprehension. It is a condition of proof, which exists when the jurors can't say that they feel a moral certainty of the truth of the charge, but it is not sufficient for the prosecutor to establish a probability, even though a strong one according to the doctrine of chances, he must establish the fact to a moral certainty, a certainty that convinces the understanding, satisfies the reason and directs the judgment. But, were the law to go further than this and require absolute certainty, it would exclude circumstances of mercy, etc., etc." As was said by a great Irish judge, to warrant an acquittal for a crime that can not be laid in categories such as timidity or passion, poverty or weakness, or corruption ready to pounce. It must be such a doubt as upon a fair view of the whole evidence, a rational understanding will suggest to the juror, that the conscientious hesitations of minds that are not influenced by party, prompted by prejudice or subdued by fear."

Then a reference is made to the latest edition of Kenny to the opinion stance that, in recent years, there developed certain political antipathy to the hallowed expression "beyond reasonable doubt" from a feeling that it tended to lead juries into acquitting persons to conviction. In fact another formula was devised, that the juror would be told that then duty was to read evidence and make sure that it was such that they felt sure that it was the right one.¹⁰ But this new formula was severely criticised and was withdrawn in *R. v. Hennigan and Leeson*,¹¹ and the old-fashioned expression "beyond reasonable doubt" remains as a standard for juries in criminal cases.

The burden of proof rests upon the State to establish the guilt of the accused beyond reasonable doubt and conviction on a not-guilty verdict takes this

10. *Government of Bombay v. Sakur*, 1947 Bom. 38, 228 I. C. 251.

11. *Dr. Kenny's Outlines of Criminal Law*, 17th Ed., p. 480.

12. *R. v. Summells*, (1952) 1 All E. R. 1059.

13. (1955) 2 All E. R. 918.

burden is sustained. The conviction cannot be sustained on the basis of conjecture, suspicion, a mere belief in the defendant's guilt, or even a strong probability of guilt¹⁴. It is difficult to define the phrase "reasonable doubt". Various definitions of "reasonable doubt" have been given. It has been said that it is doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your conscience, after you have fully investigated the evidence and compared it in all its parts, you say to yourself "I doubt, if he is guilty", then it is reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there. It must be such a doubt as in the graver transactions of life, would cause a reasonable man to hesitate and pause in passing a final judgment on the question before him. A reasonable doubt must be a doubt arising from the evidence or from the want of evidence and *cannot be an imaginary doubt or conjecture unrelated to evidence*.¹⁵

It has been held that 'reasonable doubt' is a real, substantial, serious, well-founded actual doubt arising out of the evidence and existing after consideration of all the evidence. The negative definitions are more frequent and perhaps more helpful. Hence a mere whim or a surmise or suspicion furnishes an insatiable foundation upon which to raise a reasonable doubt, and so a vague conjecture, whimsical or vague doubt, a capricious and speculative doubt, an arbitrary, imaginary, fanciful, uncertain, chimerical, trivial, indefinite or a mere possible doubt is not a reasonable doubt. Neither is a desire for more evidence of guilt, a capricious doubt or misgiving suggested by an ingenious counsel or arising from a merciful disposition or kindly feeling towards a prisoner, or from sympathy for him or his family¹⁶. The dedication to the doctrine of 'benefit of doubt' should not be allowed to reign sudden and supreme. Justice is as much due to the accuser as to the accused. The balance must be maintained. Too frequent acquittals of the guilty may tend to bring criminal law itself into contempt.¹⁷

14. *Gran Mitharam v. State of Maharashtra*, 1971 Cr. L. J. 1317 at 1322; 1971 Cri. App. R. 288 (S.C.); (1971) 2 S. C. C. 611; (1971) 2 S. C. Cri. R. 464; 1971 U. J. (S. C.) 890; 1971 S. C. D. 1042; A. I. R. 1971 S. C. 1898; *State of Punjab v. Brahm Singh*, 1973 Panj. L. J. (Cri.) 399; 1974 Cri. L. R. (S.C.) 595; 1974 Cri. App. R. (S. C.) 254; 1974 U. J. (S.C.) 597; 1974 S. C. Cri. R. 384; (1974) 2 S. C. W. R. 563; 1975 Cri. L. J. 282; 1975 Cur. L. J. 52; (1975) 2 Cri. L. J. 36; A. I. R. 1975 S. C. 258; *Shesh Narain v. State*, 1971 Cri. L. J. 1364 at 1365, 1366; *Male Boroni v. State, Assam*, A. I. R. (1971) Assam 59; 1971 Cri. L. J. 1263; *Dilli Mukand Singh v. State of M. P.*, 1971 M. P. W. R. 435; 1971 M. P. L. J. 667; 1971 Jah. L. J. 513;

1971 Cr. L. J. 1632 at 1635; *Nahni Farooq v. Republic of India*, 1974 Cur. L. R. (Cr.) 318 (charge against postmaster of collecting money order amount by forging payee's signature).

15. Wharton's Criminal Law Evidence, 12th Ed., Vol. I, p. 31.

16. Underhill's Criminal Evidence, 5th Ed., Chapter III, p. 13. See also *Miller v. Minister of Pensions*, (1947) 2 All E. R. 372, 373-374 where Denning, J., said the phrase does not mean proof beyond a shadow of doubt; Phipson, 11th Ed., p. 57; *The State of Rajasthan v. Bhagwan Das*, 1973 W. L. N. 330 (Raj).

17. *Public Prosecutor v. P. M. V. Khan*, 1974 Cri. L. J. 1069 at 1074; (1974) 1 An. W. R. 407; 1974 Mad. L. J. (Cri.) 325; I. L. R. (1974) A. P. 520.

The benefit of doubt to which accused can claim consideration is a reasonable doubt and not the doubt of a vacillating mind¹⁸⁻¹⁹

The scope of the explanation given by the accused in criminal cases is now really settled. The oft quoted decision of Sankey, L. C., in *Woolbington v. Director of Public Prosecutions*²⁰ considered and explained in *Mancini v. Director of Public Prosecutions*²¹ and *Kuaku Meneke v. The King*²² is apposite :

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exceptions. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge and where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Therefore, this burden on the prosecution cannot be shifted on to the accused when he furnishes an explanation either under Section 313, Cr. P. C. or under the newly amended Code gives evidence on his own behalf. The value to be attached to such an explanation has been set out in the well known case of *Rex v. Abraham, Antch*²³ which arose under the corresponding English Law falling under illustration (a) to Section 114 of the Indian Evidence Act. The Court observed :

"Upon the prosecution establishing that the accused were in possession of goods recently stolen they may in the absence of any explanation by the accused of the way in which the goods came into their possession which might reasonably be true find them guilty, but if an explanation were given which the jury think might reasonably be true, and which is consistent with the innocence although they were not convinced of its truth, the prisoners are entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. The Jury might think that the explanation given was one which could not reason-

18-19. *Babu Lal v. State of Rajasthan*, (1977) Cri. L. J. 59 at 67 (F.B.).

20. 1935 A. C. 462

21. 1942 A. C. 1.

22. A. I. R. 1946 P. C. 23; 223 I.C. 153.

23. (1914) 84 L. J. K. B. 396; 112 L. T. 480; 11 Cr. App. R. 45.

ably or truly attributing a violence or an incrimination or a guiltlessness to the accused beyond anything that could lawfully be supposed.²

In other words, the explanation of the accused may be so convincing as to fairly tip the scales in a case in which case the accused would be entitled to an acquittal on the explanation may be felt to be so reasonably true that it will not raise any reasonable doubts on the prosecution version with the result that a court would not have discharged the onus of proof, imposed on it, without coming to the Court beyond reasonable doubt of the prisoner's guilt, and, in which, the accused would be entitled to an acquittal. But if the explanation given by the accused is, on the face of it, improbable, inadequate or unconvincing or contradictory, or a manifest after thought, no Court would come to the conclusion that that explanation may reasonably be true. But even then the failure of the accused's explanation getting no importance attached to it would not render the prosecution case stronger, and it must affirmatively and satisfactorily establish guilt of the accused, and it will not be for the accused to establish his innocence.

On Failure of Accused to remove reasonable doubt: Accused entitled to acquittal. Where the prosecution fails to satisfy the Court affirmatively of the existence of circumstances entitling the accused to acquittal, the accused is entitled to be acquitted. In such a consideration of the evidence as a whole, a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to acquittal. Thus, where it is doubtful whether the witnesses have proved their case, the accused has a right to be acquitted.³ And, where a virgin in a prosecution evidence raises a doubt as to the extent of the guilt of the accused persons, the benefit of doubt must go to the accused.⁴ But the principle that benefit of doubt must be given to the accused, does not apply where after considering the entire evidence the Court is convinced beyond all reasonable doubt that the prosecution case is acceptable.⁵

Where one of two accused husband and wife had at different stages been anxious to kill each other on himself and on the other and each indicated that he or she was justified in shooting the accused and there was no other evidence, the Court on the one of the cases was a fit case for giving the benefit of doubt to both the accused.⁶

24. See also *R. v. Ayca*, (1950) 2 All E. R. 330, explaining *R. v. Schama and R. v. Abramovitch*; See also *R. v. Garth*, (1949) 1 All E. R. 778; *R. v. Hepworth and Fearly*, (1953) 2 All E. R. 918; *State v. Sidhnath Rai*, A. I. R. 1959 All. 233; 1959 Cr. L. J. 413; *Sarwan Singh v. State of Punjab*, (1957) 1 All. L. J. 100; 1957 Cr. L. J. 100; A. I. R. 1957 S. C. 637; 1957 All. W. R. (Sup.) 99; 1957 M. P. C. 781; (1957) 1 Mad. L. J. (Cr.) 672; A. I. R. 1957 Punj. 1002; *Raja Khema v. State of Saurashtra*, A. I. R. 1956 S. C. 217; 1956 Cr. L. J. 421; (1956) 1 Mad. L. J. S. C. 135; 1956 All.

W. R. (Sup.) 60; 1957 Andh. L. T. 92.

25. *Parbhoo v. Emperor*, A. I. R. 1941 A. 402; 43 Cr. L. J. 177 (F.B.); *State v. Sidhnath Rai*, A. I. R. 1959 A. 233; 1958 A. L. J. 511.

1. *Ram Balak Singh v. The State*, A. I. R. 1964 Pat. 62; (1964) 1 Cr. L. J. 214.

2. *Ramkrishnaiah v. State*, A. I. R. 1965 A. P. 361; (1965) 2 Andh. W. R. 151; *State of Haryana v. Gardial Singh*, 1974 Cal. L. J. 1286; A. I. R. 1974 S. C. 1871.

3. *Parbhoo v. Emperor*, supra; *Bhatosa v. State*, A. I. R. 1965 A. 117.

4. *Chinna Maharaya v. State*, 1969 Tab. L. J. 523; 1969 M. P. L. J. 324; 1969 Cr. L. J. 1291.

The non-examination of a material witness throws doubt over the prosecution case.⁵ However the prosecution case is not adversely affected when no prejudice is caused to accused on account of non-examination of witnesses,⁶ or when there is evidence of other eye-witnesses though one witness mentioned as eye witness in the F I R has not been produced,⁷ or when sufficient explanation has been given for non-examination of one of the eye-witnesses,⁸ or by failure to produce informer as witness when information is recorded in general diary.⁹ The Supreme Court¹⁰ has observed that there is no duty on the prosecution to examine witnesses who have been won over by the accused and where the public prosecutor has given a statement that the witness concerned was either relative of the accused or had been gained over by the accused and was, therefore, not likely to speak the truth, in view of this explanation, it cannot be said that the witness was deliberately withheld or unfairly kept back and as such no adverse inference could be drawn against the prosecution for not examining such witness. Same view was taken in the undernoted case¹¹ for not producing a woman eye-witness who according to prosecution was close relation of accused and had been won over.

An accused person is entitled to the benefit of doubt if his version may reasonably be true though he might have failed to establish its truth. The reason is that the onus on the accused is not as heavy as it is on the prosecution.¹²

5. *Narain v. State of Punjab*, 1959 S. C. J. 447 (1959 A. W. R. H.C.) 292; 1959 Cr. L. J. 537; 1959 M. L. J. (Cr.) 285; 61 P. L. R. 509; A. I. R. 1959 S. C. 484; *Sri Krishan Rathi v. Mendal Bros.*, A. I. R. 1967 Cal. 75; *State Government of Manipur v. K. G. Sharma*, 1968 Cr. L. J. 1390 (material witness if not should have been examined on commission); *Sharif v. State*, 1972 All. Cri. Reports 381 (All.); *Ishwar Behera v. State*, I. L. R. 1975 Cut. 1423; (1975) 41 Cut. L. J. 904; 1975 Cut. L. R. (Cri.) 295; 1976 Cr. L. J. 611 at 614 (Advers: inference can be drawn against prosecution on account of withholding best evidence); *Dhaneswar v. State*, 1973 Cr. L. J. 1430 at 1424 (keeping away evidence of independent witnesses in a case of free fight is ordinarily unpardonable); *Sarwan Singh v. State of Punjab*, (1976) 4 S. C. C. 369; 1976 Cr. L. R. (S.C.) 362; A. I. R. 1976 S.C. 2304 at 2311, 2312 (but omission to examine any and every witness even on minor points is of no consequence); *Om Prakash v. State of H. P.*, 1974 Cr. L. J. 556 at 564; *Rama Swami v. Mutthu and others*, 1976 L. W. (Cri.) 110 (witnesses essential to unfolding of narrative on which prosecution case is based must be

called by prosecution).

6. *Food Inspector v. Katmakaran*, 1973 Ker. L. T. 595 at 600; 1973 Mad. L. J. (Cri.) 412; 1973 F. A. C. 140.
7. *Arjun Ghusi v. State of Orissa*, (1975) 41 Cut. L. T. 517 at 518, 519; *Ugrasen Sahu v. The State*, 1976 Cut. L. T. 667.
8. In *Re. Bhappanna*, 1971 Cr. L. J. 1640 at 1645; 1971 Mad. L. J. (Cri.) 200; (1971) 1 Mys. L. J. 473.
9. *State of U. P. v. Rajji*, 1971 Cr. L. J. 642 at 645; 1971 U. J. (S.C.) 237; (1971) 2 S. C. Cri. R. 238; 1971 (Cri.) A. P. R. 93 (S.C.); (1971) 3 S. C. C. 174; A. I. R. 1971 S. C. 708.
10. *Mst. Dalbir Kaur v. State of Punjab*, A. I. R. 1977 S. C. 472 at 485; (1977) 1 S. C. J. 54; (1977) M.L.J. (Cri.) 50; (1976) 4 S. C. C. 158; (1976) S. C. C. (Cri.) 527.
11. *Somabhai v. State of Gujarat*, (1976) 1 S. C. J. 157.
12. *Ram Krushna v. State*, (1967) 33 Cut. L. T. 1088, 1091; *Sukhdev v. State*, 1970 All. Cri. R. 482; *Garin Singh v. State of Punjab*, 1972 Cri. App. R. 311; (1972) 3 Un. N. P. 1; (1972) 3 S. C. C. 418; 1972 S. C. C. (Cri.) 568; (1972) 3 S. C. R. 978; 1972 Cr. L. J. 1286; A. I. R. 1973 S. C. 460; 1972 S. C. D. 837.

Defective investigation by itself is not a ground for throwing out the prosecution case and giving benefit of doubt to the accused.¹³

In a case resting on circumstantial evidence, there should be no missing link which creates a reasonable doubt about the charge being brought home to the accused.¹⁴

In a prosecution for selling adulterated milk, as there was gross delay in filing the complaint which was not explained, the benefit of doubt given to the accused by the lower court was not interfered with by the High Court in appeal.¹⁵

If a Food Inspector who has transgressed Section 7 of the Prevention of Food Adulteration Act, 1954 and Rule 14 of the Prevention of Food Adulteration Rules, 1955 fails to examine a witness and that witness gives evidence for the defence, the benefit of doubt arising from the defence must go to the accused.¹⁶

Where the accused was charged and convicted, *inter alia*, under Section 379, I.P.C., for committing theft of a silver waist cord from the possession of a child and the accused soon after surrendered himself to the police, and no waist cord was recovered in pursuance of any statement made by the accused, he was given the benefit of doubt.¹⁷

If the dying declaration cannot be relied upon and the investigation of the Police was inadequate and purposeless so that the evidence produced did not establish the charges framed against the accused, he would be entitled to the benefit of reasonable doubt.¹⁸

If out of several accused persons some are acquitted by being given the benefit of doubt as their names were not in the First Information Report, this will not be a ground for acquitting others whose names were mentioned in that Report which furnished valuable corroboration to the evidence of the complainant and the witnesses.¹⁹ There is no rule of law that if the Court acquits certain accused on the evidence of a witness finding it to be open to some doubt with regard to these for definite reasons, any other accused against whom there is absolute certainty about his complicity in the crime based on the

13. State v. Arora, Pailan (1960) 32 Cut. L. T. 494, 499.

14. Karam Singh v. State, I. L. R., 1967 Cut. 883; 1969 Cr. L. J. 301; A. I. R. 1969 Orissa 23, 25.

15. Public Prosecutor v. P. Venkateswara Rao, 1969 Cr. L. J. 1278 (Andh. Pra.). See the Prevention of Food Adulteration Act, 1954, section 2 (xiii).

16. B. A. Sawant v. State, I. L. R., 1968 Bom. 1305; 70 Bom. L. R.

1341; A. I. R. 1969 Bom. 353, 359.

17. Chinnapaiyan, In re, 1969 M. L. W. (Cr.) 29; (1969) 1 M. L. J. 511; 1969 M. L. J. (Cr.) 385.

18. Priyalal Barman v. State, 1970 Cr. L. J. 1599; A. I. R. 1970 Assam 137, 141.

19. Jagdish Prasad v. State, I. L. R., 1969 Bom. 1191; 71 Bom. L. R. 536; 1969 Mah. L. J. 433; 1970 Cr. L. J. 660; A. I. R. 1970 Bom. 166, 169.

remaining credible part of the evidence of that witness should also be acquitted.²⁰

In an election petition a corrupt practice may be proved only by evidence beyond reasonable doubt. But in giving the benefit of doubt, the court in reaching a judicial conclusion should not vacillate.²¹

An accused person is entitled to the benefit of reasonable doubt in the matter of sentence as in the matter of conviction.²²

If some part of the evidence leads to a conclusion that a man is guilty and if another part of the evidence in the same case indicates that the man may not be guilty, or if two possible views of a conflicting narrative can be spelt out from the entire evidence, the accused gets the benefit of doubt.²³

When, after considering the entire evidence and the probabilities of the case, it cannot be said that the prosecution has proved beyond all reasonable doubt, the charge against the accused, he is entitled to the benefit of doubt and must be acquitted.²⁴

When there is no evidence that a person either took away a married woman or enticed her, the case is not free from doubt and the person should be acquitted.²⁵

Where Section 34, I. P. C., is not attracted to the case of an accused as far as hurt caused by him is concerned, he is entitled to the benefit of doubt and to acquittal of the offence under Section 324 read with Section 34, I. P. C.¹

In the face of admission and confession by the accused and other evidence, there could be no question of raising any reasonable doubt against the prosecution case so as to entitle the accused to the benefit of doubt.²

If the prosecution fails to discharge its onus to show that the Khesari dal kept in the shop of the accused was for human consumption, the accused must get the benefit of doubt.³

20. *Sat Kumar v. State of Haryana*, 1974 U. J. (S.C.) 92; 1974 Cri. L. J. 345 at 348; 1974 S. C. Cri. R. 126; (1974) 3 S. C. C. 643; 1974 S. C. C. (Cri.) 173; 1974 Cri. App. R. 66 (S.C.); 1974 Cri. L. R. (S. C.) 18; A. I. R. 1974 S. C. 294.

21. *D. P. Mishra v. Kamal Narayan*, (1970) 2 S. C. J. 639; 1970 Jab. L. J. 685; 1970 M. P. L. J. 872; A. I. R. 1970 S. C. 1477, 1482; *Abdul Husain v. Shamsul Huda*, A. I. R. 1975 S. C. 1612.

22. *Vaijanath Hanumanth v. State*, 1970 Cr. L. J. 91 (Goa); *Mi Shevi Yi v. Emperor*, A. I. R. 1924 Rang. 179; *Gorakh v. The Crown*, (1939) 40 Punj. L. R. 542.

23. *Bharat Commerce and Industries Ltd. v. Surendra Nath*, A. I. R.

1966 Cal. 388, 392.

24. *In re Madivalappa*, (1965) 1 Mys L. J. 476; 1966 Cr. L. J. 672; A. I. R. 1966 Mys. 142, 147.

25. *Gurdial Singh v. State*, (1965) 67 Punj. L. R. 628, 630.

1. *Sajjan Singh v. State*, 67 Punj. L. R. 1204; 1965 Gur. L. J. 730; 1966 Cr. L. J. 361, 364.

2. *Madan Lal v. The State of Punjab*, 1967 S. C. D. 1036; (1967) 2 S. C. W. R. 587; 1967 A. W. R. (H.C.) 817; 69 Punj. L. R. 846; 1967 Cr. L. J. 1401; A. I. R. 1967 S. C. 1590, 1592 and 1593.

3. *Bhagwandas Khandelwal v. State*, (1967) 33 Cut. L. T. 840, 851 (see the Prevention of Food Adulteration Act, 1954, Section 16 (1) (a)).

If two views are possible in a criminal case, the one favourable to the accused should be accepted.⁴

Where there is a reasonable doubt regarding the nature of the conditions in an import licence for the contravention of which the accused is being prosecuted, the benefit of that doubt must go to the accused.⁵

In a case concerning rash and negligent driving (Section 279, I. P. C.) a person charged with the offence for the prosecution was examined for the defence. The evidence for the prosecution rested principally on one witness. In these circumstances the accused was entitled to the benefit of doubt.⁶

A case concerning offence under Section 491, I. P. C., unless there is reliable evidence to the contrary, the second marriage of the accused, a Hindu, was solemnised according to Hindu rites, the accused is entitled to the benefit of doubt.⁷

If on considering the entire evidence and the probabilities of the case it cannot be said that the prosecution has proved beyond all reasonable doubt, the charge against the accused, he is entitled to the benefit of doubt and must be acquitted.⁸ A proprietor of medical store and a Government servant were charged with conspiracy to defraud Government by fabricating false cash memos for medicines and obtaining reimbursement of money from Government. Proprietor admitted that he had fabricated the cash memos, but purpose of this fabrication could not be established beyond reasonable doubt. Benefit of doubt was given in this case. In cases of conspiracy better evidence

4. *Titir Dusadh v. State of Bihar*, 1966 Cr. L. J. 144, A. I. R. 1966 Pat 133, 138, *Hari Singh v. State of Gujarat*, 1962 (2) Cr. L. J. 415.
5. *In re K. T. Kosalram*, 1968 Cr. L. J. 329, A. I. R. 1968 Mad. 113, 116.
6. *Chelliah Nadar v. State* 1970 M. L. W. (Cr.) 130 (2).
7. *Ram Singh v. R. Susila Bai* (1970) 1 Mys. L. J. 138, 1970 M. L. J. (Cr.) 233, 1970 Cr. L. J. 1116, A. I. R. 1970 Mys. 201, 203.
8. *In re Madhavappa* 1965 1 Mys. L. J. 400, 1966 Cr. L. J. 672, A. I. R. 1966 Mys. 132, 137, *State of U. P. v. Hari Prasad* 1974 Cr. L. J. 1274 at 1277, 1278, A. I. R. 1974 SC 1749 (occurrence on dark night, existence of lantern doubtful and that was said to be the only source of light) *Mool Chand v. State*, 1971 All. Cr. R. 179 (article recovered from accused was not sealed at the time of recovery, but subsequently *Kesavan v. State of Kerala*, 1, I. R. (1974) 1 Ker. 507; 1974 Mad. L. J. (Cri.) 471 (admixture of good deal of suspicious elements and

embellishments in the prosecution story and the task of sifting the residue of truth difficult), *Jose Luis v. State*, 1971 Cr. L. J. 312 at 313, 316, 317; A. I. R. 1971 Goa 11 (injuries on accused not explained, eye witnesses not summoned during inquest and their statements recorded late); *Hayath v. State of Mysore* (1972) Mad. L. J. (Cr.) 177 (Mys.) (facts proved capable of two constructions one favourable to the accused); *Baghel Singh v. State*, (1975) W. L. N. 742 (Statements of key witnesses of prosecution being untrustworthy, testimony of corroborating witnesses does not improve prosecution case), 1975 Cal. L. R. 171 (According to prosecution two blows were given on the head of deceased by back side of axe, but the medical evidence was that injuries were not caused by axe but by lathi blows, and the likelihood was that lathi blows might have been given by the accused, the accused said to have given blows by back side of axe given benefit of doubt);

than acts and statements of co-conspirators in pursuance of the conspiracy is **hardly ever available.**⁹

(g) *Presumption of innocence.* It is often said that "It is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer."¹⁰ This maxim is often misunderstood. It means nothing more than this that the greatest possible care should be taken by the Court in convicting an accused. The presumption is that he is innocent till the contrary is clearly established. The burden of proof that the accused is guilty is always on the prosecution. If there is an element of reasonable doubt as to the guilt of the accused, the benefit of that doubt must go to him. The maxim merely emphasises these principles in a striking fashion. It does not mean that even an imaginary or unreal and improbable doubt is enough for holding the accused not guilty, if the evidence, on the whole, points to the only conclusion on which a prudent man can act, that the accused is guilty.¹¹ "It is the business of the prosecution to bring home guilt of the accused to the satisfaction of the judges of the jury, but the degree of the benefit of which the accused is entitled must be such as rational thinking sensible men may fairly and reasonably entertain, not the doubts of a vacillating mind that has not the moral courage to decide but shelters itself in a vain ostentatious scepticism. There must be doubt which men may honestly and conscientiously entertain."¹² Failure of doctor to send dead bodies found in a decomposed state to an anatomy expert cannot be a ground for drawing an inference adverse to the accused.¹³ When the prosecution examines witnesses it is presumed that it has absolute faith in such witnesses. If later on the witnesses do not support the prosecution or say something favourable to the defence, responsibility cannot be shirked by the prosecution. Unless the evidence given by a prosecution witness can be explained in a manner considered reasonable by the Court, the evidence given by such a witness would cause a serious dent in the prosecution story, leading to an inference favourable to the defence. The accused will get the benefit and there can be no getting away by saying that the prosecution witness was an accomplice or an associate of the accused to the extent he gave that statement.¹⁴ Goods having been stolen from a godown from back door, godown keeper cannot be said to be necessarily involved, where front doors were intact.¹⁵

9. *Bhagwan Das Keshwani v. State of Rajasthan*, 1974 Cri. L. J. 751 at 753; 1974 U. J. (S.C.) 336; 1974 S. C. D. 759; (1974) 4 S. C. C. 611; 1974 Punj. L. J. (Cri.) 266; 1974 Cri. L. R. (S.C.) 402; 1974 S. C. Cri. R. 186; 1974 Serv. L. C. 449; 1974 W. L. N. 532; 1974 S. C. C. (Cri.) 647; 1974 Cri. App. R. (S.C.) 188; A. I. R. 1974 S.C. 898.

10. Per Holroyd, J. in *R. v. Hobson*, (1823) 1 Lewin C. C. 261; see also Best, *Rev.*, s. 49, 440; *Muhammad Yaqub v. Emperor*, 1925 Cr. L. J. 939; *In re Tarit Kanti*, 45 Cal. 169; 45 I. C. 338; A. I. R. 1918 C. 988.

11. *Pershadi v. The State*, 1955 All. 443 at p. 461; 56 Cr. L. J. 1125.

12. *R. v. Garton*, 11 H. & L. 681 per Cockburn, C. J.; "If," said L. C. Baron Pollock to the jury in *R. v. Manning and Wife*, 30 cc. Sess. Pap. 654 1849 cited in *Wills Circ. Ev.*,

6th Ed., §19. "the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of certainty which the law requires, and which will justify you in returning a verdict of guilty." See also the other cases cited in *Wills' ib.*, and *R. v. Madhub*, (1874) 21 W. R. Cr. 13, 20; *R. v. Gokool*, 25 W. R. Cr. 36 (1876); *Weston v. Peary Mohan Dass*, (1915) 40 C. 898.

13. *State of Punjab v. Bhavji Singh*, 1975 Cri. L. J. 282 at 284; A. I. R. 1975 S. C. 258.

14. *O. P. Kumar v. State of H. P.*, 1974 Cri. L. J. 556 at 564; (1972) 2 S. C. L. J. 48.

15. *K. Bahadur v. P. Gorwara*, 1973 B. L. J. R. 284 at 297; 1972 Pat. L. J. R. 217.

It cannot be stated as a universal rule that whenever injuries are found on the person of accused persons, a presumption is to be necessarily raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused the members of the accused persons probabalise the version of the right of private defence.¹⁶⁻¹⁷ When death is caused by a weapon in a fit of epilepsy, the accused can get benefit of general exception under Section 81 of Penal Code provided he discharges the onus.¹⁸

(r) *Adherence to formalities*. The same principle which requires a greater degree of proof demands a strict adherence to the formalities prescribed by the law of procedure. For in a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in *possession* are it need scarcely be observed, *strictissimi iuris*.¹⁹ Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad the defect will not be cured by any waiver or consent of the prisoner.²⁰ Sir Elijah Impey in his charge to the jury in *Nuncomar's case* said:

"You will consider on which side the weight of evidence lies, always remembering that, in criminal, and more specially in capital, cases you must not weigh the evidence in golden scales: there ought to be a great difference of weight in the opposite scale before you find the prisoner guilty. In cases of property, the stake on each side is equal and the least preponderance of evidence ought to turn the scale; but in a capital case, as there can be nothing of equal value to life you should be thoroughly convinced that there does not remain a possibility of innocence before you give a verdict against the prisoner."²¹

(s) *Standard of proof in civil cases*. The standard of proof is the same in all civil cases as is apparent from the definitions of the words 'proved', 'disproved' and 'not proved' in this section. The Act makes no difference between cases in which charges of a fraudulent or criminal character are made and cases in which such charges are not made. But this is not to say that the court will not while striking the balance of probability keep in mind the presumption of innocence or the nature of the crime or fraud suggested. It is wrong

16-17. *Ram Swarup v. State*, 1972 Raj. L. W. 325; 1972 W. L. N. 507 at 515.

18. *Satwant Singh v. State of Punjab*, 1975 Cri. L. J. 1605 (Punj.).

19. Per Cockburn, C. J., in *Martin v Mackonochie*, L. R. (1878) 3 Q. B. D. 730, 775; see *R. v. Kola*, (1881) 8 C. 214; *R. v. Bhista*, (1876) 1 B. 308 (F.B.); *Jetha v Ram*, (1892) 16 B. 689; *R. v. Bholanath*, (1876) 2 C. 23-27; 25 W. R. Cr. 57; but see also *Sr.* 529-538, Cr. Pr. Code.

20. *R. v. Bholanath*, (1876) 2 C. 23; *R. v. Allen*, (1880) 6 C. 83; *Hossein v. R.*, 6 C. 96, 99; *Pulukuri Kottaya v. Emperor*, 1947 P. C. 67; 74 L. A. 65; L. L. R. 1948 Mad. 1; see also notes to *Ss.* 5, 121 post.

21. The story of Nuncomar and the Impeachment of Sir Elijah Impey, by Sir James Fitzjames Stephen, Vol. 1, p. 168. See also Lord Cowper's speech on the Bishop of Rochester Trial, Philip's Circ. Ev., xxvii.

to insist that such charges must be proved clearly and beyond doubt²². The fact that a party is alleged to have taken bribe in a civil case does not convert it into a criminal case and the ordinary rules applicable to civil cases apply. Thus, where in a civil case fraud is to be inferred from circumstantial evidence, the criterion is not that applicable to circumstantial evidence in criminal cases²³. But contrary view has been taken in the following cases where it has been held that fraud like any charge of criminal offence whether made in civil or criminal litigation must be established beyond reasonable doubt²⁴⁻²⁵.

When the conduct of the parties subsequent to the partition shows that the arrangement effected under the guidance of the Panch was mutually accepted and acquiesced in, the absence of defendant's signature on the memorandum of partition will not invalidate the partition effected by the Panch¹. Allegation that polling agent of respondent, successful candidate, hired or procured truck on behalf of respondent was not believed because such authority could be inferred only in the case of a general agent entrusted with the duty of doing all the election work for a candidate and not in the case of a polling agent². Burden is on appellant to prove that poster containing allegations against the character of appellant, a candidate at election, was distributed by respondent, successful candidate. One witness from each village for each separate meeting held could not be held to be reliable enough to discharge the burden of proof³. The very fact that the only staircase leading upto the terrace is in the portion of the appellants would clearly show that the room on the terrace would be *prima facie* in the exclusive possession of the appellants, even though there was no wall on the terrace separating the two portions specially when there is nothing to show that the apparent is not the real state of affairs⁴. When no rule could be shown that Government order could not be issued without being entered in a register, mere fact, therefore that the register did not contain an entry regarding the orders did not conclusively suggest that the Government did not issue such orders⁵. Mere fact that the school was successively having a non-christian as Headmaster does not lead to the inference that it was not established and administered by the Christians⁶. For establishment of the institute it is not necessary that the school must be constructed by the minority community. Even if a school previously run by some other organization is taken over or transferred to the Church and Church reorganises and manages the school to cater to and in conformity with the ideals of the Roman

22. Gulabchand v. Kudilal, (1966) 1 S. C. R. 623; (1967) 1 S. C. A. 177; 1967 S. C. D. 75; (1967) 1 S. C. J. 580; (1966) 2 S. C. W. R. 296; 1966 A. W. R. (H.C.) 765 (2); 1966 Jab. L. J. 1121; 1966 M. P. L. J. 1008; 1967 M. L. J. (Cr.) 315; 1966 Mah. L. J. 982; A. I. R. 1966 S.C. 1734, 1737 and 1738; ~~Gulabchand v. Kudilal~~, (1966) Mohan Dass, (1915) 1. L. R. 40 Cal. 508; ~~J. Chaitanyam Woodroffe, J.~~ and Raja Singh v. Chaitanyam Singh, A. I. R. 1940 Pat. 201, at p. 203.

23. *Gulabchand v. Kudilal*, *supra*, overruling *Raja Singh v. Chaichoo Singh*, A. I. R. 1940 Pat. 201 at p. 203, per Meredith, J.

24-25. Kishandas v. Shrawan Kumar, 1976
lab. L. J. 554 at 558: 1975 M. P.

I. J. 556; Sri Krishna v. Kurushetra University, A. I. R. 1976 S. C. 376 at 381; (1976) 1 S. C. C. 511.

1. Munna Lal v. Suraj Bhan, A. I. R. 1975 S. G. 1119 at 1120: (1975) 1 S. C. G. 556; 1975 U. J. (S.C.) 287; (1975) 1 S. C. W. R. 691.

2. Nihal Singh v. Rao Birendra Singh,
207: 1970 U. J. S. C. 753.
Nihal Singh v. Rao Birendra Singh,
Supra.

4. *Shyam Lal Sen v. State*, 1972 Cri. L. J. 942 at 944 (Cal.).

5. *G. S. Baroca v. State of J. and K.*,
1975 Serv. L. C. 535: 1975 Lab. I.
C. 774 at 780 (J. & K.).

6. *A. M. Patroni v. Asstt. Educational Officer, A. I. R.* 1974 Ker. 197 at 200.

Catholic as it can be safely concluded that the school has been established by the Roman Catholics? When ceremony did not require presence of a priest, but there is evidence that he volunteered himself as a priest though uninvited, inference against validity of ceremony cannot be drawn⁸. Person asserting a dedication to be waqf must prove initially that it was made by a Muslim⁹. It cannot be laid down as a general rule that wherever a defendant chooses to deny his signatures, the plaintiff must examine a hand writing expert to prove his case. Nor is the Court bound to accept the evidence of a hand writing expert produced by the defendant as true. The Court has to apply its own mind to the evidence of the expert and it is open to it either to believe it or to disbelieve it¹⁰.

(t) *Standard of proof varying with enormity of crime*. It after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that, however strong the suspicion raised against the accused, every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal¹¹. Even as between Criminal cases a distinction has been declared to exist. Thus "the fouler the crime is, the clearer and plainer ought the proof of it to be"¹². "As the crime is enormous, and dreadfully enormous, indeed it is, so the proof ought to be clear"¹³. "But the more atrocious, the more they want the crime to be the more clearly and satisfactorily you will expect that it should be made out to you"¹⁴. "The greater the crime, the stronger is the proof required for the purpose of conviction"¹⁵.

These and the like dicta, however, in so far as they may be said to imply that the rules of evidence may be modified according to the enormity of the crime or the weightiness of the consequences which attach to conviction (for if they may be made more stringent in one direction, it is said they may be relaxed in another) have been severely criticised¹⁶. To quote the language of L. C. J. Dukes in the earlier portion of a passage of which the latter part is the effect of the dicta already cited.

"Nothing was depend upon the comparative magnitude of the offence, for be it great or small, every man is entitled to have the charge against him clearly and satisfactorily proved."¹⁷

In *Sargan v. State of Punjab*¹⁸ the Supreme Court observed that it is no doubt a matter of regret that a foul and bloodied and cruel murder should go unpunished, but, considered as a whole, the prosecution story may

7. *A. M. Patroni v. Asst. Educational Officer*, A. I. R. 1974 Ker. 197 at 200, 201.
8. *Sankara Warriar v. Sree Dosi*, 1973 Ker. L. R. 228; 1973 Ker. L. J. 332; 1973 Ker. L. T. 963; A. I. R. 1973 Ker. 250 at 252.
9. *M. S. Waqf Board v. Kazi Mohideen*, A. I. R. 1974 Mad. 225 at 227.
10. *Panchu Lal v. Ganeshi Lal Maheshwari*, 1972 W. L. N. 658; 1973 Raj. L. W. 182; A. I. R. 1973 Raj. 12 at 13 dissented from; *Bhagwan Din v. Gouri Shankar*, A. I. R. 1957 All. 119; 1956 All L. J. 42.
11. *H. T. Huntley v. Emperor*, 1944 F. C. 66; I. L. R. 23 P. 517; 214 I. C. 199.
12. *Trial of Lord Cornwallis* 7 State

- Trials 149.
13. *Trial of R. C. Crossfield*, 26 State Trials 218.
14. *Trial of Mary Blandy*, 18 State Trials 1186.
15. *R. v. Hobson*, per Holroyd, J. (1825) 1 Lewin's Crown Cases, 261. See also *R. v. Ings*, (1820) 33 St. Tr. 957 at 1135, and *Madeleine Smith case* cited in *Wills' Circ. Ev.*, 6th Ed., 319-322.
16. *Wills' Circ. Ev.*, 6th Ed., 319-322.
17. *R. v. Ings*, 33 St. Tr. 957 at 1135.
18. 1957 S. C. J. 699; A. I. R. 1957 S. C. 687; 1957 All W. R. (Sup.) 99; 1957 M. P. C. 781; (1957) 1 Mad. L. J. (Cr.) 672; I. L. R. 1957 Punj. 1602; See also *Braj Bandhu Naik v. State*, 41 Cut. L. T. 496; I. L. R. (1975) Cut. 450; 1975 Crd. & J. 1933 at 1937.

be true' yet between 'may be true' and 'must be true' there is inevitably a long distance to travel, and the whole of this distance must be covered by legal, reliable and unimpeachable evidence."

(u) *Corpus delicti, proof of.* Every criminal charge involves two things—first, that a crime has been committed; and secondly, that the accused is the author of it. If a criminal fact is ascertained an actual *corpus delicti* established—presumptive proof is admissible to fix the criminal¹⁹. A restriction has been said to exist against the use of circumstantial evidence in the case of the well known rule that the *corpus delicti* (that is, the fact that a crime has been committed) should not in general be inferred from other facts but should be proved independently. But it is not necessary (and indeed in the case of some crimes it would be impossible) to prove the *corpus delicti* by direct and positive evidence.²⁰ If the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was committed, is as safe as any other inference. More accurately stated, the rule is that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the *corpus delicti* either by direct evidence or by cogent and irresistible grounds of presumption.²¹

The *corpus delicti* of a crime is the body or the substance of the crime charged. it involves two elements:—

- (1) injury to a specific person, property or right, or a violation of a statute; and
- (2) criminal agency of someone in producing that injury or violation.²²

Corpus delicti, which is the body of the substance of the crime normally contains two elements:

- (a) the end result of an act, such as, in homicide a death, and
- (b) the fact, that the end result so produced by a criminal act, such as in a homicide case, that death was caused by shooting

19. *R. v. Ahmad Ally* (1865) 11 W. R. Cr. 27, 19; *R. v. Ram Ruchea* (1865) 4 W. R. Cr. 29.

20. See Phipson, Ev., 9th Ed., 53.

21. Steph. Introd. 66; Wills' Crim. Ev. 6th Ed., 323—411; Arthur Wills' Crim. Ev., 890, Part V. Proof of the *corpus delicti* and cases there cited; Norton, Ev., 74; Cunningham Ev., 17; Best, Ev., s. 441, et seq. Powell, Ev., 72. See *Evans v. Evans*, (1790) 1 Hagg. Con. 35: 166 E. R. 983 (the Courts may act upon presumptions as well in criminals as in civil cases) *R. v. Barrett's case* 4 B. & Ald. 95. So in cases of adultery it is not necessary to prove the fact by direct evi-

dence. *Loveden v. Loveden* 1809 2 Hagg. Con. 1; *Williams v. Williams* (1798) 1 Hagg. Con. 299: 161 E. R. 550 followed in *Allen v. Allen* 1854 1 R. P. D. 248, 252 even in a criminal case; *R. v. Madge* 1874 21 W. R. Cr. 13, 16, 17. See provisions of Cr. Pr. Code, S. 114. Also Bengl. Rep. XX. 1817, S. 14 and generally as to the *corpus delicti*; *R. v. Petta*, (1885) 4 W. R. Cr. 19; *R. v. Ram Ruchea* (1865) 4 W. R. Cr. 29; *R. v. Ponnudan* (1867) 7 W. R. Cr. 14; *R. v. Bedcondreen*, (1882) 11 W. R. Cr. 20.

22. Wharton's Criminal Evidence 1st Ed., p. 48.

(x) *General rules with regard to proof in criminal cases*—These may be stated as follows:—

(a) The onus of proving facts essential to the establishment of the charge against the accused, lies upon the prosecutor. Every man is to be regarded as legally innocent until the contrary be proved. Criminality is, therefore, never to be presumed.³

(b) The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused.⁴ If there be any reasonable doubt of the guilt of the accused, he is entitled, as of right, to be acquitted.⁵

The above hold universally; but there are two others peculiarly applicable when the proof is presumptive (v. ante):

(c) There must be clear and unequivocal proof of the *corpus delicti* (v. ante).⁶

(d) In order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.⁷

While the concurrence of several separate facts, all of which point to the same conclusion, may, though the probative force of each be slight, be quite sufficient in their cumulative effect to produce conviction, mere aggregation of separate facts, all of which are inconclusive in the sense that they are quite as consistent with the innocence as with the guilt of an accused person, cannot have any probative force.

(y) *Standard of proof in matrimonial cases*—In awarding relief under Section 23 of the Hindu Marriage Act 1955 (25 of 1955) the court must be

3. Lawson's Presumptive Ev. 93, 432; Wharton, Cr. Ev., ss. 319, 717; Best, Ev., s. 440; Greenleaf, Ev., 1, 34; Wills' Circ. Ev., 6th Ed., 305; Powell, Ev., 9th Ed., 403; Best Treatise on Presumption of Law and Fact (1844). See ss. 101, 102, 103, 105, 106, 114, post. As to the meaning of the presumption of innocence in criminal cases, see Thayer's Preliminary Treatise on Evidence, (1898) 551. See also R. v. Ahmed Ali (1869) 11 W.R., Cr. 25-27; where facts are as consistent with a prisoner's innocence as with his guilt, innocence must be presumed, and criminal intent or knowledge is not necessary. *See also* R. v. Baskerville (1927) 113 All E.R. 109, where facts were contrary to the provisions of the law; R. v. Nobokisto, (1867) 8 W.R., Cr. 87; R. v. Madhub, (1874) 21 W.R., Cr. 13, 20 (the accused is entitled to the benefit of the legal presumption in favour of innocence;

the burden of proof is undoubtedly upon the prosecutor); Deputy Legal Remembrancer v. Karuna, (1894) 22 C. 164; Panchu Das v. R. (1907) 34 C. 698.

4. Best, Ev., ib., and v. ante.

5. Wills' Circ. Ev. 6th Ed., 315; Best, Ev., s. 440 and v. ante; Lolit v. R. (1894) 22 C. 313; R. v. Madhub, supra 20; R. v. Panchanun, (1866) 5 W.R., Cr. 97.

6. Best, Ev., ss. 440, 441; Wills' Circ. Ev., 6th Ed., 323-411.

7. Wills Circ., Ev., 6th Ed., 311; Best, Ev., s. 451; rule approved in Bal-mukund v. Ghansam, (1894) 22 C. 391; R. v. Ishri, (1907) 29 A. 46; Mahanand Yogi v. Emp. (1922) 27 C. 1; J. 90; In re 'Tinn' Kante, A.I.R. 1918 C. 988; (1917) 45 C. 169; Manak Lal v. Premchand (Bar Council enquiry)—A.I.R. 1957 S.C. 425; (1957) 1 M.L.J. (Cr.) 254; 1957 S.C.J. 359; 1957 S.C.A. 719; 1957 S.C.R. 575.

dashed beyond all doubt. In matrimonial cases, the standard of proof drawn from the criminal law is not a safe or proper analogy.⁸

The cumulative effect of the evidence on record to prove adultery should be such as to satisfy the conscience of the Court that a matrimonial offence has been committed by a spouse. Where matrimonial relationship is in question and future of children is involved very careful consideration should be given to the evidence to see whether the standards of proof as required has been met keeping in view that the result of such decision may change the social status of the parties and their dependants. To prove that charge against the wife, the conduct of the co-respondent in this regard cannot go against her to fill up the blank in the evidence which ought to have been produced. Where the parties had opportunity to commit such offence, it must also be shown by some cogent evidence that such opportunity was in fact availed of by them.⁹

See also in the evidence, Rules as to. "In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence which compels us not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that, within all human probabilities, the act must have been done by the accused."¹⁰

8. *Dr. H. T. Vira Reddi v. Kistamma*, (1969) 1 M. L. J. 366, 373; 81 M. L. W. 490; A. I. R. 1969 Mad. 235 relying on the statement of law in *Prestone Jones v. Prestone Jones* 1951 A. C. 391, 417, cited with approval by the Supreme Court in *E. J. White v. Mrs. K. O. White*, A. I. R. 1958 P. C. 441.

9. *Sahdeo Kumar Bhatnagar v. Dipa Bhatnagar*, A. I. R. 1953 Calcutta 108 (S. B.).

10. *Hanuman Gowind Narayan Kar v. State of Madhya Pradesh*, 1952 S. C. 343; 1952 S. C. R. 1091; (1952) 2 M. L. J. 631; 1952 All W. R. Sup. 109; 1952 S. C. A. 623; 1952 S. C. J. 109; *Prasad v. State of Bihar*, 1954 S. C. 621; 55 Cr. L. J. 109; *Gaya Prasad v. State*, A. I. R. 1954 All. 109; *Uppal v. Srinivasulu*, In re, A. I. R. 1958 Andh. Pra. 37; *Kodur Thimma Reddy*, In re, A. I. R. 1957 Andh. Pra. 758; *Madugula Jeremiah*, A. I. R. 1955 Andh. Pra. 109; *Jani Singh*, In re, (1957) 2 Andh. W. R. 222; A. I. R. 1922 Andh. 273; *State v. Abraham*, A. I. R. 1960 Ker. 115; *State v. N. S. v. State of S. Andh*, 1951 L. J. 109; *Patil v. Patil*, A. I. R. 1959 Cr. L. J. 448; A. I. R. 1959 H. P. 3; *Sivaraman v.*

State, 1, L. R. 1959 Ker. 319; *Tri-bat Singh v. Bimla Devi*, A. I. R. 1959 J. & K. 72; *Govinda Reddi v. State*, A. I. R. 1960 S. C. 29; 1960 Cr. L. J. 137; *Krishna v. Jagannath*, A. I. R. 1965 Pat. 76; *Subedar v. State of U. P.*, (1971) 2 S. C. Cr. R. 135, 140; *Awadhi Yadav v. State of Bihar*, (1971) 2 S. C. Cr. R. 141, 142 (regard to human, not imaginary, probabilities); *Jaswant Singh v. The State*, 1 L. R. 1965 L. Raj. 660; 1965 Raj. L. W. 400; 1966 Cr. L. J. 451; A. I. R. 1966 Raj. 83, 89; *Charan Singh v. The State of U. P.*, 1967 Cr. L. J. 525; A. I. R. 1967 S. C. 520, 522 reiterating the danger in such cases referred to in *Hanuman Gowind Narayan Kar v. State of Madhya Pradesh* supra that conjecture or suspicion may take the place of legal proof; *Rajanikant Keshav Bhandari v. State*, 1967 Cr. L. J. 357; A. I. R. 1967 Goa 21, 25; A. N. O. 113; *Patil v. The State of Manipur*, 1967 Cr. L. J. 1023; A. I. R. 1967 Manipur 1 (the absence of explanation or a false explanation completes the chain of circumstantial evidence); *Kishore v. State*, 1967 Cr. L. J. 1155; A. I. R. 1967 Orissa 118, 127; *Bandha v. State*, 1967 A.

of his guilt. It is well stated that the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offence home to him beyond any reasonable doubt¹². What has to be seen is not the effect of each item of circumstantial evidence separately but their cumulative effect¹³. If the cumulative effect of all the proved facts is conclusive in establishing the guilt of the accused, the conviction would be justified even though one or more of the facts by itself or taken together is of an inconclusive¹⁴. The circumstantial evidence, or any reasonable hypothesis, must be consistent only with the guilt of the accused and not with his innocence¹⁵. In a criminal case the negative basis of affirmatively establishing a crucial fact which is the subject-matter of the charge by appropriate circumstantial evidence which, on any reasonable hypothesis, does not admit of any sensible inference other than the guilt of the accused and the court can confidently record a verdict of guilty beyond reasonable doubt. The court should not be influenced by the failure of the accused to furnish an explanation under Section 312 Cr. P. C., to give evidence on the crucial fact charged¹⁶. Any hypothesis or explanation tending to show the innocence of the accused¹⁷ must be rational, because an irrational, or unnatural, or a highly improbable explanation cannot be taken into consideration. The test is of probabilities upon which a prudent man may base his opinion¹⁸. It is not, however, correct to say that before circumstantial evidence can be raised the burden is to prove the guilt of the accused¹⁹ but if the possibility is remote and one which he is able to explain, the absence of explanation may be taken into account²⁰. When the various links in the chain of circumstantial evidence pointed an accused have been satisfactorily made out and the circumstances point to the accused as the probable assassin with reasonable certainty and proximity to the deceased as regards time and situation, and he offers no explanation which if accepted though not proved would furnish a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would not be an additional link which completes the chain²¹. At the same

12. *Aban v. State of Bombay*, A. I. R. 1960 S. C. 500; 1960 Mad. L. J. 109; *Ben v. R.* 1961 1960 Cr. L. J. 682; 1960 S.C.J. 779; 1960 2 S. C. R. 46; (1960) 2 S. C. A. 62.

13. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584, following *Raghav Prapanna Tripathi v. State of U. P.*, A. I. R. 1963 S. C. 74; *State v. Prabhoo Sahay Kharia*, Maharashtra, A. I. R. 1963 S. C. 74.

14. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

15. *State of A. P. v. I. B. S. Prabhoo*, 1969 Cr. L. J. 6033 (All.) 618; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

16. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

17. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

18. *Perhadi v. State*, 1955 All. 443 at 444; *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

19. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

20. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

21. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

22. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

23. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

24. *State v. Prabhoo Sahay Kharia*, 1969 B. L. J. R. 578, 584; 1969 S. C. R. 94; 1962 S. C. J. 545; A. I. R. 1963 Punj. 107; 1963 A. L. J. 18; 1963 M. W. N. 418; 1963 Cr. L. J. 154; A. I. R. 1962 S. C. 354; *Irfan Ali v. State*, 1970 Cr. L. J. 6033 (All.) 618.

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- (1955) 1 M. L. J. (S. C.) 31; 1956 M. W. N. 385; 58 Pun. L. R. 171; 1955 Cr. L. J. 1647; A. I. R. 1955 S. C. 801 at pp. 806, 807; Sardul Singh v. The State, (1967) 69 Pun. L. R. (B) 168; Patra Bahare v. State, (1969) 35 Cut. L. T. 258, 261; State of Orissa v. Sukra Singh, (1975) 2 Cr. L. J. 119 (H. P.).
22. Brij Bhushan Singh v. Emperor, 1946 P. C. 38; 73 I. A. 1; 222 I. C. 529.
23. Golam Mohiuddin v. State of West Bengal, A. I. R. 1964 C. 503; 68 C. W. N. 215.
24. Chaz v. State, A. I. R. 1966 All. 142; 1966 Cr. L. J. 369; 1966 A. W. R. (H. C.) 149; 1966 Cr. L. J. 4.
25. Ibid at p. 148 of A. I. R. 1966 All. 142.
1. Public Prosecutor v. A. Hari Babu, 1975 M. L. J. (Cri.) 283 at 287; (1975) 1 An. W. R. 304.
2. Kanbi Karsan v. State of Gujarat, (1962) Supp. (2) S. C. R. 726; (1963) 2 S. C. J. 364; A. I. R. 1966 S. C. 821; (1962) 1 Ker. L. R. 511; (1963) Mad. L. J. Cri. 465; 1966 Cr. L. J. 605.

the circumstance of each case.³ The fact that an accused person, after finding out that he is wanted by the police, takes flight and absconds before presenting himself in the court of a Magistrate, is suspicious but explicable on other grounds than guilt.⁴ Subsequent conduct of the accused being that of a normal man cannot be taken to be any guide to establish the innocence of the accused and even to cause doubt in favour of the accused because in fact human behaviour is seldom uniform and is often unpredictable because what motivates him is difficult to postulate.⁵

The motive of the accused, his abscondence from the village for four days, his extrajudicial confession and recoveries including the blood stained *gandasa* borrowed by him a couple of days before the occurrence along with the medical evidence constituted sufficient evidence to compel the inference of the accused being responsible for the murder of his wife.⁶

The following facts were constituted to be sufficient circumstantial evidence to connect the accused with the crime: The motive for the crime, conduct of the accused immediately before and after the crime being unnatural and suspicious, the refusal of the accused to participate in identification parade and to give specimen of his footprints.⁷ The fact that accused alone was with his wife in the house when she was murdered there with *brozen* and the fact that the relations of the accused with his wife were strained pointed to his guilt.⁸ The accused murdered the

3 Wasim Khan v. State of U. P., 1956 S. C. R. 191; A. I. R. 1956 S. C. 400; (1956) 2 M. L. J. (S. C.) 9; 1956 B. L. J. R. 431; 1956 All W. R. 371; 1956 Cr. L. J. 590; 1956 All L. T. 513; 69 M. L. W. 819; 1956 S. G. A. 519; 1956 S. C. J. 437.

4 Pirthi v. State, 1966 Cr. L. J. 1369; A. I. R. 1966 All. 607, 613; Rahman v. State of U. P., 1972 Cr. L. J. 23; 1971 S. C. D. 1000; Raghbir Singh v. State of U. P., 1971 U. J. (S. C.) 762; (1972) 3 S. C. C. 79; 1971 Cr. L. J. 1468; 1972 S.G.C. (Cri.) 399; A. I. R. 1971 S. C. 2156 (If the evidence of eye witnesses is trustworthy, then the act of absconding would fortify the conclusion of the Court with respect to the guilt of the accused); 1975 Mah. L. J. 431 (Abscondance cannot be a determining link in completing the chain of circumstantial evidence); State of Rajasthan v. Manga, 1973 Raj. L. W. 58; 1973 Cr. L. J. 1075; Mazahar Ali v. State, 1976 Cr. L. J. 1629; 1976 Kash. L. J. 179 (It is a very small item in the chain of

circumstantial evidence and too much importance should not be placed on it); Public Prosecutor v. A. Hari Babu, (1975) 1 An. W. R. 304; 1975 Mad. L. J. (Cri.) 283 (abscondance not an incriminating circumstance when the other evidence does not prove the various links); S. B. Shome v. State, Assam L. R. (1972) Gau. 141; 1973 Cr. L. J. 76.

State v. Bhagwan Das, 1973 W. L. N. 330 at 341 (Raj.).

Iqbal Miru v. State, 1969 Cr. L. J. 1186.

Mulkh Raj Sikka v. Delhi Administration, 1974 Cr. L. J. 1013 at 1172, 1174; 1974 Cr. L. R. (S. C.) 512; 1974 S. C. C. (Cri.) 698; 1974 App. R. (S.G.) 226; (1975) 3 S. C. C. 2; 1975 All Cr. C. 17; A. I. R. 1974 S. C. 1723.

9 Nika Ram v. State of H. P., 1972 Cr. L. J. 1317 at 1322; (1972) 2 S. C. C. 80; (1972) 3 UM NP 427; 1972 App. R. 445; 1972 S. C. C. (Cri.) 635; 1972 U. J. (S.G.) 932; (1973) 1 S.C.R. 428; 1. L. R. (1974) H. P. 187; A. I. R. 1972 S. C. 2077.

decrease at a certain rate, λ , and the speed of the decrease is $\lambda \times P_{\text{max}} \times (1 - P_{\text{max}})$ in the bag. Suppose that the bag is initially empty, and that the probability of the bag decreasing, λ , would be λ_{max} if the bag were full. If $\lambda_{\text{max}} = 0.001$, then the bag would be expected to contain $RS/500 \times (1 - \lambda_{\text{max}})$ items in the steady state, as

[illegible]

Besides possession of stolen property belonging to the deceased, the fact that the accused was in the house of the three murdered persons at midnight when they were murdered and the accused had concealed the bodies strongly corroborated established that the accused was himself the murderer.

The following circumstances were held not to be sufficient to connect the accused with the crime—

The untrustworthy explanation of the accused on his person as well as the circumstance about his act of offence.¹⁴ Where circumstantial evidence held, see the following cases.¹⁵⁻¹⁸

In cases based on circumstantial evidence, the evidence should be so strong as to preclude any other reasonable hypothesis. In order to justify the inference of guilt, the evidence must be incompatible with the innocent state and not explainable upon any other reasonable hypotheses than that of guilt. The Court's decision should not rest on suspicion.¹⁷

An original contract to continue a partnership

10. Vairavan, In re, 1974 Mad. L. W. (Cri.) 43 at 43.
- 11-12. Mohan Lal Pangasa v. The State of U. P., A. I. R. 1974 S. C. 1144 at 1145, 1146; 1974 Cr. L. J. 799.
13. P. N. Swamy v. State, 1975 Cr. L. J. 509 at 516.
14. Jagta v. State of Haryana, 1974 Cr. L. J. 1010 at 1015 (S. C.); 1974 Cri. L. R. (S. C.) 472; 1974 S. C. C. (Cri.) 657; (1974) 4 S. C. C. 747; (1975) 1 S. C. R. 165; A. I. R. 1974 S. C. 1543.
- 15-16. Om Prakash v. State of H. P., 1975 Chand. L. R. (Cri.) 455 (Him).

17. *Manje Gowda*, (1978) 2 Mys. L. J. 190; 1. L. R. (1975) Kant. 1454; 1973 Mad L. J. (Cri.) 678.
Om Prakash v. State of H. P., 1974 Cr. L. J. 556 at 558; (1972) 2 Sun. L. J. (H. P.) 4139 (relying on *Udaiyal Singh v. State of U. P.*, (1972) Cri. L. J. 7 (S.C.)).

may either before or after the crime, and in some way connect between the accused and the offence; if the circumstantial evidence establishes the guilt of the accused, the prosecution has established one condition of the offence in relation to the time and local circumstances. If the substantial evidence must be sides, relate unerringly to the accused⁸

The law may be taken to be that—

“Circumstantial evidence is accepted as satisfactory evidence, as in the case of other evidence ;

“but the facts from which it is deduced must be of a conclusive nature and tenor, and the inference drawn from them must be invariable and are not explained by any other hypothesis except the guilt of the accused.”

Although there should be no missing links in the case, yet it is not necessary that every one of the links must appear on the surface of the evidence; some of these links may have to be inferred from the proved facts ;

“In applying the above restrictions, the Court must consider the sequence of natural events to human conduct and their relation to the facts of the particular case ;”⁹

When circumstances are susceptible of two equally possible inferences, the Court should adopt that inference which incriminates the accused and discards the inference which goes in favour of the prosecution.

In the case of poisoning, the prosecution must ordinarily establish—

- (1) that death was caused by poisoning,
- (2) that the accused had poison in his possession, and

“the knowledge and opportunity to administer poison.”

Substantial evidence to establish murder by poisoning may be direct or circumstantial. Thus, if the circumstantial evidence alone establishes the fact, the Court can irresistably hold that the death was the result of poisoning by the accused, conviction can rest on it alone.¹⁰

When the evidence, all the incriminating facts and circumstances taken together, together with cogent and reliable evidence and the fact so established, is such that the guilt of the accused and should not be capable of being explained by any other reasonable hypothesis than that of his

In re Thangaswami, A. I. R. 1963 M. 476; (1963) 2 Cr. L. J. 651.

8. Ibid. (Case law reviewed); S. B. Shoina v. State, 1973 Cri. L. J. 76.

9. Harbans Singh Chohan v. The State, A. I. R. 1960 Cal. 722; 1960 Cr. L. J. 1577.

10. Ram Das v. State of Maharashtra, A. I. R. 1977 S.C. 1164 at page 1166, 1167.

11. In re Virabhadrapa, A. I. R. 1962 Mys. 138; 1962 M. L. J. (Cr.) 41.

12. State of Orissa v. Kaushalya Dei, A. I. R. 1965 Orissa 38.

witness²². In appreciating evidence of a partisan witness in a case where a large number of persons are involved and in the combination of evidence of a case in injuries to others and the evidence is of a partisan character, the latter side for the Judge to be guided by the compass of probabilities, and not by the established contours of the case, as seen in the heat of the moment, and to deal with communal back-biting in which partisan witnesses may be motivated by a mistaken or misplaced sense of group loyalty. The Judge must not only analyse evidence very carefully²³. Courts and tribunals in dealing with evidence before them should apply the test of human probabilities. Human beings may differ as to the reliability of evidence. But in our system of law, once the fact finding authority is made conclusive by law.²³

Evidence of drug trafficking, even if it is not reliable, may be of much weight²⁴. It is not safe to rely on the evidence of a witness who is not so sized is *gone* when criminal report has not been believed²⁵.

Where the prosecution case is one which the High Court has accepted but if the High Court did not find it possible to accept a vital part of the story the other part will be not found to be true and not accepted.

When a witness has been examined and found to be a liar, his evidence does not lose its character because the doubt that arises is not that this is also a circumstance to be taken into account in assessing the reliability of his testimony.²⁶

Evidence of a witness who is a party to a case, even if it is not accepted, cannot be used against him.²⁷

When some evidence is not accepted, the other evidence should be accepted. If the evidence adduced by a witness is not accepted, the other evidence should be accepted. If the material is innocuous, other accused should also be discharged.²⁸

Witnesses who are not examined in a case, but who are examined in another case, under Section 140 Cr. P. Code, may be examined in a case, but their evidence should be accepted. If the evidence is not accepted, the other evidence should be accepted. If the material is innocuous, other accused should also be discharged.²⁹

22. Chuhar Singh v. State of Haryana, 1975 Gur. L. J. 577 at 579 (S.C.); 1975 Cri. L. R. (S.C.) 463, (1975) 2 Cri. L. T. 487; 1975 B.B.C. J. 750; 1975 All Cr. C. 282; 1975 Cri. App. R. (S.C.) 506; 1975 U. J. (S.C.) 516; 1975 S.C. (Cri.) R. 468.

23. Bava Haji Homsa v. State of Kerala, A.I.R. 1974 S.C. 902 at 909; 1974 Cri. L. J. 755; 1974 S.C.D. 449; 1974 S.C. C. (Cri.) 515; 1971 Cri. L. R. (S.C.) 517; (1974) 4 S.C. C. 479.

24. Ahr Bhagu Jetha v. State of Gujarat, A.I.R. 1974 S.C. 292 at 294; 1974 Cri. App. R. 20; 1974 Cri. L. J. 343; 1974 S.C. C. (Cri.) 183; 15 Guj. L. R. 342; (1974) 3 S.C. C. 653; 1974 Cri. L. R. (S.C.) 50; (1974) 2 S.C. R. 477.

25. I. T. Commissioner W. B. v. D. P. More, A. J. R. 1971 S.C.

2439 at 2443; 82 I. L. R. 540; 1971 I. L. (S.C.) 872; (1972) 1 S. C. J. 334; 1971 Tax L. R. 1622; (1972) 1 U. N. P. 87; (1972) 1 I. T. J.

1-2. Medu Sth v. State of Assam, 1972 Cri. L. J. 362 at 366.

3-4. Rudheshwar Singh v. The State, Assam L. R. (1971) Assam 32 at 35.

5. Hari Dev v. State, A. I. R. 1976 S.C. 1489 at 1492, Reversing 1971 Cr. L. J. 1615 (Delhi).

6. State of Assam v. Rajkhowa, 1975 Cr. L. J. 354 at 390 (Gauhati).

7. Panchappa Muttappa v. State, 1971 Cri. L. J. 595 at 598; A. I. R. 1971 Goa 15.

8. Muniswami v. State of Karnataka, 1975 Mad. L. J. (Cri.) 690 at 696.

9-10. Satyabhama Dei v. Suryamani Dibya, (1973) 1 Cut. W. R. 392 at 394.

defence story that unknown dacoits have committed the crime was not substantiated and hence not believed in view of the fact that many villagers had come and it was improbable that the accused would have been falsely involved and implicated.¹⁻⁴ It cannot be laid down as a proposition of law that after the lapse of a long period, witnesses in no case would be able to identify the dacoits, they had seen in the course of a dacoity committed during the night. However, the Court must be extremely cautious in weighing such evidence.⁵ In dark night witnesses may not be in a position to identify persons at a distance beyond two or three feet beyond possibility of mistake and when during identification was not acceptable and other evidence regarding identity of assailants was not of much value, accused was held not guilty.¹ Accused was charged for committing murder with pistol. In the Arms Act case he was acquitted but witnesses A and B not examined in that case, can be relied upon in murder case to prove that it was the accused who shot the deceased by the same pistol.² Accused cannot be convicted in a case under Arms Act on the basis of evidence of the connected murder case.³

Accused a poor labourer could not engage an advocate, but he cross-examined the witnesses, the Sessions Judge himself did not put questions to the prosecution witnesses to find out whether they were speaking the truth but remarked in the judgement that cross-examination was not convincing. From a labourer and who is better cross-examination could not be expected. It was held that appreciation of evidence was not satisfactory and accused was acquitted.⁴⁻⁶

If two interpretations of a statement are possible in a given case, then the one which favours the accused has to be adopted.⁷⁻⁹ Normally when the witness says that an axe or spear is used there is no warrant for supposing that what the witness means is that the blunt side of weapon was used, unless confirmation is obtained from the witness that blunt side of weapon was used.¹⁰ Most of the accused persons belong to a class which do scratch or scratch wound themselves in course of their daily avocation. Many of them are also not particularly clean in their habits or accustomed to change clothing or even to wash them thoroughly. Thus the blood marks found on the clothing may not be their own received even without their knowledge and accused to retain in part. What courts should see is whether the blood marks are such that by their size, shape and location they indicate that they came from some other

24. *Brahma Singh v. State*, A. I. R. 1972 S. C. 1229 at 1231; 1972 S. C. Cri. R. 407; 1972 U. J. (S. C.) 808; (1972) 3 S. C. C. 388; 1972 S. C. C. (Cri.) 582; 1972 Cri. L. J. 763.

25. *Delhi Administration v. Balkrishan*, 1972 Cri. L. J. 1; 1972 U. J. (S.C.) 103; 1972 S. C. Cri. R. 144; (1972) 1 S. C. J. 347; 1972 M. L. J. (Cri.) 205; A. I. R. 1972 S. C. 3.

1. *Het Ram v. State*, 1974 Cri. L. J. 871 at 873 (All.).

2. *Chandrika Prasad v. State*, 1975 *Rajdhani L. R.* 551 at 562, 563.

3. *Tara Singh v. State of Punjab*, 1975 *Chand. L. R.* (Cri.) 526 at 528.

4-6. *Panhappa v. The State*, 1971 *Cri. L. J.* 595 at 598; A. I. R. 1971

Goa 13.

7-9. *Jamuna Chaudhary v. State of Bihar*, 1972 *Cri. L. J.* 824 at 827; 1972 *Raj. L. W.* 18; 1971 *W. L. N.* (Part I) 651.

10. *Hallu v. State of M. P.*, A. I. R. 1974 S. C. 1936 at 1939; 1975 *All. Cri. C.* 62; 1974 *B. B. C. J.* 398; 1974 S. C. C. (Cri.) 462; (1971) 1 *Cri. L. J.* 101; (1971) 4 S. C. C. 300; 1971 *Cri. App. R.* 172 (S. C.) 1974 S. C. D. 614; 1974 *M. P. L. J.* 685; 1974 *Cri. L. R.* (S. C.) 697; 1974 S. C. Cri. R. 216; 1974 *Ma. L. J.* 691; (1974) 3 S. C. C. 1974 *Cri. L. J.* 1385; 1974 S. C. 628; 1975 *Chand. L. R.* (Cri.) 27.

person and that too in course of an attack in which the blood of the latter was shed. For appreciation of evidence in criminal cases also see the following cases.¹¹⁻¹³

An advocate is at least expected to know that he should not be a party to undesirable practice of getting a poster printed so as to adversely affect the election of a candidate. As the poster contained allegation against the character of the appellant and consequently, the advocate should have been on guard and should not have taken an active part in getting it printed. If there is specification about the date and place at which each meeting took place in which speeches against the character of appellant were made, respondent cannot be expected to meet the case put forward in evidence by witnesses of the appellant.¹⁴

When conclusion has been reached on an appreciation of a number of facts established by evidence, its soundness or otherwise has to be judged by assessing the cumulative effect of all the facts.¹⁵

If the plaintiff puts the defendant in the witness box as his witness, then the plaintiff must be treated as a person who puts the defendant forward as a witness of truth.¹⁶

Even though direct evidence in proof of the gold being smuggled one is not available, inference can be placed on the conduct of the persons who possessed gold in order to reach the conclusion that gold was smuggled.¹⁷⁻¹⁸

If the representative does not in fact, believe in the truth of his representation he is as much guilty of fraud as if he had made any other representation which he knew to be false.²⁰

It is well settled that where a person on whom fraud is committed is in a position to discover truth by due diligence, fraud is not proved. It is neither a case of *suggestio falsi*, nor *suppressio veri*.²¹

11-13. See *Singh v. State of Punjab*, 1972 All Cr. R. 7; *Balkrishna v. State of Kerala*, 1971 Ker. L. R. 455; *State v. Mahesh v. P. Ramappa Maragi* (1972) 2 Mys. L. J. 6; *Subhlal Gope v. State of Bihar*, 1971 Cri. L. J. 630; A. I. R. 1971 Pat. 151; *Badri v. State of U. P.*, A. I. R. 1975 S.C. 1985; *Sheo Lochan v. State*, 1973 All. W. R. (H.C.) 420; 1973 All. Cri. R. 269; *State v. Bhima*, (1971) 37 Cut. L. T. 765; I. L. R. (1971) Cut. 920; (1971) 2 C.W.R. 101; *State v. Balraj v. P. Gorwora*, 1973 B. L. J. R. 281; *State v. P. Ramappa Maragi*, evidence resulting in indirect benefit to the accused (accused is not a party to make him party to a crime); *State v. Kainilal*, 1975 Rajdhani L. R. 145; 1975 W. L. N. (U.C.) 257; *Om Parkash v. State of Haryana*, (1971) Cri. L. J. 749; *Pritam Singh v. State*, I. L. R. (1970) 20 Raj. 122; *State v. P. Ramappa Maragi*, All. W. R. (Part I) 38; A. I. R. 1971 Raj. 184; (1972) 1 C. W. R. 237;

Munswami v. State of Karnataka, 1975 Mad. L. J. (Cri.) 690 (Kant.); (1975) 2 Cri. L. T. 119 (H.P.); *Kesar Singh v. State of Punjab*, 1974 Cri. L. J. 780; A. I. R. 1974 S. C. 985.

14. *Nihal Singh v. Rao Birendra Singh*, 1970 U. J. (S.C.) 753 at 756, 758; 45 E. L. R. 207; (1970) 3 S. C. C. 239.

15. *I. T. Commissioner v. Baba Autar Singh*, 1971 Tax L. R. 1479 (Delhi).

16. *Shive Lal v. Jatinder Kumar*, 1976 Kash. L. J. 35 at 36; *State v. K. L. R.* 413 (Relying on *Mahunt Singh v. State of Bihar*, 1938 P. C. 59).

17-19. *Abdul Razaq v. State of Mysore*, 1972 Cri. L. J. 406 at 413; 1971 Mad. L. J. (Cr.) 420; (1971) 2 Mys. L. J. 422.

20. *R. C. Thakkar v. Gujarat Housing Board*, A. I. R. 1973 Gujarat 34 at 54.

21. *Sri Krishan v. Kankeshwar University*, A. I. R. 1976 S.C. 376 at 381; (1976) 1 S. C. C. 311.

A witness deposing about the correctness of a figure in a ledger balance sheet of company was not cross examined on that point as to how the figure was arrived at, there would be no justification in discounting such evidence. See the cases cited in the foot-note.²²⁻²⁵

In cases where any general exception is pleaded by an accused person and evidence is adduced which fails to satisfy the Court that even if the accused is entitled to be acquitted, if a reasonable doubt is created whether the accused is or is not entitled to the benefit of the said exception.

An accused person estopped his plea by reference to the evidence appearing from the prosecution evidence itself.²

(c) *Correctness of evidence*—In order to judge the credibility of witnesses, the Court should not confine itself to the way in which the witnesses have deposed or to their denunciation but it should also look into the surrounding circumstances as well as the probabilities, so that it may arrive at a correct idea of the trustworthiness of the witnesses.³

If medical evidence on the person of an accused is proved by medical evidence to have been caused earlier than the time of investigation, the investigation becomes suspect and no reliance can be placed on the evidence of the investigating officer or of the witnesses who support the case of the prosecution.⁴

A witness who was working in his field cannot be believed because at midday he and his wife went home to fetch food when it was already prepared at home.⁵

The evidence of the chowk dar who looked a report before the murder was discovered and before any one had suspected that the accused had a hand in the crime containing all details of the incident is not reliable. There were

22. *U. P. Elec. Supply Co. v. The Workmen*, A.I.R. 1971 S.C. 2521 at 2528; (1971) 2 Lab. L.J. 528; (1972) 3 Civ. A. P. J. 123 (S.C.); 40 F. J. R. 58; 1971 F. I. R. 240; (1971) 3 S. C. 495; 1971 Lab. I. C. 1; (1972) 1 S. C. R. 553; (1973) 1 S. C. J. 661.

23. *Chandran v. A. V. Jhargir Khan*, 1971 M. P. 32; *Chandra Bhan Singh v. State*, 1971 Cri. L. J. 94 (All.); I. L. R. 1972 (2) Cal. 480; *Tillu v. State*, 1971 Raj. L. W. 456; 1971 W. L. N. (Part. I) 74.

24. *Prabhoo v. Emperor*, A. I. R. 1941 All. 402 (F.B.); *Narain v. Emperor*, A. I. R. 1948 Pat. 294; (accused need merely make out a prima facie case).

25. *Dhruvendranath v. State*, A. I. R. 1952 C. 621.

26. *Ramchandra v. Champabai*, A. I. R. 1965 S. C. 354; 66 Bom. L. R. 486; 1965 M. P. L. J. 17; 1965 Mah. L. J. 37; (1965) 2 S. C. J. 557; 1965 S. C. D. 362; *Chandara-*

ji Kothari v. Narayan Bahpa, (1967) 12 Law Rep. 92 (Mysore) (also a case of will as in the Supreme Court case). *Charan Singh v. State of P. & H.*, 1971 Cr. L. J. 1253; 1974 Cri. L. R. (S.C.) 517; 1974 S. C. C. (Cri.) 735; 1974 Cri. App. R. (S.C.) 295; 1974 S. C. C. (Cri.) 125 (1975) 3 S. C. C. 39; A. I. R. 1975 S. C. 246 (Criminal cases cannot be put in a straight jacket); *Brajabandhu Naik v. State*, 1975 Cri. L. J. 1933 (Orissa).

27. *Bhagwan Dayal v. State*, 1968 Cr. L. J. 1028; A. I. R. 1968 All. 250.

28. *Rati Pal v. State*, I.L.R. (1967) 2 All. 360; 1968 A. I. J. 423, 426.

29. *Mulkh Raj Sikka v. Delhi Administration*, 1973 Cri. L. J. 1171 at 1175; 1973 S. C. C. (Cri.) 174; 1974 Cri. App. R. (S.C.) 226; (1975) 3 S. C. C. 125; A. I. R. 1975 S. C. 125; 1975 W. L. N. 125.

fact that some times complaints were made against a senior officer or that he used rather inappropriate language in describing his powers and functions would not show that he is not a very truthful witness particularly when higher authorities did not find substance in the complaints.⁷ Merely because prosecuting witnesses were not examined by the Police and were also not examined as witnesses in the connected criminal case on the complaint filed by the police against the driver, it cannot be held that their evidence cannot be relied on.⁸ Merely because a witness has taken part in the investigation at an earlier stage is no reason to doubt his veracity on the ground that he agreed to participate in subsequent stages of investigation.⁹

But the evidence of an adult witness merely because it has been corroborated by several witnesses of same type,¹⁰ negative evidence to prove the factum of meetings,¹¹ deposition of the Pradhan in a case where Gaon Sabha was one of the plaintiffs a defendant and Pradhan showed ignorance of such fact,¹² the evidence of witness not sent to identify the accused in identification parade of the accused despite his request,¹³ witness though respectable and belonging to honourable profession but giving statement to suit what he believes to be just, rather than what has actually taken place,¹⁴ witness giving different versions at different stages of examination.¹⁵ Even if there is no enmity there are persons who give false evidence, either because they are interested or they are influenced or they are coerced or threatened.¹⁶ Where the material and integral portion of the testimony of the sole witness is unreliable,¹⁷ witness whose testimony suffers from infirmity of suppression, concoction and embellishments of facts in material particulars and it being not possible to disengage truth from falsehood,^{18, 19} if the intrinsic evidence of a witness is unreliable,²⁰ it should not be given weight.

When witness is acquitted by appellate court, his credibility cannot be assailed on the ground of previous conviction or slight mistake. A witness prosecuted under Sections 107 and 110, Cr. P. C., a few years back in 36 cases cannot be read upon.²¹ Evidence of witnesses appearing as prosecution or police witnesses four or five times in police cases pertaining to same police sta-

7. Mohan Das Lalwani v. State of M. P., 1973 Cri. L. J. 1812 at 1816 (S.C.); 1973 S. C. C. (Cri.) 1011; 1974 S. C. Cri. R. 27; (1974) 2 S. C. W. R. 682; (1974) 3 S. C. C. 653; 1974 Mad. L. J. (Cri.) 374; (1974) 1 S. C. J. 688; (1974) 1 S. C. R. 636; A. I. R. 1973 S.C. 2679.
8. Varadamma v. H. Mallappa Gowda, 1974 A. C. J. 3720 (2 Mys.).
9. Onkar v. State of M. P., 1974 Cri. L. J. 1300 at 1307 (S.C.); 1974 M. P. L. J. 601; 1974 Pat. L. J. 277.
10. Muluwa v. State of M. P., 1976 Cri. L. J. 717 at 722 (S.C.); 1975 L. J. (S.C.) 65; 1975 Cri. L.R. (S.C.) 521; 1975 Cri. App. R. (S.C.) 322; (1976) 1 S. C. C. 37; A. I. R. 1976 S.C. 989.
11. Kishan Kaur v. Khurshid Ahmad, (1974) 2 S. C. C. 660; (1975) 1 S. C. R. 61; 1975 2 S. C. J. 178; A. I. R. 1975 S. C. 290.

12. State of U. P. v. Ram Shri, A. I. R. 1976 All. 121 at 130; 1975 All. W. C. 632; 1975 R. D. 339.
13. Jhabhu v. State of U. P., 1972 All. Cri. R. 101 at 102.
14. Smt. Kamla Kuer v. Ratan Lal, A. I. R. 1971 All. 304 at 315.
15. Narayan Pillai v. State, 1971 Cri. L. J. 168 at 169.
16. Kolandivelu, In re, 1974 M.L.W. (Cri.) 147 at 156.
17. In re Bhargaraj and others, 1973 Cri. L. J. 1301 at 1309; (1972) 2 Mad. L. J. 336; 1972 Mad. L. W. (Cri.) 638 (Relying on Khushal Rao v. State, A. I. R. 1958 Cri. L. J. 106 (S.C.)); A. I. R. 1958 S.C. 22.
- 18-19. State of Orissa v. Sukra Singh, 1975 Cri. L. J. 200 at 203; I. L. R. 1974 Cut. 563; 41 Cut. L. T. 119.
20. Kanika Bewa v. State, 1976 Cri. L. J. 418 at 419; 1975 41 Cut. L. T. 798.
- 21-23. Jagdishwar Mandal v. Safia A. I. R. 1972 Pat. 297 at 303.

tion does not carry any weight⁴ but in the following cases⁵ evidence of witness appearing in 5-7 cases as prosecution witness coupled with the fact that there was a judgment in which his evidence was not considered sufficient for conviction, was not held unreliable. Evidence of men of substance appearing as a witness after a lapse of 18 months after the occurrence, even though suffering from lapse of memory in some aspects, would not cast any doubt on their veracity even though it had appeared previously in five or seven cases for the prosecution⁶. It is to be discarded merely on that ground but should be examined carefully⁷. Where names of assailants were not disclosed to the eyewitnesses and there was deep enmity between the parties, the accused were entitled to be acquitted. Open hostility between parties is as much a ground for not believing a prosecution of false case⁸. Where the evidence of confession is not reliable, the mere circumstance that witnesses have spoken about bad blood between the parties cannot be given undue emphasis to convict⁹.

Evidence of prosecution witnesses who offer no explanation as to how accused sustained injuries or who are silent on this point or who have tried to suppress the injuries should be discarded¹⁰. But in the following cases it has been said that there is no such hard and fast rule¹¹. It has also been held that in the facts and circumstances of a case failure of the witnesses to explain the injuries of the accused does not affect their credibility¹². Even if prosecution witnesses have suppressed facts regarding injuries sustained by accused or have given belated explanation about them, their evidence can be believed,¹³

24. *State of Punjab v. Rameshwar Das*, 1973 Cr. L. J. 1113 at 1113 (1973) Punj. L. J. (Cri.) 383; 77 Punj. L. R. 189; (1973) 2 Cri. L. T. 74; 1974 Punj. L. J. (Cri.) 329; *Hira Lal v. State of Haryana*, 1971 Cri. L. J. 290; 1971 U. J. (S.C.) 106. (1970) 3 S. C. C. 933; A. I. R. 1971 S. C. 356.
25. *Amarjit Singh v. State of Punjab*, (1971) 73 Punj. L. R. 774 at 781, 782.
- 1-2. *Singha v. State*, (1972) 74 P. L. R. 176 at 178.
3. *State of Punjab v. Sohan Singh*, 1974 Cr. L. J. 331 at 352 (S.C.); 1974 U. J. (S.C.) 67; 1974 S. C. C. (Cri.) 63; 1974 S. C. W. R. 91; (1974) 3 S. C. C. 585; 1973 Cri. L. R. (S.C.) 790; A. I. R. 1974 3, C. 300.
4. *State v. Hukam Chand*, 1 L. R. 1973, 1 Delh. Cr. L. J. 43.
5. *State v. Daya Sagar*, 1973 Cr. L. T. 291 at 298.
6. *Tek Chand v. State of Haryana*, 1972 Cri. L. J. 51 at 52 (S.C.); 1972 S.C. Cri. R. 157; 1972 U. J. (S.C.) 277; (1972) 1 S.C.J. 483; 1972 Mad. L. J. (Cri.) 268; A.I.R. 1972 S.C. 228; *Bansidhar Dandapat v. State of Orissa*, 1976 Cut. L. J. 1011 (1971) Pat. L. J. 124; *Balbir Singh v. State of Haryana*, 1976 C. L. R. 383 (Punj. and Haryana), (1971) 2 Cut. W. R. 373; (1972)

1. *Cut. L. R. (Cri.)* 595; *Thakur G. Raji Balaji v. State of Gujarat*, (1971) 12 Guj. L. R. 536 (A. I. R. 1968 S. C. 1281 followed); *Guljara Singh v. State*, 1971 Cri. L. J. 498; 1970 W. L. N. (Part I) 265; A. I. R. 1971 Raj. 68.
- *Bhagwan Tana Patel v. State of Maharashtra*, 1974 Cri. L. J. 145 at 148, 149; (1973) 2 S. C. W. R. 554; 1974 Mad. L. J. (Cri.) 258; (1974) 3 S. C. C. 536; A. I. R. 1974 S.C. 21; *Ujagar Singh v. State of H. P.*, 1976 C. L. R. 6 (Him. Pra.).
8. *Gajendra Singh v. State of U. P.*, 1975 Cri. L. J. 1494 at 1498 (S.C.); 1975 S. C. C. (Cri.) 499; 1975 Cri. L. R. (S.C.) 388; A. I. R. 1975 S. C. 1703 relying on *State of Gujarat v. Sai Fatima*, A. I. R. 1975 S.C. 1478; *Ambika Yadav v. State*, 1972 B. L. J. R. 10.
9. *Singh v. State*, 1974 All Cr. R. 215. See *Hazara Singh v. State of Punjab*, A. I. R. 1957 S.C. 469; 1975 W. L. N. (U.C.) 185; (1974) 76 Punj. L. R. 84; 1973 J. & K. L. R. 855; 1973 Kash. L. J. 123; *State of Assam v. Bhabananda Sarma*, 1972 Cri. L. J. 1552; *Bankey Lal v. State of U. P.*, 1971 S. C. D. 400; 1971 Civ. Ap. R. 239 (S.C.); 1971 Cri. L. J. 1540; (1971) 1 S. C. W. R. 514; (1971) 3 S. C. C. 184; A. I. R. 1971 S.C. 2233.

non-explanation of injuries on accused which are mere bruises or abrasions or if the positive evidence of guilt of accused is otherwise cogent and reasonable, failure to explain injuries on accused cannot compel acquittal¹⁰. The effect of non-explanation of injuries on the accused or of some injuries on the deceased is a question of fact which in some cases may undermine the evidence and shake the foundation of the case, while in other it may have little or no adverse effect on the prosecution case. In such cases evidence of the prosecution witnesses has got to be carefully examined¹¹. But in a recent case the Supreme Court has enunciated the law thus:—In a murder case, the non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

- (1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
- (2) That the witnesses who have denied the presence of the injuries on the person of the accused are lying on a very material point and therefore, **their evidence is unreliable**;
- (3) That in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence of the prosecution consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

There may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy that it far outweighs the effect of the omission on the part of prosecution to explain the injuries¹².

Evidence of injured witness is entitled to weight. An injured witness, in any case, would not easily substitute a wrong person for his actual assailant¹³. But his evidence should be scrutinised by applying the test of probability¹⁴. The assessment of the credibility of a witness is affected by the demeanour of the witness on the witness stand particularly when he is confronted with inconsistent facts or contradictory statements said to have been made on earlier

10. *State of Orissa v. Sukra Singh*, 1975 Cri. L. J. 200 at 202; I. L. R. (1974) Cut. 563; 41 Cut. L. T. 119.

11. *Vasudevan v. State*, 1976 Kerala L. T. 354 at 358.

12. *Lakshmi Singh and others v. State of Bihar*, A. I. R. 1976 S. C. 2263 at 2269, 2270; (1976) 4 S. C. C. 394; 1976 S. C. C. (Cri.) 671; 1976 Cri. L. J. 1736; 1976 All.

Cri. C. 372.

13. *Januna Chaudhry v. State of Bihar*, 1974 Cri. L. J. 890 at 894 (S.C.): 1974 S. C. C. R. 92; 1974 S. C. C. (Cri.) 250; (1974) 3 S. C. C. 774; 1974 Cri. App. R. 125; 1974 B. B. C. J. 168; 1974 Cri. L. R. (S. C.) 73; (1974) 2 S. C. R. 609; A. I. R. 1974 S. C. 1822.

14. *Harihar v. State of U. P.*, 1971 Cri. L. J. 1578 at 1580.

occasions.¹⁵⁻¹⁶ In case testimony of such witnesses is found acceptable on its own, there being no inherent infirmities found in it, there would be no need to seek for corroboration from independent quarters.¹⁷ A person could not be a competent witness when he was 10 years old at the time of the transaction for which he has deposed.¹⁸ If the testimony of a witness appears to be reliable it should not be discarded simply because some suggestions were made to him but not established.¹⁹

Regarding credibility of witnesses if there is no suggestion made by the accused to the witnesses during their cross examination that there is enmity between the accused on the one side and the prosecution witnesses on the other, such evidence cannot be disbelieved particularly when it is corroborated and the accused have not taken defence of enmity.²⁰ But it has also been held that there is no rule of law or prudence that if witnesses are neither interested nor inimical the court must accept their evidence without testing it by yardstick of probabilities and without considering other factors and features of the case.²¹ It is submitted that the latter view is correct.

Where all the three courts including the High Court rejected the defence evidence summarily without pausing to consider it in the light of the probabilities of the case on the assumption that defence witnesses are often untrustworthy but it is wrong for that reason to assume that they always lie and that the prosecution witnesses are always trustworthy. The prime infirmity from which the judgment of the High Court suffered consisted in this double assumption. The Court should assess the credibility of defence witnesses in the same manner as it should assess credibility of prosecution witnesses.²²

(1) *Number of witnesses.* (a) *General.* Section 134 of this Act states that no particular number of witnesses shall in any case be required for the proof of any fact. Section 3 lays down that a fact is said to be proved when after considering the matters before it, the court believes it to exist or considers the existence so probable that a prudent man under the circumstances of the particular case would act upon the supposition that it exists. The Mosaic Law in some cases, and the Civilians and Canonists in all, accepted the evidence of more than one witness, the doctrine adopted by most nations in Europe and by the ecclesiastical and some other tribunals.

(2) *The English Rule of Common Law.* Under the rule that one is equal to none, governed strictly at one time the effect of evidence. Testimony usually was counted not *exactly*, the oath in any case being insufficient. In Anglo-Saxon and Norman times, proof was according to the importance of the case made six-handed, twelve-handed, etc., and he who had the greater number of witnesses prevailed. This rule came to be greatly relaxed and in England

15-16. *Harsarup Das v. Paramanabhaih*, 1972 Cri. L. J. 1956 at 959; 1972 Sim. L. J. (H. P.) 1.

17. *Satyanarayana Rao v. State of Mysore*, 1972 Mad. L. J. (Cri.) 321 at 331.

18. *State of Bihar v. Hanuman Koeri*, 1971 Cri. L. J. 187 at 191.

19. *Pukhraj v. State of Rajasthan*, 1970 W. L. N. (Part I) 518 at 531; 1. L. R. (1971) 21 Raj. 52.

20. *In re Thipauna*, 1971 Cri. L. J. 1640 at 1645; 1971 Mad. L. J. (Cri.)

200; (1971) 1 Mys. L. J. 473.

21. *Sadhu Charan Pande v. Mahant Tripathi*, 1974 Cri. L. J. 1120 at 1121; 40 Cut. L. R. 577; 1974 Cut. L. R. (Cri.) 310.

22. *Kaur Sain v. State of Punjab*, 1971 Cri. L. J. 358 at 359; 1974 Cri. App. R. 76; 1974 S. C. Cri. R. 132; (1974) 3 S. C. C. 649; 1974 Cri. L. R. (S. C.) 23; 1974 S. C. C. (Cri.) 179; (1974) 2 S. C. R. 393; A. I. R. 1974 S. C. 329; (1972) 1 Cut. L. R. (Cri.) 450.

now the general rule is the same as enacted by Section 134 of the Indian Evidence Act.

(3) *Rule in India*. There are certain exceptions, where the testimony of single witness is declared by Indian statutes to be insufficient to prove a particular fact, for example, in cases of treason, perjury and personation at elections.

(4) *Rule in criminal cases*. In Criminal cases as pointed out in the decisions of the Supreme Court²³ it is the weight of the evidence and not the number of witnesses which the court ought to consider and on credible witness outweighs the testimony of a number of witnesses of indifferent character, and unless corroboration is insisted upon by statute, court should not insist on corroboration, except in cases, where the nature of the testimony of the single witness itself requires that corroboration should be insisted upon, as a rule of prudence, and this will depend on the circumstances of each case. It is not incumbent, unless there are special circumstances in the individual case, on the prosecution, to produce all the persons who happened to be gathered at the spot, when the offence occurred or was discovered. It is necessary for the prosecution to produce every witness who can speak to a particular fact; where the prosecution produces one witness when there are two witnesses available, it does not follow that the evidence of the person who has been produced should be disbelieved. The only limitation is, witnesses essential to the unfolding of the narrative on which the prosecution rests must be called by the prosecution. This view has been followed in the following cases²⁴. It can, by no means be laid down as a general maxim that the assertions of two witnesses is more convincing to the mind than the assertion of one witness. An accused can be convicted even on the basis of the evidence of a single eyewitness, but such a witness must be a man of woman of worth. Court can rely on the evidence of one witness alone.²⁵

23. *Vadivelu Theevar v. State of Madras*, A. I. R. 1957 S. C. 614; 1957 S. C. J. 527; (1957) 2 M. L. J. (S.C.) 69; 1957 Cri. L. J. 1000; 1956 M. P. C. 711; 1957 All. I. J. 898; 1957 2 All. W. R. (S. C.) 69; 1952 All. W. R. (H. C.) 640; *Shivaji Sahchrao Bohade v. State of Maharashtra*, (1973) 2 S. C. W. R. 426; 1973 S. C. C. (Cri.) 1033; (1973) 2 S. C. C. 793; 1973 Cri. App. R. 410 (S.C.); 1973 Cri. L. R. (S. C.) 602; (1974) 1 S. C. R. 489; 1975 Mad. L. J. (Cri.) 417; (1975) 2 S. C. J. 82; 1973 Cri. L. J. 1783; A. I. R. 1973 S. C. 2622; *Jose v. State of Kerala*, 1973 Cri. L. J. 687; A. I. R. 1973 S. C. 941; *Chuhar Singh v. State of Haryana*, (1975) 2 Cri. L. T. 487; 1975 B. B. C. J. 730; 1975 Cri. L. R. (S. C.) 463; 1975 All. Cri. C. 282; 1975 U. J. (S. C.) 576; 1975 Cri. App. R. (S. C.) 906; 1975 Gur. L. J. 577; 1975 S. C. (Cri.) R. 468; *Mst. Dalbir Kaur v. State of Punjab*, (1977) 1 S. C. T. 111; 1977 M. L. J. (Cri.) 111; A. I. R. 1977 S. C. 472 (1977) 1 S. C. C. 158; 1976 S. C.

C. (Cri) 527. (There is no duty on prosecution to examine witnesses who have been gained over by the accused).

24. *S. V. Vaidya Pillai v. State of Kerala*, I. L. R. (1968) 2 Ker. 303; 1968 Cr. L. J. 1362 (Witnesses mere soda vendors, with convictions for petty offences); *P. B. Gupta v. State*, 1968 Cr. L. J. 1613; A. I. R. 1968 Tripura 57 (62).

25. *Food Inspector v. Cannanore Municipality*, A. I. R. 1964 Ker. 261; *Bardhab Gharan Mohanty v. Madan Sahu*, I. L. R. 1967 Cut. 616; 33 Cut. L. T. 640; *The Chairman, Suri Municipality v. Sisir Kumar Ghose*, 66 C. W. N. 102, 106; *Rama v. State*, 1969 Cr. L. J. 1100; A. I. R. 1969 Goa 116, 118; *Chand Lal Gordhan Patil v. State of Gujarat*, 1970 C. A. R. (S.C.) 352, 355. *In re Thangaraj*, 1972 Mad. L. W. (Cri) 638; (1972) 2 Mad. L. J. 376; 1973 Cri. L. J. 1301; *Ram August Tewari v. Bindeshwari Tiwari*, 191 Pat. L. J. R. 587; I. L. R. 1972 Pat. 172; 1972 B. L. J. 161; A. I. R. 1972 Pat. 142; 1973 Cr. L. R. (Cri) 512.

If a case rests upon the statement of a solitary eye-witness who has changed the version in the Sessions Court from that given in the committing Court and there is nothing further to connect the accused with the offence with which he is charged, there would be good ground for acquitting him but not when there are other clear circumstances in the case to show that the earlier statement is definitely to the prejudice.¹ But ordinarily it is very risky to rely upon a solitary witness who has made conflicting statements. Legally there can be no objection to basing the conviction of an accused on the sole testimony of a witness, provided he is above reproach and entitled to full credit.² There is no rule of law that conviction cannot be based on the sole testimony of a Food Inspector. It is only out of a sense of caution that the courts insist that the testimony of a Food Inspector should be corroborated by some independent witness. This is a necessary caution which has to be borne in mind because the Food Inspector may in a sense be regarded as an interested witness, but this caution is a rule of prudence and not a rule of law. If it were otherwise, it would be possible for any guilty person to escape punishment by resorting to the device of bribing panch witnesses. The conviction of the appellants under Prevention of Food Adulteration Act could not be assailed as infirm on the ground that it rested merely on the evidence of the Food Inspector.³⁻¹

The evidence of a single witness, if believed, would be sufficient to prove a fact. This is because the evidence has to be weighed, not counted.⁴ In prosecution for offence under Prevention of Food Adulteration Act, the public witness admitted his signatures on papers relating to supply of food article to the Food Inspector but turned hostile, it was held that conviction on the solitary evidence of Food Inspector is proper.⁵

Where the victim of a murder was the manager of land in the possession of the accused as lessees and the only eye-witness to the crime was interested in the purchase of the land, his evidence cannot be rejected on the ground of his interest which can have no bearing on the question of his evidence in relation to the murder, especially as the minor discrepancies in his evidence were immaterial and the evidence was substantially corroborated by other evidence on record.⁶

Permission granted to cross-examine a witness by itself is not enough to discredit the witness.⁷

To sum up in the language of English Textbook Harrison Advocacy at Petty Sessions, 1956, page 30, "what is required is quality and not quantity of testimony. If two witnesses give almost identical evidence, it frequently pays to call one of them to the witness-box, choosing the one who gives the greater appearance of truth. If one witness is called and he is believed, the

1. Periyasami v. State of Madras, (1967) 2 S. C. R. 122; (1967) S. C. D. 761; (1967) 2 S. C. J. 227; (1967) 2 Andh. W. R. (S. C.) 41; 1967 Cr. L. J. 975; A. I. R. 1967 S. C. 1027, 1029.
2. In re Muruga Goundan, A. I. R. 1949 Mad. 628.
3. Joginder Singh v. State, 1968 Raj. L. W. 35; 1968 Cr. L. J. 378; A. I. R. 1968 Raj. 63, 68.
- 3-1. Prem Ballab v. State, A. I. R. 1977 S. C. 56 at page 59; 1976 F. A. J. 390; (1977) 1 S. C. C. 173; (1977) Andh. L. J. (S.C.) 11.
4. Rama v. State, 1969 Cr. L. J. 1393; A. I. R. 1969 Goa 116, 118.
5. Mohan Podkar v. State of Bihar, 1974 B. L. J. R. 267 at 269; 1975 F. A. J. 67; 1975 F. A. C. 154.
6. Ramsetty Butchaiah v. State, 1969 Cr. L. J. 542 (Andh. Pra.).
7. Sachdeo Tanti v. Biptin Pasin, 1969 Cr. L. J. 1527; A. I. R. 1969 Pat. 415; Emperor v. Haradhan, A. I. R. 1933 Pat. 517.

other does no more than waste the time (and we may add, patrician time) and gives the cross-examiner another chance by cross-examination to throw doubts on the testimony of both. The object of adduction of evidence is to convert the judge with the best evidence of the truth of the version proposed to be proved and not to furnish material by repetitive evidence for the cross-examiner to work upon and manufacture discrepancies, the favourite pastime in our courts."

There is no absolute bar against relying upon uncorroborated testimony of a single witness if it is otherwise reliable⁸. Unless corroboration is insisted upon by statute, the Court should not insist on corroboration except in cases where the nature of the testimony of a single witness itself requires as a rule of prudence that corroboration should be insisted upon⁹. In cases where there is no dearth of witnesses or where all the witnesses are partly reliable and partly unreliable or are persons of bad character or are accomplices, or persons in the nature of accomplices or are children or victims of sexual assault, insistence on plurality of witnesses implicating an accused for convicting him may or may not result in injustice depending on circumstances of each case. But it would result in injustice if where only one eye-witness is available and he is wholly reliable witness and even then corroboration is insisted upon¹⁰.

Where the evidence of a sole witness suffers under a serious intemper of its being partly reliable and partly unreliable, there should be "corroboration in material particulars by reliable testimony" with a particular note of caution that the Court must look for corroboration more so in cases where several persons have been implicated and the sole witness gives varying and discrepant versions as to the details of the occurrence¹¹. Evidence in such cases should be weighed and not counted¹². Where a witness names a number of persons as having committed an offence and the court gives the benefit of the doubt to one of them, that is no reason for disbelieving him¹³.

(e) *Interested witnesses.* Interested evidence is the sort of evidence the source of which is likely to be tainted¹⁴. Where the Sub-Inspector himself is a participant in the offence of offering a bribe, though it was with the object of working out a bribe, he is a biased case of offering a bribe, he was an interested witness¹⁵. The evidence adduced on behalf of the petitioners consisted of the evidence of 4 alleged eye-witnesses, two of whom were employees of the Moti Mahal Restaurant and the other two were residents of the locality. The evidence of employees could not be assailed on the ground that they were interested.

8. *Ramanuj v. State*, 1970 All. (Cri.) R. 328 at 329.

9. *Ramratan v. State*, A. I. R. 1962 S. C. 424; 1962 (1) Cr. L. J. 473; 1962 M. L. J. (Cr.) 263; 1962 All. W. R. (H. C.) 268; (1962) 1 S. C. J. 371; 1962 All. Cri. Report 166; *Shwaji Sahebrao Bobade v. State of Maharashtra*, A. I. R. 1973 S.C. 2622.

10. *Kunhaman v. State of Kerala*, 1974 Ker. L. T. 328 at 424.

11. *In re Thangaraj*, 1972 Mad. L. W. (Cri.) 638; (1972) 2 Mad. L. J. 376; 1973 Cr. L. J. 1501 at 1505.

12. *In re Repana Naganna*, A. I. R. 1961 A. P. 70, relying on *Piarc v. Emperor*, A. I. R. 1944 F. C. 1, (17).

13. *Ramratan v. State*, supra.

14. See *Jogendra Krishna Ray v. Keertpal Harshi & Co.*, I. L. R. 49 Cal. 345; 35 C. L. J. 176; A. I. R. 1923 Cal. 63; *Rameshwar Kalvan Singh v. State of Rajasthan*, 1952 S. C. R. 377; 1952 S. C. J. 46; (1952) 1 M. L. J. 440; 65 M. L. W. 351; 1952 M. W. N. 150; 1952 Cr. L. J. 517; A. I. R. 1952 S. C. 54, 58; *Binami Properties (Private) Ltd v M. Gulmali Abdul Hossein & Co.*, A. I. R. 1967 Cal. 390, 401.

15. *Hira Lal v. State of Haryana*, 1971 Cr. L. J. 290 at 291; 1971 U. J. (S. C.) 106; (1970) 3 S. C. C. 983; A. I. R. 1971 S. C. 356.

dence has to be scrutinised with great care²⁴. Though the testimony of interested witnesses must be scrutinised with great care, the present trend of decisions is that this appreciation of oral evidence by a court cannot conform to certain set formula or be measured by the yardstick common to all cases.²⁵ Even in the case of interested witnesses it is not desirable that the evidence should be at once discarded. A judge cannot shut out the evidence from consideration simply because it came from interested parties. No evidence is tainted simply because it comes from quarters interested in the case; but it has to be judged on its own merits.¹ It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence.^{1, 2} The fact that there is a longstanding enmity between the family of the accused and the family of the plaintiff alone is not enough to reject the testimony of prosecution unless other circumstances exist which render the prosecution evidence unworthy of credit. It must be remembered that enmity is a double edged weapon; it may be that because of enmity, the crime has been perpetrated, and it may also be that the accused has been falsely implicated. In a case where parties are admittedly on inimical terms, prudence enjoins that the court should scrutinise the evidence with circumspection.^{1, 2} The relationship of the prosecution witnesses to the murdered man is no ground for not acting upon its testimony, if it is otherwise reliable, in the sense that those witnesses are competent witnesses who could be

24. *Ramesh Chandra Reddy v. State of A. P.*, (1971) 1 S. C. W. R. 34; 1 P. & F. Prosec. v. S. Gobala Rao, 1971 Cri. L. J. 536; (1969) 2 Andh. W. R. 304; 1969 Mad. L. J. 902; *Mangulu Malik v. State*, (1971) 37 Cut. L. T. 1264; (1971) 2 Cut. W. R. 527; *Awadh Singh v. State of Bihar*, 1971 Pat. L. J. R. 206; 1971 B. W. R. 605; 1972 Cri. L. J. 446; *State of Bihar v. Hanuman Koeri*, 1971 Cri. L. J. 187; *State v. Ladhu Singh*, 1 L. R. 1110; 1 L. R. 1110; 1 W. I. N. S. Pat. L. J. 1110; *State of Rajasthan*, 1971 Raj. L. W. 249; *State of U. P. v. Iftikhar Khan*, 1973 Cri. App. R. 88; (1973) 1 S. C. C. 512; 1973 S. C. Cri. R. 288; 1973 S. C. D. 225; 1973 Cri. L. R. (S.C.) 196; (1973) 3 S. C. R. 328; 1973 S. C. C. (Cri.) 384; 1973 Cri. L. J. 636; *A. I. R. 1973 S. C. 863*; *Channa Ram v. Indro*, 1974 Chand. L. R. (Cri.) 475; *Municipal Committee, Amritsar v. Behari Lal*, (1974) 1 Cr. L. T. 154; 1974 F. A. C. 432; 1974 Chand. L. R. 470; *Ramji Lal v. Satwant Kaur*, 1974 Punj. L. J. (Cri.) 211; *Sarwan Singh v. State of Punjab*, A. I. R. 1976 S. C. 2304; 1976 Cri. L. J. 1106; 1976 4 S. C. C. 396; *Dargahi v. State of U. P.*, 1973 S. C. C. (Cri.) 928; (1973) 2 S. C. W. R. 357; 1973 S. C. D. 1057; (1974) 3 S. C. C.

902; 1973 Cri. L. J. 1828; 1973 S. C. W. R. 465; 1973 Cri. L. R. (S.C.) 633; *A. I. R. 1973 S. C. 2695*; *Nankha Singh v. State of Bihar*, 1972 Cri. L. J. 1204; (1972) 1 S. C. W. R. 926; 1972 Cri. App. R. (S.C.) 234; 1972 S. C. Cri. R. 400; 1972 S. C. D. 793; 1973 U. J. (S.C.) 14; 1972 3 S. C. C. 590; *A. I. R. 1973 S. C. 491*; *Sarjang Mahto v. State of Bihar*, 1971 Pat. L. J. R. 107; *Prem Datta Gautam v. State of U. P.*, 1973 S. C. C. (Cri.) 912; 1973 U. J. (S.C.) 808; 1973 Cri. App. R. 387 (S.C.); (1974) 3 S. C. C. 286; 1973 Cri. L. R. (S.C.) 600; 1973 Cri. L. J. 1767; *A. I. R. 1973 S. C. 2496*; *Maghar Singh v. The State of Punjab*, 1974 Chand. L. R. (Cri.) 128.

25. *In re P. Ramulu*, A. I. R. 1956 Andhra 247; 1956 Cr. L. J. 1389.
1. *Maidhandas v. Sricharan*, A. I. R. 1956 Assam 170; see also *Mangal Singh v. M. B. State*, A. I. R. 1957 S. C. 199; 1957 Cr. L. J. 325.

11. *Pirara Singh v. State of Punjab*, A. I. R. 1977 S.C. 2274 at page 2275; 1977 Cr. L. J. 1941; (1977) 4 S. C. C. 374.

12. *Khalak Singh v. The State*, A. I. R. 1957 Madh. Pra. 153; 1957 Cr. L. J. 1138; *Tahsildar Singh v. State*, A. I. R. 1958 All. 214; 1958 Cr. L. J. 324.

expected to be near about the place of occurrence and could have seen what happened.²

A witness is normally considered to be independent, unless he or she springs from sources which are likely to be tainted and this usually means that unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely, ordinarily a near relative will be the best person to screen the real culprit and falsely implicate an innocent person. The mere fact of relationship is not enough to throw away the evidence of a witness if it is found to be true.³ Such evidence is reliable if the witness was competent and

2. Gurcharansingh v. State of Punjab, A. I. R. 1956 S. C. 460; Bindeshri v. Rajaram, A. I. R. 1961 All. 198; Tulsiram v. Shyamlal, A. I. R. 1960 M. P. 73; Jam Khoksi Kuki v. State, 1968 Cr. L. J. 64 (2); A. I. R. 1968 Manipur 7, 11; Om Prakash v. State of Delhi, (1971) 2 S. C. Cri. R. 585; 1971 U. J. (S.C.) 367; (1971) 3 S. C. C. 413; 1971 S. C. C. (Cri.) 661; 1974 Cri. L. J. 1383; A. I. R. 1974 S. C. 1983; Balak Ram v. State of U. P., 1974 Cri. L. J. 1486; N. W. Naik v. State of Maharashtra, (1970) 2 S. C. C. 101; 1970 S. C. D. 697; 1970 S. C. Cri. R. 516; (1971) 1 S. C. J. 72; 1971 M. L. J. (Cri.) 43; 1971 All. Cri. R. 156; 1971 All. W. R. (H.C.) 160; 1971 M. L. W. (Cri.) 71 (2); 1971 (1) S. C. R. 133; A. I. R. 1971 S. C. 1656; Hari Krishna Mathur v. Kiram Bahadur Singh, 1972 All L. J. 337; 1972 A. W. R. (H.C.) 129; 1972 Ren. C. J. 773; 1972 Ren. C. R. 448; I. L. R. (1972) 1 All. 412; A. I. R. 1972 All. 369; Mahender Singh v. State, 1972 Cri. L. J. 1590 (Delhi); Kanaran v. State, I. L. R. (1972) 1 Ker. 476; Kuma alias Kumbhakaran v. State, 1975 Cut. L. R. (Cri.) 404 (Orissa); Surjan Singh v. State, 1971 W. L. N. 360 (D.B.); Rain Dhani Pande v. State of M.P., 1973 Jab. L. J. 504; 1973 M. P. W. R. 326; 1973 M. P. L. J. 570; 1973 Cri. L. J. 1880; Kala v. State of Punjab, 1973 (1) Chand L. R. 101 (When the story disclosed by them is probable, satisfactory and genuine); Sarwan Singh v. State of Punjab, A. I. R. 1976 S. C. 2304; (1976) Cr. L. J. 1757; (1976) 4 S. C. C. 369; Gazumuddin Mian v. Abdul Gafoor, 1972 Cri. L. J. 182 (Assam).
3. Dalip Singh v. The State of Punjab, 1954 S. C. R. 145; 1953 S. C. A. 709; 1953 S. C. J. 532; 1953 M. W. N. 642; 1953 Cr. L. J. 1465; A. I. R. 1953 S. C. 364, 366; State v. Bhola Singh, 1969 Cr. L. J. 1002; A. I. R. 1969 Raj. 219,

224; Angroo v. State of U. P., (1971) 2 S. C. Cri. R. 35; 1971 Cri. L. J. 285; (1970) 3 S. C. C. 208; A. I. R. 1971 S. C. 296 (The fact of relationship would rather add to the value of his evidence); Ram Kishun v. State of U. P., 1971 All. Cr. R. 137; State v. Mayadhar Rana, 1971 (1) Cut. L. R. (Cri.) 363; (1972) 38 Cut. L. T. 725 (unless they are otherwise biased); State of U. P. v. Samman Dass, 1972 U. J. (S.C.) 526; (1972) 2 Um. N. P. 262; (1972) 3 S. C. C. 201; 1972 S. C. Cri. R. 511; 1972 S. C. C. (Cri.) 275; (1972) 3 S. C. R. 58; 1973 Mad. L. J. (Cri.) 504; 1973 All L. J. 489; (1973) 2 S. C. J. 345; 1973 M. P. W. R. 452; 1972 Cri. L. J. 487; A. I. R. 1972 S. C. 677 (unless a motive is alleged and proved against them to implicate falsely an innocent person); Varadamma v. H. Malappa Gowda, 1972 A. C. J. 375; Paras Ram v. H. P., 1973 Cut. L. J. 428; Radhu Kandi v. State, 39 Cut. L. T. 337; 1973 Cut. L. R. (Cri.) 101; 1973 Cri. L. J. 1320 (In fact this adds to the value of his evidence); Guli Chand v. State of Rajasthan, 1974 Cri. App. R. 120 (S.C.); 1973 W. I. N. 998; 1974 Cri. L. R. (S.C.) 53; (1974) 3 S. C. C. 698; A. I. R. 1974 S.C. 276; Barati v. State of U. P., 1974 Cut. L. J. 769; 1974 S. C. C. (Cri.) 420; (1974) 4 S. C. C. 258; 1974 Cri. App. R. 178 (S.C.); (1974) 3 S. C. R. 570; 1974 S. C. D. 579; 1974 Cri. L. R. (S.C.) 365; A. I. R. 1974 S. C. 839; State of Punjab v. Hari Singh, 1974 Cri. L. J. 822; A. I. R. 1974 S.C. 1168; State v. Bansidhar Panda, 1974 Cut. L. R. (Cri.) 475 (Place of occurrence and time was such that presence of independent witnesses was least expected); Gajendra Dandseva v. State, (1974) 40 Cut. L. T. 650 (In the absence of any special reason of general unreliability, relationship is often a sure guarantee of truth); Suna v. State, (1974) 40 Cut. L.

tion of the evidence when the question is about the ceremonies having been performed, where relatives only were invited to witness the same¹⁴. A witness in a particular suit cannot be said to be an interested witness because if he is related to one of the contestants, but the witness himself is not going to be benefited by the result of the suit¹⁵. The imputation of interestedness could be made only when it is shown that the witness is inimically disposed towards the accused. If an witness is interested the court will exercise extra caution in evaluating his evidence.¹⁶

Though no enmity or grudge is suggested against a witness, but if this witness was not even examined by the police nor was he cited in the charge sheet, in a grave charge of dacoity with murder, it will not be proper to place reliance on a witness who never appeared during the investigation and was not named in the chargesheet. The accused who are entitled to know his earlier version to the police are fatally deprived of an opportunity of effective cross examination and it will be difficult to give any credence to a statement which was given for the first time in court after about a year of the occurrence. The High Court was not right in accepting the evidence of such witness as lending assurance to the trial judge's verdict with respect to the basis of which, none perhaps the High Court felt bound to convict the accused^{16-A}.

In an election case before the Supreme Court all the witnesses on either side except the Returning Officer were interested in the rival candidates. Though there were a few circumstances against the Returning Officer showing that he was not altogether a completely independent witness, the Supreme Court held that those circumstances would not justify rejection of his evidence *in toto*, only his evidence required to be scrutinised carefully and accepted at least to the extent to which it was supported by circumstantial evidence¹⁷.

Where, in a matrimonial application for judicial separation from his wife, an elderly man of 64 years was a partner in the landlord of the house in which the spouse lived for the last three years, gave evidence and there was nothing on the record to show that he was interested in the marital or paternal welfare of the wife, there was no justification for rejecting his evidence¹⁸.

In a matrimonial case where a husband and a servant existed both at the time of the receipt and of giving evidence in the Sessions Court and there was nothing on the record to show any improper relations. Such a witness can be correctly described as an independent and disinterested witness who was worthy of credence.¹⁹

In the case cited above, none of the four witnesses had a real opportunity to see the deceased and three of them were relations of the deceased and the parties were all living together in the same house, though the wife had a lot of cash of

14. *Sankara Warriar v. Sree Devi*, A. I. R. 1973 Kerala 250 at 252; 1973 Ker. L. R. 228; 1973 Ker. L. J. 332; 1973 Ker. L. T. 963.

15. *Jagdishnu v. Bhagu*, (1973) 1 Cut. W. R. 809; I. L. R. 1973 Cut. 553; A. I. R. 1974 Orissa 120 at 123.

16. *Narangbham v. The Union Territory of Manipur*, 1966 Cr. L. J. 772; A. I. R. 1966 Manipur 8, 10.

16-1. *Ram Lakhan v. State of U. P.*, A. I. R. 1977 S. C. 1936 at 1943;

1977 Cr. L. J. 1566; (1977) 3 S. C. C. 268; 1977 S. C. Cr. R. 357.

17. *Khaje Khanavar v. S. Nijalingappa*, (1969) 3 S. C. R. 524; 1969 S. C. C. 636; (1969) 2 S. C. J. 759; A. I. R. 1969 S. C. 1034, 1042.

18. *N. Sreepadachar v. Vasantha Bai*, A. I. R. 1970 Mys. 232, 233.

19. *Nana Gangaram v. State*, I. L. R. 1969 Bom. 654; 71 Bom. L. R. 375; 1970 Mah. L. J. 172; 1970 Cr. L. J. 621, 625.

In a case of communal riot, the witnesses belonging to one or other community may be partial or interested witnesses but their evidence cannot be discarded. The court, however, has to weigh such evidence carefully with a view to its not taking advantage of the situation in which they are not falsely implicated.¹

When the consistency is established between the deposed and the witnesses, it is not to be held that they were unimpaired or independent witnesses especially when the evidence given by them showed that they were not influenced and the same version or the sequence of events in almost identical words.²

If a witness who gives a false statement in his deposition is not caught from the beginning, it is not correct to rely on a statement which works with the testimony of another witness. If the truth has been lost and is comparably mixed in the evidence of a witness it must be rejected as unreliable.³

When the court has to appreciate evidence given by witnesses who are not independent, it should carefully weigh the evidence and take the following matter into account :

- (i) whether or not there are discrepancies in the evidence;
- (ii) whether or not the evidence stands in contrast with the
- (iii) whether or not the story disclosed by the evidence is probable.

But the court is not to conclude that evidence given by witnesses should be rejected only on the ground that it is evidence of partial or interested witnesses. It is not to be rejected as such unless it is so obviously false that it leads to failure of justice.⁴

The evidence of a witness cannot be held to be unreliable if he has the direct knowledge of the facts in dispute, if he is not a party to the crime or offence, if he is not a person of great character and if there is no reason to believe that he is inclined to favour the accused.⁵

But the court must also consider as to whether or not there is any bias of the testimony.⁶

1. *Mandal Sahu v. State*, 35 Cut. L. T. 35; A. I. R., 1969 Orissa 176, 178.

2. *K. Sankaran v. The State of Kerala*, 1970 S. C. Cr. 225, 228.

3. *Kanbi Nanji Vinji v. State of Gujarat*, 1970 G. A. R. (S.C.) 1, 4.

4. *Masalti v. State of U. P.*, (1964) B.S. C.R. 133; 1964 S. C. D. 980; (1965) 1 S. C. J. 605; A. I. R. (1964) 2 All 694; (1964) 1 Andh. L. T. 19; 1965 M. L. J. (Cr.) 312; (1965) 1 Cr. L. J. 226; A. I. R. 1965 S.C. 202, 209; *Sudhir Chandra Jana v. Amulva Chandra Misra*, 1969 Cr. L. J. 1079, 1080 (Cal.); *Rama Kanta v. State*, (1969) 35 Cut. L. T. 400, 402; 1970 Del. M.L.J. 100.

Union of India, A. I. R. 1969 Delhi 183; *Bakhtawar Singh v. State*, 1975 W. L. N. 1; 1975 Cr. L. J. 968 (Raj.).

5. *Ramchander v. State of Rajasthan*, 1970 Cr. L. J. 653, 656 at 656; 1970 Raj. L. W. 118; *Bhupendra Singh v. State of Punjab*, (1968) 2 S.C.J. 716; (1968) 2 S. C. W. R. 496; 1969 Cr. L. J. 6; A. I. R. 1968 S. C. 1438.

6. *Samson Hyam Kemkar v. State of Maharashtra*, (1974) Cr. L. J. 809 at 811; 1974 S. C. C. (Cr.) 1096; (1974) 1 S. C. W. R. 213; 1974 U. J. (S.C.) 43; (1974) 3 S. C. C. 494; 1973 Cr. L. R. (S.C.) 691; A. I. R. 1974 S. C. 1117.

Wrote both the management, as well as the work men, adduced oral evidence in support of their respective claims; but the Tribunal emphasised that evidence was adduced and had not chosen to place any reliance on such evidence. No case was committed by the Tribunal, when it disregarded that evidence.⁷⁸

Being a close relation, the witness would have no reason for leaving out the most essential of his brother, and implicating respondent falsely particularly since there was not even a suggestion in the court of the Committing Magistrate or the Trial Court that the witness had any enmity or other reason to falsify against the respondent. His statement could not therefore be viewed as a mere concoction because of his relations with the deceased.⁷⁹

The question for consideration is to whether evidence given by a witness who is interested or not the Court has to see whether the witness is an interested witness and to decide whether the story deposed by him is probable and whether it has been shaken in cross-examination. Partisan or biased witness is no ground for discarding sworn testimony. Interested evidence is not necessarily false evidence. It should be subjected to scrutiny and accepted with caution.⁸⁰ Once the evidence of interested witnesses is considered with care and caution the mere fact that they are interested witnesses is no ground for discarding that evidence.⁸¹ Courts have to be very careful in weighing their evidence.⁸² Evidence of witnesses supported by circumstantial evidence must be justifiably rejected on the mere ground that the witnesses who gave it are interested witnesses.⁸³ Where it is difficult to rely upon the oral testimony of either side, as where they are interested persons, their testimony may not carry much weight.⁸⁴ The evidence of partisan witnesses when that is not consistent with broad probabilities of case is unreliable.⁸⁵ When witness bore false witness against accused and no independent witness was joined except that of Sub-Inspector, conviction under Section 27 of Arms Act was set aside.⁸⁶ But in the circumstances of a particular case the court may rely on the oral testimony even of interested witnesses. Thus in a rustic village, people who are really scared may be reluctant to come forward as witnesses to support one or the other side lest they should invite trouble for themselves.

78. *West Jamuria Coal Co. Ltd. v. Workmen*, 1972 Lab. L. C. 1151 at 1154; (1972) 1 L. W. 13; (1971) 1 Lab. L. J. 549.
79. *State of Punjab v. Ramji Das*, AIR 1977 S. C. 108 at page 1087; 1977 Cri. L. J. 705; (1977) 2 S. C. W. R. 373.
80. *Ishwari Prasad v. Mohammad Iqbal*, A. I. R. 1963 S. C. 1728; 1963 B. L. J. R. 226.
81. *In re Vuyvuri Ratna Reddy, A. I. R. 1963 A. P. 252*; (1962) 2 Andh L. T. 368; *Ramdro Ram v. Akalu*, AIR 1966 P. L. J. R. 362, 363 (prosecution witnesses from inimical sources); *Kishan v. State of Rajasthan*, 1972 W. L. N. 231; 1972 Raj. L. W. 545; 1972 Cri. L. J. 125. Witnesses, fearing the chances of over-implicating their adversaries were not called out and court not accepting part of the prosecution case, even then they cannot be dubbed as liars and may

be believed with respect to other parts of the case).

82. *D. C. Choudhary v. State of Haryana*, 1970 S. C. D. 123, 126; 1970 Cr. A. R. 62.
83. *State of U. P. v. Ibrahim Khan*, 1973 Cr. L. J. 636 at 641; 1973 Cr. App. A. 88; (1973) 1 S. C. C. 512; 1973 S. C. Cr. R. 288; 1973 S. C. D. 325; 1973 Cr. L. R. (S.C.) 196; (1973) 3 S. C. R. 328; 1973 S. C. C. (Cr.) 584, A. I. R. 1973 S. C. 865.
84. *Ghurphekan v. State of U. P.*, 1972 Cr. L. J. 46 at 751 A. I. R. 1972 S. C. 1172.
85. *Kashinathsa v. Narsingna*, (1961) 2 S. C. A. 542; A. I. R. 1961 S. C. 1077; 63 Bom. L. R. 659.
86. *Jamuna Ram v. State of U. P.*, 1973 Cr. L. T. 237 at 242.
87. *Mekhen Singh v. State of Punjab*, 1975 Chand L. R. (Cr.) 503 at 505; (1975) Cr. L. J. 132.

Trap witnesses being partisan in nature do require corroboration in a general way. If such material corroboration is not required as in the case of evidence of accomplices. If trap witnesses are accomplices, their evidence would require corroboration as that of an accomplice, but if they are not accomplices but are interested in the success of the trap only, their evidence must be treated as that of interested or partisan witnesses and should be tested in the same way as that of any other interested witness by all possible checks and in a proper case it may not be acted upon without independent corroboration.¹ When there was no independent search witness and no other evidence from which corroboration could be found the conviction was set aside.² In order to corroborate trap witnesses independent and trustworthy witnesses are necessary.³ If a witness is otherwise reliable and independent, his association in pre-arranged raid does not make him an accomplice or partisan and conviction can be based on his evidence.⁴ A junior officer of the status of Sub-Inspector of Police cannot do this, this fact itself makes the evidence of such officer and the witnesses procured by him unreliable.⁵ A witness coming from a place 18 miles away was a member of raiding party. Want of satisfactory reason of his presence at odd hour of 4.00 a.m. at the place of raid, and conflict in evidence as to his presence was secured by police would raise grave doubt about his presence.⁷

In weighing partisan or interested evidence the court has to be very careful and should not mechanically reject such evidence. The court should take into account the following matters, viz., whether or not (a) there are any discrepancies in the evidence; (b) evidence strikes the court as genuine; and (c) the story disclosed by the prosecution is probable.⁸

(c) *Faction Cases*—Independent evidence in faction cases is impossible. In cases arising out of faction, as a rule, persons unconnected with either faction do not care or dare to come forward as witnesses, lest they should be come upon and incur the displeasure of the other party. In such cases, the witnesses may rope in the innocent along with the guilty, not so much out of personal animosity but in the hope of furthering the interests of the faction. To guard against the danger of condemning innocent persons on factional testimony the Court should scrutinise the oral evidence with more

1. *Khembu Ram v. State*, 1972 Cri. L. J. 381 at 385; 1971 Sim. L. J. 289 (H.P.); *Satyanarayana Rao v. State* (H.P.), 1971 S. C. 1111 (Cr.) 321 (Mys.).

2. *Ch. P. Singh v. State*, 1972 S. C. 1044 at 1045.

3. *Prabhu Singh v. State*, 1972 P. L. J. 1293; 1972 S. C. 1044 at 1045. *Ad. R.* 344 (S.C.) 857; 1972 S. C. C. (Cri.) 100.

4. *Prabhu Singh v. State*, 1972 P. L. J. 1293; 1972 S. C. 1044 at 1045. *Ad. R.* 344 (S.C.) 857; 1972 S. C. C. (Cri.) 100.

5. *Maha Singh v. State*, A. I. R. 1976 S. C. 449 at 455; (1976) S. C. C.

(Cri.) 135; (1976) 1 S. C. C. 644; 1976 Cri. L. J. 346; 1976 Cri. A. R. 94.

6. *Prabhu Singh v. State*, A. I. R. 1971 S. C. 356 at 357; 1971 Cr. L. J. 1044 at 1045.

7. *Prabhu Singh v. State*, 1972 P. L. J. 1293; 1972 S. C. 1044 at 1045. *Ad. R.* 344 (S.C.) 857; 1972 S. C. C. (Cri.) 100.

8. *Prabhu Singh v. State*, 1972 P. L. J. 1293; 1972 S. C. 1044 at 1045. *Ad. R.* 344 (S.C.) 857; 1972 S. C. C. (Cri.) 100.

9. *Prabhu Singh v. State*, 1972 P. L. J. 1293; 1972 S. C. 1044 at 1045. *Ad. R.* 344 (S.C.) 857; 1972 S. C. C. (Cri.) 100.

that given by a witness is not a sufficient ground for rejecting his evidence. The implications should be taken into account.

9. *Cr. L. J.* 399: (1967) 1 M. L. J. (Cr.) 311. No witness's evidence can be rejected merely because he pursues, or stands in, a particular interest. It will only be weighed on its own merits and compared with the rest of the other admissible evidence of the case.¹⁰ It is only when there are inherent improbabilities in the evidence given by the witness, the court of law is justified in coming to the conclusion that he is unreliable. So the testimony of a witness is not liable to be rejected merely because he belongs to the particular party.¹¹ It is not worthy¹²

A witness cannot be rejected on the ground that he belongs to a particular party.¹³ Evidence of a witness cannot be rejected merely because he belongs to a particular party.¹⁴ For evidence of even witnesses because some of them are day labourers and cannot be relied upon for not relying upon their evidence.¹⁵ A witness who is interested in the case, by attending pamphlets in an election, is not a party to the case, and is not interested in supporting a particular candidate.¹⁶ A witness who is a successful candidate after election is not a party to the case.¹⁷

Merely because persons may use money to get some thing, institution Varkas, they do not become parties to the case.

If the statement of a witness is not reliable, it is no ground for rejecting his evidence. It is no reason for rejecting his evidence. A witness who is generally have vague ideas of facts, and is not a party to the case, is not a party to the case, and is not a party to the case.

Want of interest in the case is not a ground for rejecting his evidence on his credibility and reliance.²⁰

9. *In re Poreddi Venkata Reddy*, A. I. R. 1961 A. P. 23; (1961) 1 Cr. L. J. 42; *Ranbir v. State of Punjab*, (1973) 2 S. C. W. R. 25; 1973 Cr. L. J. 1120; 1973 S. C. C. (Cri.) 858; 1973 Cur. L. J. 721; 1973 S. C. D. 723; 1973 Cr. L. R. (S.C.) 488; 1973 B. B. C. J. 505; (1974) 1 S. C. R. 102; A. I. R. 1973 S. C. 1409; *Baldeo Singh v. State of Bihar*, (1972) 1 S. C. W. R. 179; 1972 Cr. A. P. R. 86 (S.C.); 1972 S. C. D. 117; 1972 S. C. Cr. R. 117; (1972) 5 C.J. 339; 1972 Pat. L. J. R. 240; 1972 Cr. L. J. 262; A. I. R. 1972 S. C. 464; See also note 9 (u) post.
- 10-11. See *Mulpura Venkataramayya v. Kesavanarayana*, A. I. R. 1963 A. P. 447; (1963) 1 Andh. W. R. 251.
12. *State of Mysore v. Koti*, A. I. R. 1966 S. C. 100; *State of Saurashtra*, A. I. R. 1966 S. C. 217; *Tarsem Lal v. State*, A. I. R. 1965 Punj. 27.
13. *Rebekka Bibi v. Japamony*, 1967 Ker. L. T. 1122, 1124; 1967 Ker. L. J. 399; (1967) 1 M. L. J. (Cr.) 311.
14. *Kiran Bahadur Singh v. Hari Krishna Mathur*, A. I. R. 1972 All. 369 at 371; 1972 A. W. R. (H.C.) 129; 1972 A. L. J. 337; 1972 Ren. C. R. 448; 1972 Ren. C. J. 773; 1 L. R. (1972) 1 All. 412.
15. *State of Assam v. Bhabanand Sarma*, 1972 Cr. L. J. 1552 at 1561 (Assam).
16. *Babu Rao Bagaji Karemure v. Gobind*, A. I. R. 1974 S. C. 405 at 416; (1974) 3 S. C. C. 719; (1974) 2 S. C. R. 429.
17. *Dinkar Bandhu Deshmukh v. State*, 72 Bom. L. R. 405; 1970 Mah. L. J. 634; A. I. R. 1970 Bom. 438, 444.
18. *Mahendra Das v. State of Bihar*, 1969 B. L. J. R. 897, 899; 1969 Pat. L. J. R. 482.
19. *Orissa* 120 at 123; (1973) 1 Cut. W. R. 809; 1 L. R. 1973 Cut. 553.
20. *B. B. Mishra v. State of Maharashtra*, 1965 Mah. L. J. 565; 1967 Cr. L. J. 21; A. I. R. 1967 Bom. 1, 4.

[illegible]

5. State of Tripura v. Shri Ashu Ranjan, 1970 Cr. L. J. 69; A. I. R. 1970 Tripura 1; Ram Sarup Charan Singh v. The State, A. I. R. 1967 Delhi 26; Kesho Prasad v. State, A. I. R. 1967 Delhi 51; Ganpat Singh v. The State, A. I. R. 1967 Delhi 171.
6. Chandra Bhan Ram Chand v. State, 1971 Cri. L. J. 197; Singha v. State, (1972) 74 P. L. R. 176; Inder Lal v. The State, 1973 (1) Chand L. R. (Cri.) 93; State of Punjab v. Rameshwar Das, 1974 Punj. L. J. (Cri.) 383; 77 Punj. L. R. 189; (1975) 2 Cri. L. T. 79; 1975 Cri. L. J. 1.
7. State v. Sant Prakash, 1976 Cri. L. J. 274 at 277; 1975 All. W. C. 444; 1976 A. L. J. 100; 1976 All. Cri. Case 326 (F. B.).
8. State of Himachal Pradesh v. Booti Chand, 1971 P. L. R. 120; Cr. L. J. 747; Babu Lal v. Hargovind Das, A. I. R. 1971 S. C. 1277.
9. Gadhari Lal Gupta v. D. N. Mehta, Asstt. Collector of Customs, 1971 Cri. L. J. 1 at 4, 5; (1970) 2 S. C. C. 530; (1971) 2 S. C. Cri. R. 67; (1971) 2 S. C. J. 12; (1971) M. L. J. 100; 1971 Cr. App. R. (S. C.) 390; A. I. R. 1971 S. C. 28.
10. Chander Bhan Ram Chand v. State, 1971 Cri. L. J. 197 at 198-200.
11. K. Kunhaman v. State of Kerala, 1974 Ker. L. T. 328 at 359, 360.
12. Jaswant Singh v. State of Haryana, 78 Punj. L. R. 288 at 291; 1976 Chand L. R. (Cri.) 116; (1976) 3 Cri. L. T. 171; 1975 Cur. L. J.
13. Singh v. State of Punjab, Chand L. R. (Cri.) 460 at 461.

life, viz., as boys and girls, teenagers and adults and old men and women. There can be no dispute that, by reason of the marked increase in the field of activity open to women and the great strides in all phases of modern life, the same type of education being given to both men and women in this country, the significant differences between the sexes are disappearing. But, still there are marked differences owing to physiological structural differences and different social traditions for men and women. This study can be neglected only at the peril of the examiner of witnesses in the box and the appraiser of their evidence on the bench. Those interested may study with profit Huns Gross Criminal Investigation and McCarty's Psychology for the Lawyer. There are some feminine characteristics which may carefully be borne in mind. On account of physiological structural differences, there are resultant differences in the social attitudes and positions of the sexes. Female intuition is well known. This is probably the result of their emotionally keener perceptive sense. On the other hand, a sort of mental exaggerated suggestibility is more common in women than in men and their emotional stirrings are not so firmly controlled as in men. The time estimates of women are far more variable than those of men and on the whole markedly less accurate. The women overestimate and are notably inaccurate in comparison with men. Insistence on convention and the consequent covering of all their feelings, emotions and outpouring on that footing is much more marked in women than in men. There are some of the salient differences. Yet in evaluating evidence, as has been pointed out by the Supreme Court, the fact, that the witnesses are women and that a number of lives of the accused depend upon their testimony is not a valid reason for saying that corroboration is necessary to act on their evidence.¹⁷ When there is no substantial discrepancies in the evidence of rural ladies it cannot be discarded.¹⁸

(h) *Chance witnesses*. A chance witness is a witness who could not normally be where and when he professes to have been. From that point of view, one may be a chance witness even at one's own house, if for instance, one should at that hour be at one's office, he or even the *nomad* in the desolation of Sahara, may not be a chance witness, if his being there and then was on his itinerary.¹⁹⁻²¹ There is no magic in the words 'chance witness'. If presence of a witness is assured and the witness is present at the time of occurrence, he cannot be termed as chance witness. If by coincidence or chance a person happens to be at the place of occurrence, at the time it is taking place, he is called a chance witness.²² Evidence of witnesses who had given reasons for their presence at the spot cannot be said to be that of chance witnesses and cannot be discarded on that ground.²⁴ Persons present at the bus stand to catch a bus when the accused came there and was apprehended and opium was recovered from accused, cannot be called as chance witnesses and their evidence

17. Dalip Singh v. State of Punjab, A. I. R. 1953 S. C. 364; 1954 S. C. R. 145; 1953 Cr. L. J. 1465; 1953 M. W. N. 642.

18. Surendra Nath v. State of Orissa (1975) 41 Cut. L. T. 1251 at 1256; 1975 Cut. L. R. (Cri.) 421.

19-21. Sunder v. The State, A. I. R. 1957 All 809; 1957 Cr. L. J. 1378.

22. Chankin Lal v. State, 1976 Kash. L. J. 252; 1976 Cr. L. J. 1310.

at 1915; State of Bihar v. Ram Balak Singh, 1966 Cr. App. R. 409 (S. C.).

23. Bahal Singh v. State of Haryana, 1976 S. C. C. 734; 1976 Cr. L. J. 1568 at 1572; (1976) S. C. C. (Cr.) 461; A. I. R. 1976 S. C. 2032.

24. State of Bihar v. Ram Balak Singh, 1966 Cr. App. R. 409 (S. C.).

cannot be discredited on that ground²⁵. A witness returning from fields at the time of occurrence was attracted to the house of accused by hearing hue and cry is not a chance witness unworthy of credit, when he is not interested in prosecution or against accused¹. Chance witnesses, close relations of the deceased (victim of murder) but estranged from the accused, reaching the spot at the crucial moment of occurrence for which there was no corroboration, cannot be believed²⁻³. If such a person happens to be a relative or friend of the victim or inimically disposed towards the accused then his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable but does require cautions and close scrutiny.⁴

But a chance witness is not necessarily a false witness, though it is proverbially rash to rely upon his evidence.⁵ In India, a chance witness plays a considerable part on account of certain settled Police notions regarding proof. "To ease himself" is an easy pretext, used by Indian witnesses in criminal cases, to explain their otherwise unacceptable presence in most unexpected places but equally unexpected but convenient moments and to account for their chance meeting of important witnesses and for their fortuitous opportunities for seeing things about which they would otherwise know nothing. (Sir Cecil Wash, Crimes in India, page 120). Sometimes truthful eye-witnesses are made to appear as chance witnesses. "One point of criticism which one is frequently compelled to regard as an almost fatal defect in the evidence of eye-witness in India, whose testimony demands close scrutiny, is when he becomes an eye-witness because he rises in the night to make water, or the dog barks". But the witnesses to a brutal murder at night in India are almost invariably taken in this way. It has grown into a sort of custom of the country. Police and honest witnesses say that they were aroused by the noise of the disturbance, but this is rare. It is difficult to resist the conclusion that the little touch due to the act of Nature which appears common and even in every district in Uttar Pradesh comes from the Police, who have an undoubted settled conviction that murderers working by stealth at night will take care not to wake the neighbours. But an eye-witness who is peacefully sleeping, must wake somehow and this demand of Nature synchronises with the murderous act with the remoteness of an apocryphal. However, it remains that

25. State of Punjab v. Rameshwar Das, 1974 Punj. L. J. (Cri.) 383; 77 Punj. L. R. 189; (1975) 2 Cri. L. T. 79; 1975 Cr. L. J. 1630 at 1635.

1. Fateh v. State of Punjab, (1972) 74 Punj. L. R. 387 at 393.

2-3. See, for example, Exmdr v. 1971 U. J. (S. C.) 613, 614.

4. Read S. 3, N. 9, cl. (h) and 1976 Cr. L. J. 1568 at 1572; Md. v. State of Punjab, 1972 W. L. N. 790 (Raj.).

5. Ismail Ahmad v. Momin, 93 I. C. 209; A. I. R. 1941 P. C. 11; Wash, op. cit. supra, A. I. R. 1901 J. & K. 42; see also Jagabandu v. State of Punjab, 1974 Cr. L. J. 1310.

Cut. L. T. 786; 1968 Cr. L. J. 205; A. I. R. 1968 Orissa 26, 29 and Himirita Loknath v. State, I. L. R. 1962 Cut. 661; Sri Ram v. State, 1973 W. L. N. 401; 1973 Raj. L. W. 495; 1973 Cr. L. J. 1443; Subrata Kumar v. Dipita Bhowmik, 61 Cr. L. J. 944; A. I. R. 1974 Cal. 61; Guli Chand v. State of Karnataka, 1974 Cr. L. J. 331; 1974 U. J. (S. C.) 121; 1974 Cr. App. P. 179 (S.C.); 1974 S. C. C. (Cri.) 222; 1973 W. L. N. 998; (1974) 3 S. C. C. 698; 1974 Cr. L. R. (S.C.) 53; A. I. R. 1973 S. C. 20; 1974 Cr. L. J. 1310; State, 1976 Kash. L. J. 253; 1976 Cr. L. J. 1310.

though the chance witness is not necessarily a false witness, it is unsafe to rely on such evidence.⁶

Although the evidence of a chance witness is otherwise available, it cannot be withheld merely on the theory that he is a chance witness.⁷ But such evidence would necessarily require corroboration by independent evidence.⁸

In a case on charge under Section 323, I. P. C., alleging assault on some Harijans, the evidence of the seven prosecution witnesses who were all Harijans, should not be mechanically rejected as partisan because six of them were victims and the seventh a chance witness; all that is required is caution in dealing with partisan evidence.⁹⁻¹⁰

(d) *Hostile witness.* It is the duty of the Court in cases where a witness has been found to have given unreliable evidence in regard to certain particulars, to accept his rest of his evidence with care and caution. If the remaining evidence is trustworthy and the substratum of the prosecution case remains intact, then the Court should uphold the prosecution case to the extent it is considered safe and trustworthy.¹¹ The evidence of a hostile witness remains admissible in the trial and there is no legal bar to base a conviction upon the testimony of hostile witness if it is corroborated by other reliable evidence.¹²⁻¹³

(e) *Coincidence.* Coincidences have to be carefully scrutinised because they may either be very useful or misleading.¹⁴ Coincidence in the testimony of independent witnesses affords a good ground for the credibility of a witness. Such coincidences, when numerous and presenting themselves as unobtrusive or incidental, necessarily produce a prodigious effect in arousing belief because if the witnesses had concerted a plot, coincidences would almost inevitably have been converted by cross-examination to contradictions; while the supposition of collusion or that some deception has been practised on the witnesses be excluded, then coincidences and harmony in the evidence of several persons can be explained upon no other hypothesis than that their individual statements are true."

(f) *Eyewitnesses.* The appreciation of the evidence of eyewitnesses depends upon:

(i) the accuracy of the witness's original observation of the events which he described; and

(ii) correctness and extent of what he remembered and his veracity.

6. *Ismail Ahmad v. Momin*, A. I. R. 1941 P. C. 11 at p. 13.

7. *Kishore v. State*, 1967 Cr. L. J. 1105 A. I. R. 1967 Ompa 181, 185, 12 J. L. 129; *State of Bihar v. Ram Balak Singh*, 1976 Cr. App. R. 409 (S. C.); *State of Punjab v. Purneshwar Dass*, 1964 Punj. L. J. (Cr.) 383, *Fatch v. State of Punjab*, (1972) 74 Punj. L. R. 367.

8. *Man Govinda Mandal v. Gangadhar Gaur*, 71 C. W. N. 781, 783; *Sambhu Nath v. Purna Chandra Jena*, 10 O. J. D. 163.

9. *State v. State*, (1974) 40 Cut. L. T. 159 at 164; *Babu Lal v. State of*

Rajasthan, 1976 W. L. N. 338; *Chandrika Pd. v. State*, 1975 Rajdhani L. R. 551.

10. *State of Bihar v. The State of Haryana*, 1976 Cr. L. J. 203 at 205; 1976 C. R. L. R. (S. C.) 1, 1976 L. J. (S. C.) 73, 1976 S. C. C. C. 171, 173; *Cr. App. R.* (S. C.) 71; 1976 S. C. C. Cri. R. 93; (1976) 2 S. C. R. 921; 1976 Mad. L. J. 390, 399 A.I.R. 1976 390, 399; *State of Bihar v. and another v. State*, 1976 Cr. L. J. 1629 (J. & K); 1976 Kash. L. J. 179.

11. *Text on Evidence*, s. 59.

Inaccuracy in the hour of lodging a first information report will not, on the facts of a case, be enough to discredit the evidence of all the eye-witnesses.¹⁵

The fact that eye-witnesses are relations among themselves has no relevance unless previous enmity between the accused and those witnesses is established.¹⁶

There can be no doubt that the appreciation of oral evidence by courts will be greatly facilitated by a sound knowledge of Psychology. It is no exaggeration to state that a lucid and comprehensive text book like McCarty's Psychology for the Lawyer (New York [1929]) is an essential *vade mecum* for the appreciation of oral evidence.¹⁷

In assessing the value of the evidence of an eye-witness, the principal considerations are—

- (1) Whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them; and
- (2) whether there is anything inherently improbable or unreliable in their evidence.

It is to be remembered that witnesses are expected to depose what they have seen and heard and not to draw inferences from what they see. The privilege of drawing inferences is given to courts not to witnesses.¹⁸ It is generally not easy to find witnesses on whose testimony implicit reliance can be placed. It is always desirable to test the evidence of witnesses on the anvil of objective circumstances in the case. The High Court by placing implicit reliance on two eye-witnesses denied to itself the benefit of a judicial consideration of the infirmities in their evidence.¹⁹ If an eye-witness is closely associated with complainant and his statement is inherently improbable and also incongruous with other evidence of the prosecution, it should be rejected.²⁰ The testimony of a witness unshaken by long cross-examination should not be rejected outright simply because the evidence of other witnesses has not been accepted due to lack of corroboration from medical evidence.²¹⁻²³

Sole eye-witness inimical to accused and not disclosing names of assailants for about 20 hours to anyone and there being feeble light at the place of occur-

15. *State of U. P. v. Siya Ram*, 1970 U. J. (S.C.) 42, 48.

16. *Bhawan Swarup v. State of U. P.*, 1970 C. A. R. (S.C.) 387, 390.

17. See Chapter VIII of McCarty's Psychology for the Lawyer, 1929 (New York).

18. *Badrin v. State of Orissa*, 1974 Cri. L. J. 11 at 12, 1974 L. J. S. C. 82, 1974 S. C. C. (Cri.) 104; 1974 S. C. C. Cri. R. 15; 1974 J. S. C. C. 562; 1974 B. B. C. J. 282; 1974 Cr. L. R. (S.C.) 9; A. I. R. 1974 S. C. 775.

19. *Hallu v. State of M. P.*, 1974 Cri. L. J. 1380 at 1388, 1974 Panj. L. J. (Cri.) 96; 1974 B. B. C. J. 398; 1975 All. Cri. C. 62; (1974)

1 Cri. L. T. 101; 1974 S. C. C. (Cri.) 462; (1974) 4 S. C. C. 300; 1974 Cri. App. R. 172 (S.C.) 1974 S. C. D. 614; 1974 M. P. L. J. 685; 1974 Cri. L. R. (S.C.) 697; 1974 S. C. Cri. R. 246; 1974 Mah. L. J. 694; (1974) 3 S. C. R. 662; 1974 Serv. L. C. 628; 1975 Chand. L. R. (Cri.) 27; A. I. R. 1974 S. G. 1936.

20. *Rathi Day v. State*, 1974 Cut. L. R. (Cri.) 261; 1975 Cri. L. J. 1393 at 1394, 1395.

21-23. *Gulab Singh v. State of Rajasthan*, 1975 Cri. L. J. 695 at 697; 1974 Raj. L. W. 130; 1974 W. L. N. 168 [1974 Cri. L. J. 145 S. C. followed].

rence, is not reliable.²⁴ If in a murder charge an eye-witness did not come forward and tell the District Officer what he had long after stated in Court; his omission to do so renders his testimony as an attestation.²⁵ If evidence of eye-witnesses is in accord with medical evidence and is also corroborated by recovery of weapons of attack in pursuance of the disclosure statement of the accused there is no reason to disbelieve the eye-witnesses.²⁶

Although in cases where the plea of the accused is a mere denial, the evidence of the prosecution is to be examined on its own merits, where, however, the accused raises a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in favour of it also have to be taken into account while assessing the prosecution evidence.²⁷⁻²⁸

If in the evidence of eye-witnesses there are no factual or material contradictions, it is not unworthy of credence.²⁹

The fact that no eye-witness is mentioned in the First Information Report is a circumstance against the prosecution, particularly when the complainant in the case was aware or could be reasonably aware, of his presence.³⁰ Non-mention of the names of certain eye-witnesses of the occurrence in the Dying Declaration does not diminish the value of the testimony of the eye-witnesses. On the trifling contradictions their evidence could not be rejected.³¹ In a murder case name of the sole eye-witness was not mentioned in the First Information Report or in a request report. The witness admitted that he was not on talking term with accused. Evidence of such witness was not considered trustworthy.³² A witness whose name is mentioned in First Information Report lodged within 2 days of the occurrence, it was not a case of party faction and the witness had no animus against the accused; such evidence should not be disbelieved merely because the witness was examined by police after two days.³³ Facts deposed by witness not mentioned in the First Information Report and in the statements recorded by police under Section 161 Cr. P. C. is a serious omission which affects his credibility.³⁴ It is a matter of fact the witnesses had been examined only after a very long time by the police that certainly is a

24. *Babuli v. State of Orissa*, 1974 Cri. L. J. 510 at 512; A. I. R. 1974 S. C. 775.

25. *R. Kondiah v. State of A. P.*, 1975 Cri. L. J. 262 at 267; (1975) 2 S. C. J. 499; 1976 Mad. L. J. (Cri.) 21; (1976) 1 Andh. W. R. (S.C.) 1; 1975 Cri. App. R. (S.C.) 24; 1975 Cri. L. R. (S.C.) 54; 1975 S. C. Cri. R. 50; (1975) 3 S. C. C. 752; 1975 S. C. C. 199; A. I. R. 1975 S. C. 216; *Kumar alias Kumbhakaran v. State of Orissa* (Cri. L. R. 454) (not disclosing the occurrence to police or anyone else, though police examined the witnesses the following day).

26. *Asa Singh v. State of Punjab*, 1973 Cri. L. J. 623 at 626; 1972 Cri. App. R. 108 (S.C.); 1972 S. C. Cri. R. 204; 1972 U. J. (S.C.) 679; (1972) 3 S. C. C. 746; 1972

S. C. C. (Cri.) 814; A. I. R. 1973 S. C. 512.

2-4. *State of Mysore v. Raju*, A. I. R. 1961 Mys. 74; (1961) 1 Cri. L. J. 403.

5. *Triloki Nath v. State of U. P.*, 1966 A. W. R. (H.C.) 352, 354.

6. *Rama v. State*, 1969 Cr. L. J. 1393; A. I. R. 1969 Goa 116, 120.

6-1. *Surat Singh v. State of Punjab*, A. I. R. 1977 S. C. 705 at page 707; 1977 Cal. L. J. 199; 1977 U. J. R. (S.C.) 53; 1977 U. J. (S.C.) 53. See *V. J. S. Gupta v. A. I. R. 1971 Goa 3*; 1971 Cri. L. J. 36.

8-9. *Balkrishna v. State of Rajasthan*, 1976 Cri. L. J. 82 at 82; 1975 Raj. L. W. 435; 1975 W. L. N. 812.

10. *State of Rajasthan v. Badri*, 1975 Cri. L. J. 143 at 145; 1974 W. L. N. 736; 1974 Raj. L. W. 477.

circumstance that will have to be taken into account to consider whether the evidence given by them before the court can be relied on.¹¹

When material evidence is in conflict with the oral testimony of eye-witnesses, it gets the better of the evidence of eye-witnesses and discredits the eye-witnesses.¹² In such a case the evidence of witnesses, who claim to be eye-witnesses, needs, as a rule of prudence, corroboration from circumstantial evidence.¹³

Though the eye-witness is a relation of the deceased, if his presence at the occurrence is satisfactorily explained and he is not proved to be hostile, his evidence can be relied upon.¹⁴

The evidence of an eye-witness should not be discarded merely on the ground of his being a relation of the complainant. Such testimony requires to be judged with caution.¹⁵

A witness is normally considered to be independent unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely; ordinarily, a case relative would be the last person to screen a real culprit and false-implicate an innocent person, and hence the mere fact of relationship, far from being the foundation for criticism of the evidence is often a sufficient reason of truth. No doubt no sweeping generalisation can be possible in all cases; but at the same time, there cannot be any general rule of prudence to require corroboration before the evidence is believed. Each case must be limited to and governed by its own facts.¹⁶ Thus, the testimony of the eye-witnesses who are natural witnesses of the occurrence and whom one would expect to have seen the occurrence, cannot be doubted, only because they happened to have a part, or interested otherwise in the party on whose behalf they give evidence. The test to be applied is whether or not the evidence of the witness has a ring of truth.

The conduct of an eye-witness was not unnatural if he remained a silent spectator and did not participate in the fight to stop the parties. The instinct of self-preservation is paramount and in the circumstances of the case it could not be expected that the witness would join the fray at the risk of his own safety.¹⁷

Where the alleged improvements made by the witness in his statement are all of a minor nature, they reflect the truthfulness of the witness rather than make

11. *Amalendu v. State of U. P.*, 1974 Cr. L. J. 189; *id.* 1963-1973 Cr. App. R. 37; 1973 S.C. Cr. R. 89; (1973) 4 S.C. C. 35; 1973 S.C. C. (Cri.) 676; 1973 Cr. L. R. (S.C.) 69; *A. I. R.* 1974 S.C. 100. *Barkari v. State of Rajasthan*, 1966 Cr. L. J. 828 (not to be discredited unless he had any motive in the case, be of party faction).

12. *Sardar v. State of Rajasthan*, 1956 Cr. L. J. 8; *A. I. R.* 1956 S.C. 425, 432.

13. *Indubhakar Singh v. The State*, 1952 S. C. J. 230; 1952 A. L. J. 457;

(1952) 2 M. L. J. 100; 65 M. L. W. 439; 1952 Cr. L. J. 363; *A. I. R.* 1952 S.C. 167. *Raj. Kishore v. State*, *A. I. R.* 1969 Cal. 321, 338.

14. *P. Ramanna, In re*, 1969 Cr. L. J. 1453 (Andh. Pra.).

15. *Bisheshwar Prasad v. State*, 1967 A. W. R. (H.C.) 604, 606; *A. Verghese v. State of Kerala*, 1966 Ker. L. J. 868. *Kayumuddin v. Abdul Gafar*, 1952 Cr. L. J. 182 at 183.

16. *Dalip Singh v. State of Punjab*, *A. I. R.* 1953 S.C. 364; 1953 M. W. N. 642; 1953 Cr. L. J. 465.

17. *Haji Lal Din v. State*, 1977 Cr. L. J. 538 at 546.

him a false witness. The fact that 15 of the other accused who were also implicated by the witness have been acquitted is not sufficient to discard his testimony.¹⁸

In a murder case when evidence is given by relatives of the victim and the murder is alleged to have been committed by the enemy of the family, the Court must examine the evidence of the interested witnesses very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But, if the witness, besides being a close relation of the victim is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the Court to examine the evidence given by such witness very carefully, and scrutinise all the infirmities in the evidence before it acts upon it. In dealing with such evidence the Court should begin with the enquiry whether the witness in question was a chance witness or whether he was really present on the scene of the occurrence. If the court is satisfied that he was not a chance witness, it should examine his evidence from the point of view of probabilities, and the account given by him as to the assault has to be carefully scrutinised. If the witness is shown to be related to the victim and it is also shown that he shared the hostility of the victim towards the assailant, his evidence should not be accepted unless corroborated in material particulars.¹⁹

Though prosecution witness was a full brother of deceased and was a solitary eye-witness of the occurrence but this factor alone was not sufficient for setting aside the conviction in a murder case recorded by the High Court after a careful appraisal of the evidence. The evidence of the witness, the injuries found on his person by the doctor lend assurance to his presence at the time and place of occurrence had a ring of truth and cannot be easily brushed aside despite the crying objection to which it had been subjected by the counsel for the accused. His deposition received ample corroboration from the medical evidence as also from the circumstantial evidence.²⁰

If the eye-witnesses to an occurrence are closely related to each other, their evidence cannot be rejected but has to be sifted carefully.²¹

18. *Haji Lal Din v. State*, 1977 Cr. L. J. 538 at 544.

19. *Dary Singh v. State of Punjab*, 1965 S.C. 328; (1964) 2 S.C.J. 319; (1965) 1 Cr. L. J. 350; 1964 Mad. L. J. Cr. 503; 1964 All. W. R. H. C. 532; 1964 S. C. R. 397; *Bishan Singh v. State*, (1969) 71 Pun. L. R. 73, 81; *Hari Har Saran v. State of U. P.*, (1975) 1 S. C. W. R. 536; 1975 S. C. C. (Cri.) 405; 1975 Cri. L. J. 1315; 1975 Cri. L. R. (S.C.) 344; (1975) 4 S. C. C. 148; 1975 U. J. (S. C.) 508; *A. I. R.* 1975 S.C. 1501 (evidence of parties witness subjected to careful scrutiny); *R. Kondaliah v. State of A. P.*, (1975) 2 S. C. J. 499; 1976 Mad. L. J. (Cri.) 21; (1976) 1 An. W. R. (S.C.) 1; 1975 Cri.

App. R. (S.C.) 24; 1975 Cri. L. R. (S.C.) 54; 1975 S.C. Cri. L. R. 100; 1975 S. C. C. 105; S. C. C. (Cri.) 213; 1975 Cri. L. J. 262; *A. I. R.* 1975 S. C. 266; *Satya Narain v. State of Madhya Pradesh*, 1972 S. C. Cri. R. 354; (1972) 3 S. C. C. 484; 1972 U. J. (S.C.) 855; 1972 S. C. C. (Cri.) 591; (1973) 1 S. C. J. 344; 1973 Mad. L. J. (Cri.) 210; 1973 A. W. R. (H.C.) 358; 1973 All. Cri. R. 216; 1972 Cri. L. J. 881; *A. I. R.* 1972 S. C. 1309.

19-1. *Vishvas v. State of Maharashtra*, *A. I. R.* 1975 S.C. 1000 page 417, 418.

20. *Barjender Singh v. State*, 1967 Cr. L. J. 712, 713; 1967 Cur. L. J. 850.

Before an adverse inference can be drawn from the non-examination of witnesses (eye witnesses in the instant case), the Court should weigh the evidence of witnesses, which has been given before it, against that adverse inference, and if those witnesses are reliable, act upon it.²¹

(k) *Child witness*—The evidence of a child witness is dangerous in the extreme and should be accepted with great caution.²² No provision in the Act requires the corroboration of the evidence of a child but it is a sound rule of practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn.²³ Though there were no infirmities in the evidence of a young boy, as it stood, but in view of the fact that he was a young boy it would be prudent to seek corroboration of his evidence.²⁴ Where, according to the Sessions Judge, a child witness (aged about nine years), gave evidence in a straightforward manner, the evidence should be discarded on ground of danger of being tutored.²⁵ Where there were several contradictions from which his evidence suffered, such as who had which weapon, but it was not merely on account of these contradictions of a minor character that the Supreme Court was inclined to reject his evidence. There were serious infirmities affecting his evidence and of them the most important was that he was supposed to have given the name of appellant No. 2 as the assailant of the deceased even though he had never seen him before the date of the incident. This contradiction was considered to be of a very serious nature and it was held to be unsafe to rely on the testimony of the child witness.²⁶ It is a well established rule that children are a most unworthy class of witnesses for when of tender age, they live in a realm of make believe, they are prone to mistake dreams for reality, they are peckish as clay and repeat fully as of their own knowledge what they had heard from others. The Courts are therefore to scrutinise the evidence of a child witness with utmost caution. If such to precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is, whether there was possibility of any tutoring. If this test is found in the positive, the Court will not, as a rule of prudence, convict the accused on a murder charge on the basis of child evidence unless it is corroborated to material extent in material particulars, directly concerning the accused with the crime.²⁷ If a child of 15 years has made an explicit statement on examination that he was tutored his evidence is unreliable.²⁸

A child witness is a competent witness.

But the prosecution is entitled

21. *Jagan Singh v. State of Punjab*, 1969 Bom. 1191; 71 Bom. L. R. 536; 1969 Mah. L. J. 433; 1970 Cr. L. J. 660, 661; *Arjun Ghusi v. State of Orissa*, (1975) 41 Cut. L. T. 517; *M. R. Mahton v. State*, 1972 B. L. J. R. 596.
22. *State v. Roop Singh*, 1966 Raj. L. W. 382, at pp. 385, 386 (child ten years old); *Mohd. v. Emperor*, A. I. R. 1930 Oudh 406 (child six years old); *Abbas Ali v. Emperor*, A. I. R. 1933 Lah. 667 relying on Dr. Kenney's *Outlines of Criminal Law*, 1938 Pat. 153 (child ten years old); *Mohamed Sultan v. Emperor*, A. I. R. 1946 P.C. 3 (child under twelve years).
23. *Mohd. v. Emperor*, A. I. R. 1930 Oudh 406 (child six years old); *Abbas Ali v. Emperor*, A. I. R. 1933 Lah. 667 relying on Dr. Kenney's *Outlines of Criminal Law*, 1938 Pat. 153 (child ten years old); *Mohamed Sultan v. Emperor*, A. I. R. 1946 P.C. 3 (child under twelve years).
24. *Mohd. v. Emperor*, A. I. R. 1930 Oudh 406 (child six years old); *Abbas Ali v. Emperor*, A. I. R. 1933 Lah. 667 relying on Dr. Kenney's *Outlines of Criminal Law*, 1938 Pat. 153 (child ten years old); *Mohamed Sultan v. Emperor*, A. I. R. 1946 P.C. 3 (child under twelve years).
25. *State v. Roop Singh*, 1966 Raj. L. W. 382, at pp. 385, 386 (child ten years old); *Mohd. v. Emperor*, A. I. R. 1930 Oudh 406 (child six years old); *Abbas Ali v. Emperor*, A. I. R. 1933 Lah. 667 relying on Dr. Kenney's *Outlines of Criminal Law*, 1938 Pat. 153 (child ten years old); *Mohamed Sultan v. Emperor*, A. I. R. 1946 P.C. 3 (child under twelve years).
26. *Mohd. v. Emperor*, A. I. R. 1930 Oudh 406 (child six years old); *Abbas Ali v. Emperor*, A. I. R. 1933 Lah. 667 relying on Dr. Kenney's *Outlines of Criminal Law*, 1938 Pat. 153 (child ten years old); *Mohamed Sultan v. Emperor*, A. I. R. 1946 P.C. 3 (child under twelve years).
27. *Mohd. v. Emperor*, A. I. R. 1930 Oudh 406 (child six years old); *Abbas Ali v. Emperor*, A. I. R. 1933 Lah. 667 relying on Dr. Kenney's *Outlines of Criminal Law*, 1938 Pat. 153 (child ten years old); *Mohamed Sultan v. Emperor*, A. I. R. 1946 P.C. 3 (child under twelve years).
28. *Mohd. v. Emperor*, A. I. R. 1930 Oudh 406 (child six years old); *Abbas Ali v. Emperor*, A. I. R. 1933 Lah. 667 relying on Dr. Kenney's *Outlines of Criminal Law*, 1938 Pat. 153 (child ten years old); *Mohamed Sultan v. Emperor*, A. I. R. 1946 P.C. 3 (child under twelve years).

25. *Shahir Rashid v. State*, 1969 Cr. L. J. 1282, 1285 (Delhi).
25-1. *G. P. Fernandes v. Union Territory, Goa*, A. I. R. 1977 S.C. 135 at page 138; 1977 Cri. L. J. 167; 1977 Cr. L. J. 167.
1. *Ram Singh v. State*, 1973 Chand L. R. (Cri.) 482 at 485.
2. *Haria v. State of H. P.*, 1975 Cri. L. J. 78 at 81 (H. P.).
3. *T. S. v. T. S.*, A. I. R. 1915 All. 437; *Panchu Choudhury v. Emperor*, A. I. R. 1923 Pat. 91; *Chand v. Emperor*, A. I. R. 1930 Lah. 337; *Rameshwar v. State of Rajasthan*, A. I. R. 1952 S. C. 54; *Jalwan Lodhin v. State*, A. I. R. 1953 Pat. 246; A. N. T. G. P. v. The State of Manipur, A. I. R. 1967 Manipur 11, 22.

to examine only such witnesses whom it considers to be material for the case.⁴ A child witness of 11 years gave inconsistent statements as to when he came to the place of occurrence. His name was not mentioned in I.L.R. In the site plan also the place from where he saw was not shown. It is unsafe to rely on his evidence.⁵

(4) *Identification Evidence*—The section says that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. To justify the Court in holding that a fact is proved, the circumstances must be such that a prudent man would act on the supposition that a particular fact exists, and it is only then that the Court should hold that that fact has been proved. Human memory is fallible and it is sometimes difficult to identify a person not very well known, whom one sees with a rather different appearance at the time of identification proceedings. But this does not necessarily cause any infirmity in the evidence given by the witnesses who do, in spite of this difficulty, find it possible to identify the accused. Nor is the value of the identification diminished because of the time gap between the occurrence and the identification process. The evidence at the identification has to be judged on the basis of various facts and circumstances of the particular case. It is not possible to lay down any hard and fast rule as to when a particular identification should or should not be accepted. Yet the evidence of identification must satisfy the test provided by the section. The Court should approach the evidence with reasonable caution and accept it only if that doubt is removed. It should accept the evidence only if it is satisfied that—

(1) the witness had a fair, if not good, opportunity of seeing the dacoits;

(2) the identification parade was held within a reasonable time of the incident;

(3) the witness's reliable powers of observation to be judged from the facts that the parade was not made too easy, nor hard to pick out the suspect, and he did not commit so many mistakes that it would create doubt in the mind of a reasonable man;

(4) the statement of the witness that he did not know the suspect previously is believable;

(5) the witness was not given an opportunity to see the accused after his arrest; and

(6) the investigation conducted in the case was reasonable.

4. *Doraiswami Udayar v. Emperor*, A. I. R. 1924 Mad. 249; *Jowaya v. Emperor*, A. I. R. 19 J Lah. 163; *Stephen Seveviratine v. The King*, A. I. R. 1936 P.C. 289; *Habeeb v. State of Hyderabad*, A. I. R. 1954 S. C. 51; *Bakshish Singh v. State of Punjab*, A. I. R. 1957 S.C. 904; *A.N.T.O. Thaha v. State of Manipur*, A. I. R. 1967 Manipur 11, 22

(child, daughter of victim of murder not examined for good reason). *Balkasi v. State of Rajasthan*, 1973 Raj. L. W. 435.

6. *Sheo Nandan v. The State*, A. I. R. 1964 All. 139; (1964) 1 Cr. L. J. 378.

7. *Anwar v. State*, A. I. R. 1961 All. 50; 1 L.R. (1959) 1 All. 151.

The evidence of identification is a weak type of proof for the chances of mistake are far greater in this type of evidence than where the witness deposes about facts within his knowledge⁸. Where, however, several marks of the identification are put together, and are regarded in the cumulative effect, the identity must be held established for coincidence can only apply to one feature or other.⁹

Where the prosecution adduces identification evidence in Sessions Court, while it did not examine such eye-witnesses in Committing Magistrate's Court, this is no ground for disbelieving it.¹⁰

In order that an identification memo may be regarded as a record of evidence, it must satisfy a double test, namely—

(1) that it is a statement made by a witness in a judicial proceeding or before an officer authorised by law to take such evidence, and

(2) it is a statement which was made on oath or affirmation by a witness.

An identification memo is not a record of evidence of a witness.¹¹

Nothing in Section 58 of the Succession Act, 1925 (39 of 1925) or Sections 68 to 72 of the Evidence Act requires that attesting witnesses of a will should be able to identify the signatures of each other or even to know each other.¹²

If a recovered stolen article is identified, it cannot lead to the conclusion that the witness identified it because he had previously seen it on the body of the victim and not that the recovered article was the one which had been recovered from the body of the victim.¹³

In a case of identification of dead bodies from skeleton recovered, the lapse of time since they were last seen alive has also to be taken into consideration.¹⁴ Evidence of a child witness, of 12 years, as to identification of large number of droots could not be accepted without corroboration.¹⁵ Evidence of prosecution witness that a gun was recovered from accused cannot be discarded on the sole ground that he could not identify the accused later on in the Court.¹⁶

It is difficult to believe that an Inspector of Post Offices in Orissa who used to inspect the post-offices only on some occasions would be so well ac-

8. Anmar v. State, A. I. R. 1961 All. 50; I. L. R. (1958) All. 151.
9. In re Chinmasami, A I.R., 1960 Mad. 462; 1960 Cr. L.J. 1444.
10. Jwala Mohan v. The State, 1 L.R. (1963) 1 All. 585; A I.R. 1963 All. 161 (F.B.).
11. Ramsanehi v. State, A.I.R., 1963 All. 308; 1963 A.L.J. 61.
12. Krishna Kumar Sinha v. The Kayash Pathshala, I.L.R. 1966 All. 483; A I R. 1966 All. 370, 376.

13. Karan Singh v. State, 1966 A.W.R. (H.C.) 208; 1966 All. Cr. R. 132; 1966 Cr. L.J. 318, 319.
14. State of Assam v. Upendra Nath Rajkova, 1975 Cri. L.J. 354 at 388 (Gauhati).
15. Bodhia Chamar v. State, 1972 Cri. L.J. 1407 at 1408.
16. State of Punjab v. Rameswar Das, 1975 Cri. L.J. 1630 at 1634; 1974 Punj. L.J. (Cri.) 383-77; Pun L.R. 189; (1975) 2 Cri. L.T. 79.

quantum with the Oriya handwriting of the subpostmasters under him so as to identify their writings not made in his presence¹⁷

(m) *Medical evidence*—The discrepancies between medical evidence and the testimony of the eye witnesses should be treated and appraised just like other discrepancies in the statements of the witnesses. It must not be forgotten that the eye witnesses may not give a very correct and accurate account of the version and may at places make exaggeration or may fail to give correct facts either on account of lapse of memory or on account of inability to observe minutely or to recount and recite correctly. It should also be borne in mind that sometimes the medical officers also do not bestow sufficient care while performing examinations and their opinions may not be properly formed on account of inadequate or defective examinations or lack of complete knowledge. It is hardly fair to expect a complete and perfect correspondence between the medical evidence and the oral testimony, based on what the witnesses saw with their own eyes. Naturally the Court must carefully examine the discrepancies, and if it is reasonably possible to arrive at a substantial and true version of the prosecution case, the Court should not adopt the easy course of throwing away the prosecution case on the alleged discrepancies between the medical evidence and the eye testimony¹⁸. In judging the distance from which a breath was discharged, the appearance and nature of the resultant wound cannot be said to afford a sure criterion and any deductions based thereon would lead at best to a very rough estimate¹⁹ or when the evidence of medical witness is based on conjectures and surmises,²⁰ or when due to lapse of time when their statements are recorded after the date of occurrence witnesses are mistaken about the details and consequently their evidence in some particulars runs counter to medical evidence²¹ or when oral evidence is of unimpeachable character and the same cannot be said about medical evidence²² inconsistency in the two kinds of evidence is not sufficient to discredit the eye witnesses. But if injuries are caused by lethal weapon and the prosecution evidence is totally inconsistent with medical evidence and the evidence of ballistic expert, or when eye witnesses definitely speak about only two injuries on the head having been caused one by a knife and the other by lathi, but the doctor found four injured wounds on the head, the evidence of eye witnesses suffers from serious infirmity and is unworthy of credit. If the court is not to be guilty of judicial superstition, it must not abandon a scientific attitude to medical science, cognitive processes in the instant case.²³ The mere inconsistency of the medical evidence with

17. *Nathan Ramjan Sikdar v. Republic of India*, 1974 Cut. L. R. (Cri.) 318 at 322.

18. *Mohanlal v. The State*, 1 L.R., 1960 Raj. 1200; A.I.R. 1961 Raj. 24.

19. *Om Prakash v. State of Haryana*, 1971 Cr. L. J. 749 at 758.

20. *Jeebina Chaudhuri v. State of Bihar*, 1971 Cr. L. J. 898 at 901.

21. *Priyas Ram v. State of H.P.*, 1973 Cr. L. J. 428 at 431, 432 (H.P.).

22. *Vasudevan v. State* 1976 Ker. L. J. 354; 1973 Cut. L. R. (Cri.) 254; 1 L. R. 1971 Cut. 1051 (A.I.R. 1955 All. 189 relied on).

23. *Ram Narayan v. State of Punjab*,

1973 Cr. L. J. 1580 at 1585; A.I.R. 1975 S.C. 1727; *Sarwan Singh v. State of Punjab*, (1976) 4 S.C.C. 369; 1976 C. R. A. R. (S. C.) 385; A.I.R. 1976 S.C. 2304 (Doctor stated that punctured wounds could not be caused by lathi shown to him); *Lakshmi Singh v. State of Punjab*, 1976 S.C. 1496; 1976 Cr. L. J. 1736; A.I.R. 1976 S.C. 1496 (Seven persons assaulted with lathis even after deceased fell down because of blow on the upper part of the abdomen).

24. *Shivaji Saheb Rao v. State of Maharashtra*, 1973 Cr. L. J. 1783; A.I.R. 1973 S.C. 2622.

the testimony of the eye witnesses will not by itself make the latter unreliable²⁵ and hence the eye witnesses cannot be discarded merely on the ground that the Medical Officer did not find any injury other than the stab wound on the body of the victim, who was examined at examination. The possibility of slaps and fist hits, which may leave no external marks of injuries on the person of the person, cannot be ruled out. Hence, the evidence of the eye witnesses, if not contradicted by the score, will be the medical evidence too, the latter being unable to fix their identity. If the nature of injuries proved by the medical evidence does not fit in with the prosecution version, it cannot be said that the prosecution case is free from very serious infirmity.²⁶

and *Expert Evidence*—So Gerald Burrard in his book *The Identification of Evidence* and *Expert Evidence* in Chapter VIII observed, under the head of **Photo Micrography** at page 175 :

"As has already been stated in evidence of identification which is unsupported by physical evidence is not to be regarded as being any thing more than an expression of opinion. The physical evidence is accordingly essential, such must be taken through microscope".

These observations are quoted with approval by the Supreme Court in *State of U.P. v. Abdul Karim, Mohammed Usmania and others*²⁷ and in *State of U.P. v. Abdul Karim, Mohammed Usmania and others*²⁸ where the learned Extra Judge did not take any photograph of the misfired cartridge and the misfired cartridges for comparison. Yet, he gave an opinion that the misfired cartridges and striker scrape of misfired cartridge were similar to those of test fired cartridges. In spite of the fact that he gave reasons for his opinion, the Supreme Court discredited the evidence of identification given by the learned Extra Judge. It was held that it was nothing more than an expression of opinion. The evidence according to their Lordships in this case was that the cartridges were fired from the same weapon and that the cartridges were recovered from that very gun. In another case where there was no physical evidence to verify if the opinion given by the expert is correct. He had taken the examination points of similarities in the six empty cartridges. It was held that the opinion given by the Ballistic Expert is not sufficient to establish that the six empty cartridges recovered from the place of occurrence were fired from the 12 bore gun recovered from the possession of the accused.²⁹

When the Ballistic Expert could not connect the two pieces of the bullet with the rifle, the learned Extra Judge stated that the rifle was fired from this rifle and the weapon was a 12 bore and was a bore size for firing the inability of the Expert to connect the two pieces of the bullet with the rifle could not be a circumstance to be taken into the inference that the said bullet was not

25. *Bajwa v. State of U. P.*, 1973 Cri. L. J. 769 at 778; (1973) 1 S.C.C. 714; 1973 S.C.C. (Cri.) 586; 1973 S.C.D. 498; 1973 Cri. App. R. 243 (S.C.); 1973 S.C. Cri. R. 256; 1973 Cri. L.R. (S.C.) 250; (1973) 3 S.C.R. 571; 1975 Mad. L.J. (Cri.) 54; 1975 M.L.W. (Cri.) 203; A. I. R. 1973 S. C. 1204.

1. *Poonam Ram and others v. State of Rajasthan* 1974 W.L.N. 135 at 142.

1976 Raj. Cr. C. 138; 1976 Raj. L. W. 129.

2. *Phool Chand v. State of Rajasthan*, (1976) 4 S.C.C. 405; 1976 S.C.C. (Cri.) 682 at 688; 1976 C.R.A.R. (S.C.) 363.

3. *Piyare Lal v. Shankar Das*, 1972 Cri. L. J. 135 at 137; 1971 Sim. L. J. (H.P.) 364.

3-1. 1971 U. J. (S.C.) 466.

4. *Hanuman v. State*, 1974 W.L.N. 95 at 96-100; 1974 Raj. L. W. 149.

shot from the rifle. Any Expert, may be Ballistic or otherwise, can only give an opinion evidence. In a case where eye-witnesses are reliable and testify definitely to the weapon of attack, any opinion of an Expert, even if it indicates a circumstance which does not exactly fit in the prosecution story, would be of **no avail and can easily be ignored.**⁵

J. S. Hatcher in his text *Book of Fire Arms Examination*, 1946 (Print) at page 255 has referred to the rifling marks on bullet and has said that such identifying marks are caused by its passage over surface irregularities and rough spots on the interior of the gun barrel that get there principally during the machining operations of rearing the bore and rifling the grooves. But the **learned author has pointed out at page 256 :**

"It should be understood by the reader that some guns have the barrels smoothed up after machining by a process known as *tapping*. A rod is inserted into the barrel and a lead plug is cast on the end of this rod, so that it exactly fits the lands and grooves. This lead plug is then covered with oil and emery flour, and passed back and forth through the barrel a number of times, until the most noticeable roughnesses are removed. This operation makes the inside of the barrel much smoother than it would otherwise be, and this is somewhat to the **difficulty of bullet identification.**"

Unless there were rifling marks on the bullets recovered, they were not defaced by the entry in the bodies of the victims, no Expert would ordinarily and generally give an opinion. Where none of the recovered bullets recovered pistol, in all probability, therefore, they would use country-made pistols. In such a situation it cannot be assumed that the Ballistic Expert could have found identifying marks on the bullets and his opinion would have gone against the prosecution.⁶

Where eye-witnesses gave direct evidence of the cause of murder and identification of accused was not in doubt, the discrepancy between the opinion of the expert and the prosecution story regarding the distance from which **shots were fired loses much of its strength.**⁷

(c) Tape Recorder. A tape recording and a photograph do not differ in principle. The Court must not deny to the law of evidence advantages to be gained by new techniques and new devices, provided the genuineness of the recording can be proved and the voices recorded are properly identified, provided also that the evidence is relevant and otherwise admissible. Indeed a tape recording is admissible as evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.⁸ These principles have been approved by the Supreme Court in the undernoted cases,⁹ and it has been held that tape record of speeches are documents under this section and stand on no different footing than photographs. A contemporaneous tape

5. *State v. Ram Singh*, 1973 Cri. L. J. 150 at 159 (Him. Pra.).

6. *Chatar Singh v. State of Haryana*, 1976 S.C.C. (Cri.) 285; A.I.R. 1976 S.C. 2474 at 2477, 2478.

7. *Karnail Singh v. State of Punjab*, 1971 Cri. L. J. 1465 at 1467; 1971 Cri. App. R. 385 (S.C.); (1971) 3 S. C. C. 616; A. I. P.

1971 S.C. 2119.

8. *R. v. Maqsood Ali*, (1965) 2 All E.R. 464, 469.

9. *Sri N. Rama Reddy v. V. V. Giri*, (1970) 2 S.C.C. 340; *R. M. Malkani v. State of Maharashtra*, A.I.R. 1973 S.C. 157; *Z. B. Bukhari v. B.R. Mehra*, A.I.R. 1975 S.C. 1788.

record of a relevant conversation or speech would be part of *res gestae*. The use of tape record is not confined to purposes of corroboration and contradiction only but when duly proved by satisfactory evidence of what was found recorded and of absence of tampering, it could, subject to the provisions of this Act, be used as substantive evidence. Where a witness hears incriminating conversation shouted by accused persons in separate cells the evidence of the conversation is admissible.¹⁰

Tape recordings are not inadmissible on grounds of possibility of their being tampered with. Tape recorded conversation can be corroborative evidence. Weight to be given to such evidence depends on the other factors which may be established in a particular case.¹¹

(ii) *Demeanour of witnesses*. The witness box is a test of credibility. A consideration of the demeanour of the witness upon trial and the manner in which he gives his evidence, both in chief and upon cross examination, is no less material than the testimony itself. From the way in which a witness gives his evidence one can often discover whether the witness is a liar, is a partisan or a liar or whether he is a truthful witness, struggling to tell an honest tale, in spite of physical or mental disabilities and of his unusual surroundings. In *Powell's* book in the Introduction, the importance of paying attention to demeanour, both under the Hindu and Mohammedan Law of Evidence, has been indicated.¹² If the witness is overforward and overzealous in giving answer in favour of one side, but reluctant to make any admissions that would go against that side, if his memory is clear and precise on all points that tell in favour of one party, but hazy and obscure when the truth would benefit the other party, then it may safely be concluded that he is a liar or a partisan.¹³ On the other hand, the witness's promptness and frankness in answering questions without regard to consequences and especially his unhesitating readiness in stating all the circumstances, attending the transaction, by which he opens a wide field in contradiction if his testimony be false are strong internal indications of his sincerity. In fact, it is not too much to say that unless the witness is a skilled actor, his demeanour frequently furnishes a clue to the probity of his testimony. That is why *Pain Brown's* first rule for the examination of a witness is:

"Have your eyes always on the witness—except in indifferent matters, never take your eye from that of the witness: this is the channel of communication from mind to mind, the loss of which nothing can compensate. Truth, falsehood, hatred, anger, scorn, despair, and all the passions, or all the soul is there. For instance, witness of a low grade of intelligence when they testify falsely, usually display it in various ways; in the voice, in a certain vacant expression of the eyes, in a nervous twisting about in the witness stand, in an apparent effort to recall to mind the exact wording of the story and especially by the use of language not suited to their station in life."

Since the demeanour of a witness is a very important test of his credibility, the judge is empowered by the Civil Procedure Code (see Order 18, Rule 12) and the Criminal Procedure Code (Section 280) to record remarks about wit-

10. *R. v. Mili*, 1962 3 All E.R. 298 (tape recorded to check and improve note from memory).

11. *Pattap Singh v. State of Punjab*, A.I.R. 1964 S.C. 72.

12. 9th Edition, 506-7.

ness's demeanour in the witness box. That is why, it is also enjoined that the appellate court should not, ordinarily, interfere with a trial court's opinion as to the credibility of a witness, as the trial judge alone knows the demeanour of the witness, he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility, and whether after careful thought or with reckless glibness; and he alone can form a reliable opinion as to whether, the witness has emerged with credit from a cross-examination.¹³

It has also been laid down that the most careful note (that is to say, record) may often fail to convey the evidence fully in some of its most important elements to those for which the open oral examination of the witness in presence of prison judge and jury is justly prized. It cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration, it cannot give the manner of the prisoner, when that has been important, beyond the statement of anything of particular moment. It is, in short, or it may be the dead body of the evidence without its spirit and which is supplied only when given openly and orally by the ear and eye of those who receive it.¹⁴

But, at the same time demeanour consisting in confusion, embarrassment, hesitation in replying to questions and even vacillating or contradictory answers are not necessarily a proof of dishonesty in witness, because this deportment may arise from bashfulness or timidity and may be a natural and inevitable effect upon examination by a skilful, practised, perhaps unscrupulous, advocate, whose aim in his question is to entangle, entrap and confuse the witness and make him contradict himself hopelessly. In addition, though when the question of credibility depends upon the demeanour in the box, the manner in which the witness answers and how he seems to be affected by the question put, and so on, the trial judge has an advantage. When the view upon credibility, on the other hand, are founded upon circumstantial inferences, from facts not disputed the court of appeal is really in as good a situation as a trial judge.¹⁵ In fact the impression as to the demeanour of a witness ought not to be too readily adopted by a trial judge without testing it against the whole of his evidence and, if this is not done, it is open to the appellate court to find that the view of the trial judge as to demeanour was ill founded.¹⁶ In *Sitalakshmi v. Venkata*¹⁷ it has been said that the absence of a separate note regarding demeanour of a witness is immaterial, especially when judgment is written before the recollection of the judge has become dim.

A judge's observation regarding the demeanour of a witness recorded under Order XVIII Rule 12, C. P. C. will not justify the discarding of the evidence of that witness when the judge has not properly appreciated the evidence.¹⁸

When no note is made about the demeanour of a witness and the judge

13. *Valarshak Seth Apean v. Standard Co. Ltd.*, A. I. R., 1913 P. C. 159, 161; 209 I. C. 132.

14. Per Sir John Coleridge in *R. v. Bertrand*, 1867 L. R. 1. P. C. 520 at 533.

15. *Palchur Sankarareddi v. P. Mahalakshamma*, 70 I.C. 749; A.I.R.

1914 P. C. 315.

16. *Y. v. Y.*, Yuill. (1945) 1 All. E.R. 100 (C.A.).

17. *C.W.N.*, 593 (P.C.); 123 I.C. 170; A.I.R. 1930 P.C. 170.

18. *Y. v. Y.*, M.V. v. Dr. Ammu Amma, 1968 Ker. L.J. 123.

could not have remembered what the demeanour of the witness was at the time when he writes his judgment, it would not be correct to think that the evidence of the witness, by reasons of such demeanour is not entitled to credence.¹⁹

(p) *Acceptability of evidence*—In judging the acceptability of evidence, the absence of contrary evidence is also a factor to be taken into consideration. But, the test of un rebutted evidence may be so patent or the evidence may be unconvincing or the case so unsatisfactory that the court cannot regard the fact which is sought to be proved by such evidence as proved. Evidence may be destroyed or it may be said, sufficiently rebutted by its inconsistencies, improbabilities and inherent defects and thus cease to be a fit basis for a finding for the rejection of such evidence no evidence in opposition is necessary.²⁰

In assessing the value to be attached to oral evidence judges are bound to call in their experience of life and to test the evidence on the basis of probabilities. The court is not bound to accept the oral evidence of one party only, even if unrebutted by the other party.²¹

(q) *Respectability of the locality*—Section 100(d) of the Cr. P. C. and other statutes making provisions relating to juries, provide for the presence and participation of two or more respectable inhabitants of the locality, and a considerable amount of case law has grown around it, which may be summed up as follows from the undernoted cases—

The respectability of a witness does not connote any particular status or wealth or anything of the kind. Any person is entitled to claim respectability, provided he is not disreputable in any way. The words 'respectable inhabitants of the locality' must be construed in the light of the object of the section in accordance with the maxim *ut res magis valeat quam pereat* that an act prevail rather than perish.

The Legislature has made this provision to ensure fair dealing and a feeling of confidence and security amongst the public in regard to a sometimes necessary invasion of a private right regarded as almost sacred under the British system.

In order to give effect to this object it is necessary that the persons selected should be absolutely unprejudiced and uninterested in the result of what they have to take part in. The selection of the officers connected with the police or persons who are not impartial is not contemplated by this section. Having

19. *Shankar v. State of Mysore*, A.I.R. 1961 Mys. 106.

20. *Krishna Kumar Sinha v. Kayastha Pathashala*, I.L.R. (1965) 1 All 483; A.I.R. 1966 All. 570, 584; *A.C. Agarwal v. Union of India*, 1962 A.L.J. 28, 30; A.I.R. 1962 All. 436, 437 (uncontradicted allegations, improbable of belief, can be disbelieved).

21. *Chaturbhuj Pande v. Collector, Raigarh*, (1969) 1 S.C.J. 344; (1969) 1 S.C.W.R. 320; 1969 A.L.J. 159; 1969 B.L.J.R. 196;

1969 J.L.J. 49; 1969 Ker. 1, J. 212; 1969 M.P.L.J. 346; 1969 Mah.L.J. 367; A.I.R. 1969 S.C. 255, 257; 1975 Cr.L.J. 3.
22. *Sunder Singh v. State of U.P.*, A.I.R. 1956 S.C. 411; 1956 Cr.L.J. 801; *State v. Raoji*, A.I.R. 1956 Bom. 528; *Lal Bahadur v. The State*, A.I.R. 1957 Assam 74; 1957 Cr.L.J. 502; *Bhanu v. State of Tripura*, A.I.R. 1958 Tripura 40; 1958 Cr.L.J. 1549; *In re Raja Rather*, A.I.R. 1959 Mad. 450.

been a prosecution witness is not sufficient to deprive one of one's title to respectability. Only respectable persons of the locality are to be selected as witnesses for the search. The provision as to locality is directive and not mandatory. It is impossible to define locality precisely. In a densely populated town, it means persons in the immediate vicinity. Locality must also include villages within 3 or 4 miles. In short, the words "of the locality" do not mean that they should be within a stone's throw of the place searched nor are the words restricted to the same quarter.

Sometimes, the attitude of men nearby does not make it worthwhile calling them as search witnesses. It is only independent search witnesses who may be available who have to be called. The mere fact that witnesses are taken from another locality should not be looked upon as a factor militating against their respectability.

The gist is that honest effort should be made to secure the presence of respectable persons of the locality but if no such witness is available outsiders might be incited upon. The burden of explaining why it was not possible to procure respectable witnesses from the locality will be upon the prosecution and when no such attempt is made, the evidence of the search witnesses will be viewed with a great amount of caution.

The emphasis of the section is on the word "respectable" and not on the word "locality".

At the highest, the irregularity of the search and the recovery, in so far as the terms of Section 103 had not been fully complied with, would not affect the legality of the proceedings. It only affects the weight of evidence which **are matters for courts of fact**, and the Supreme Court would not ordinarily go behind the findings of fact concurrently arrived at by the courts below.

(i) *Discrepancies.* The constant theme on the appreciation of evidence in our Courts is the discrepancies in the testimony of various witnesses. In regard to these discrepancies two extremes have to be avoided even from, **namely,—**

(a) summarily brushing aside discrepancies characterising them as representing the untutored veracity of the witnesses and that they suggest that the witnesses have not learnt the same story out of their own mouths.

(b) lay too much stress on discrepancies without any attempt to appraise their real value and effect, thereby leading to serious failure of **justice.**

The proper course is it is not enough merely to speak about the discrepancies in the evidence but there should be a fitting comment on the quality of the evidence coming from the witnesses. Discrepancies in the statements of witnesses on material points should not be lightly passed over as they seriously affect the value of the testimony. Trivial discrepancies should be ignored because several persons, giving their versions of the same facts as witnessed by them are naturally liable to disagree on material points their powers of observation, exhibition of memory being not the same and honest differences

been possible. There can be discrepancies of truth as well as discrepancies of falsehood. It is common experience that discrepancies do occur, even in the statements of perfectly honest witnesses, they are really due to differences in method of perception with regard to observation, recollection and recital of details, and unless there is any good ground to think that they are due to a design to deceive, to suppress or depart from the truth, it is unfair to discard the direct testimony of witnesses, merely on account of such discrepancies, when there is no proper comment as to material circumstances. It is the broad facts of the case, and not the minor details, that have to be considered in weighing evidence.

Pollock, J., said: "I know not a more sure or unphilosophical conduct of the mind, and one more prone to judge the substance of the story by reason of some discrepancy in the circumstances with which it is related." The usual course of human mind is to grasp substantial truth and of circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of transactions come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader but often times without success upon the minds of the judges. On the contrary, a consistent and coherent report induces the suspicion of confederacy and fraud. In weighing the evidence, it has to be borne in mind that unfortunately in this country, as pointed out in various decisions, there is a tendency to rely among police officers to try to remove all discrepancies in the evidence of witnesses with the object plausibly of presenting the court, trying the case, with a picture of witnesses making consistent coherent statements the other way. This is futile and does not convince any court with any intelligence. In case of discrepancies, due weight should be given to this pernicious habit of police officers.

Discrepancy as to time cannot be a ground for rejecting the evidence of a witness who being a vulgar or illiterate cannot be expected to be precise as to time.²³

In an earlier case witnesses are not to be disbelieved only because the particulars of the distribution of a pamphlet are at variance with their evidence. But this fact should be borne in mind while appreciating their evidence. The evidence led before trial court is at variance with pleadings and interested witnesses have put forward conflicting versions the conclusion of court that witnesses are unreliable is justified.²⁵

Persons giving their testimony of an occurrence may disagree on minor points but still agree on the broad facts that matter in weighing evidence.^{1,2} Minor discrepancies are allowed. The eye-witnesses may not be able to remember the details with regard to minor in nature about an incident at which time they were excited. Therefore, these opinions and contradictions cannot affect the truth of

²³ Pol v. State, 1 I. L. R. (1967) 108; 1968 A. L. J. 423, 426; *Sh. Govain v. Duthin Lal*, 1968 A. I. R. 1968 Pat 481, 486, 487; *Shy Kopal Singh v. V. V. Giri*, A. I. R. 1970 S.C. 2097, 2118.

²⁵ *Prabodh Chandra v. Mohinder Singh, A. I. R. 1971 S. C. 257* at 260.

¹⁻² *Rama v. State*, 1969 Cr. L. J. 1393; *A. I. R. 1969 Goa 116, 120*.

the prosecution case.³ Discrepancies in matters of detail pertaining to the precise number of blows given by the assailant, the standing or lying posture of the victim at the time of assault,⁴ as to the weapons possessed by the accused in a dacoity case,⁵ or discrepancy of minor character in describing weapons of assault, difference to some extent as to the exact abusive words used by the accused⁷ or as to the difference in the estimate of the distance of the quarter of the accused from that of the witness⁸⁻¹⁰ are such which occur even in the testimony of truthful witnesses, and this is no ground to reject the evidence when there is **consensus as to the facts of the case.**¹¹

Discrepancies in evidence as to the colour of a motor cycle which knocked down a person are not significant, particularly when mistakes might have arisen, may be, due to the faulty English translation of evidence given in the vernacular. In the same case discrepancies as to the density of the traffic were explicable as it was not clear whether they related to the time of the accident or a time after the accident.¹²

When parties give evidence after a lapse of over eight years some allowance must be made to forgetfulness and lapse of memory.¹³ Therefore it would not be appropriate to test the veracity of the evidence by giving undue emphasis on minor discrepancies. It is human experience that close relations have an anxiety to see that the true culprit is punished. Therefore, it is understood that a daughter would falsely implicate her mother as the author of the murders.¹⁴

When large number of accused are involved in the occurrence, it is quite natural that the witness who receives injuries, naturally gets a bit confused and his statement should not be rejected on the ground of contradictions.¹⁵

The fact that the complainant stated at one place in the course of his deposition that he did not know the accused but stated at another place that

3. In *Re Hippacott*, 1971 Cri. L. J. 1640 at 1645; 1971 Mad. L. J. (Cri.) 200; *Sheo Darshan v. State of U. P.*, 1971 Cri. App. R. 299 (S.C.); (1972) 3 S. C. C. 74; 1971 U. J. (S.C.) 630; 1972 S. C. C. (Cri.) 394; 1971 Cri. L. J. 1306; A. I. R. 1971 S. C. 1794; *Manchuda v. State*, 1972 W. L. N. 867 (Raj.); *S. Donganna v. State*, (1973) 39 Cut. L. T. 769; (1973) 52 Ele. L. R. 407; *Kuruchiyan Kunhaman v. State of Kerala*, 1974 Ker. L. T. 328 (Goa); *State of Assam v. U. N. Rajkhowa*, 1975 Cri. L. J. 354; (1975) 2 Cri. L. T. 119; 1975 Cut. L. R. (Cri.) 52.

4. *Sampat Tatyada Shinde v. State of Maharashtra*, 1974 Cri. L. J. 671 at 677; 1974 U. J. (S.C.) 177; 1974 Cri. L. R. (S.C.) 221; 1974 S.C.C. (Cri.) 582; (1974) 4 S. C. C. 215; 1974 S. C. C. (Cri.) 210; A. I. R. 1974 S. C. 791.

5. *Bharat Singh v. State of U. P.*, 1972 Cri. L. J. 1704 at 1706; A. I. R. 1972 S. C. 2478.

6. *Radha Kishan v. State*, 1973 Cri. L. J. 481 at 483 (Raj.).

7. *Radhakrishna Das v. State of Mysore*, (1973) 39 Cut. L. T. 1034 at 1035, 1036.

8-10. *State of U. P. v. Samman Dass*, 1972 Cri. L. J. 487 at 495; 1972 U. J. (S.C.) 526; (1972) 2 Um. N. P. 262; (1972) 3 S. C. C. 201; 1972 S. C. C. (Cri.) 511; 1972 S. C. C. (Cri.) 275; (1972) 3 S. C. R. 58; 1973 Mad. L. J. (Cri.) 504; 1973 All L. J. 489; (1973) 2 S. C. J. 345; 1973 M. P. W. R. 452; A. I. R. 1972 S. C. 677.

11. *Veeramuthu v. State of Madras*, 1971 Cr. App. R. 264 at 267, 268 (S.C.).

12. *T. P. Gnanavelu v. D. P. Kannayya*, 1969 A. C. J. 455; 3 L. R. 1969 Mad. 180, 182 (claim for compensation for death caused).

13. *Mohammad Yusuf v. D. I. L. R.* 1966 Bom. 420; 68 Bom. L. R. 228; 1967 Mah. L. J. 65; A. I. R. 1968 Bom. 112, 122.

13-1. *Shanti v. State*, A. I. R. 1978 Orissa 19 at page 23 (F.B.).

14. *Har Prasad v. State of M. P.*, 1971 Cri. L. J. 1135 at 1138; (1971) 3 S. G. C. 455; A. I. R. 1971 S. C. 1450.

he knew them for about three years, his evidence as to actual assault on him does not become unworthy of credence for that reason¹⁵. Where there were discrepancies in the evidence of all the maternal witnesses which created confusion firstly on the point whether both appellants 1 and 2 struck, and if so, which of the two injuries was caused by appellant 1 and 2, and secondly, whether both of them were armed with sticks. That being the situation, the Supreme Court disagreed with the High Court's view that it was not possible to make a distinction between the case of appellant 3 and that of appellants 1 and 2. This was so because whereas there was definiteness and unanimity amongst all the witnesses in regard to the part played by appellant 3, there was no such consistency and preciseness in regard to the parts appellants 1 and 2 individually played.¹⁶

But when one set of prosecution evidence condemns the other set of evidence produced by the prosecution,¹⁷ or the prosecution story was that three accused produced four receptacles containing about 100 packets of opium, but in the court PWS 1 and 3 stated that all the receptacles were produced by one accused, the story becomes absolutely unreliable.¹⁸ There was inconsistency in regard to the accused persons getting armed, the arms used by the accused-appellants, the place of occurrence; the manner of infliction of injuries; and while one eye witness had stated in the committing Court that he was not able to say who inflicted which of the injuries, at the trial he had tried to be very specific. The availability of light to see the details of the occurrence was also very much debated.¹⁹⁻²¹ conviction may not be based on such evidence.

Where the evidence is conflicting and it is impossible to reconcile the conflicting statements on any theory of defective memory, or failing powers of observation, or any other explicable hypothesis to account for their contradictions, the only safe guide to follow is that afforded by the acts and conduct of the principal parties concerned and the contents of the documents produced. In cases, where there is a conflict of evidence, the court of appeal should have special regard to the fact that the trial judge saw the witnesses.²²

Where some of the prosecution witnesses have contradicted their earlier statements under Section 164 of the Code of Criminal Procedure, 1973 and the contradictions suggested that the defence version might be true. There were also certain other contradictions on material points in the evidence of some of the prosecution witnesses.

The trial Court and the High Court both failed to take note of the serious

15. *Dharam Vir v. State of M. P.*, 1974 Cri. L. J. 812 at 813; 1974 S. C. C. (Cri.) 352; (1974) 4 S. C. C. 150; A. I. R. 1974 S.C. 1156.

16. *State of Punjab v. Balbir Singh*, 1971 U. J. (S.C.) 880 at 885.

17. *State of Punjab v. Balbir Singh*, 1974 Cri. L. J. 366 at 369; (1973) 2 S. C. C. W. R. 341; 1973 S. C. C. (Cri.) 962; 1973 S. C. Cri. R. 458; 1974 S. C. D. 81; 1973 Cri. App. R. 372 (S.C.); 1973 B. B. C. J. 741; (1974) 3 S. C. C. 327; 1974 Cri. L. R. S.C. 100.

18. *State of Punjab v. Balbir Singh*, 1974 S. C. R. 583; 1975 Mad. L. J.

(Cri.) 34; 1975 Mad. L. W. (Cri.) 216; A. I. R. 1974 S.C. 344.

18. *Ahmed Noor Khan v. State of Assam*, 1972 Cri. L. J. 779 at 784; A. I. R. 1972 Gauhati 7.

19. *Pandakar Nityanand v. State of Orissa*, (1975) 41 Cut. L. T. 848 at 851; 1975 Cri. L. R. (Orissa) 241.

22. *Bir Bahadur v. The State*, A. I. R. 1956 Assam 15; I. L. R. (1954) 6 Assam 428; *Brijlal v. Inda Kunwar*, 36 All. 187 (P.C.); 18 C. W. N. 649; 23 I. C. 715; A. I. R. 1914 P. C. 38; *Anam v. The State*, A. I. R. 1944 Orissa 98; *Idharajid v. Emperor*, A. I. R. 1933 Lah. 39, 35 Cri. L. J. 1180.

infirmities in the prosecution case. These infirmities cast a legitimate doubt on the truth of the prosecution story. Accordingly the accused were acquitted.²²⁻¹ Similarly where the story narrated by the witness in his evidence before the Court differed substantially from that set out in his statement before the police and having regard to the large number of contradictions in his evidence, contradictions not on mere matters of detail, but on vital points, it was held unsafe to rely on his evidence and such evidence was excluded from consideration in determining the guilt of accused.²²⁻² Where the case against the accused hinges to a very large extent on the testimony of a witness and his evidence is neither "wholly unacceptable" nor wholly impeccable, the Court should be on its guard not to rely on his bare word, without some assurance from independent sources, about the identity and connection of the accused with the commission of the serious offence of murder.²²⁻³

Minor contradictions are bound to appear when ignorant and illiterate women are giving evidence. Even in case of trained and educated persons, memory sometimes plays false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of offence. It would not, therefore, be right to reject the testimony of eye-witnesses merely on the basis of minor contradictions.²³

Absence of discrepancies in oral evidence may make it unacceptable. Thus if oral evidence of an adoption is given 18 years after the event and there are no discrepancies in the evidence of the witnesses, such evidence must be one prepared for the case and cannot be accepted in proof of the adoption.²⁴ The testimony of a witness who testifies to minute recollections of circumstances when the transaction was such that he must have paid momentary attention cannot be accepted at its face value.²⁵ The witnesses watched the occurrence from a close distance in an electric light. The assault was so dastardly and gruesome that it must have made a definite and lasting impact on the memory of the witnesses that made them remember the assault with its grotesque details. Human memory is like a camera which takes snapshots of striking incidents and then transmits the same through word of mouth faithfully with absolute accuracy and precision. Moreover, it is not a question of giving photographic details at all, but the witnesses have merely described what they actually saw. It is manifest that in view of the electric bulb burning, the witnesses were bound to observe the weapons with which the accused were armed, the main parts of the body where the blows were given and the like.¹

22-1. *Bhajan Singh v. State of Punjab*, A. I. R. 1977 S.C. 664 at para 6; 1977 Cri. L. J. 439; 1977 Punj. L. J. (Cri.) 25.

22-2. *N. D. Dhayagude v. State of Maharashtra*, A. I. R. 1977 S.C. 381 at page 382; 1977 Cri. L. J. 258; 1977 S.C. Cr. (Cri.) 10.

22-3. *Phool Chand v. State of Rajasthan*, A. I. R. 1977 S.C. 315 at page 319; 320; 1977 Cri. L. J. 207; 1977 S. C. Cr. R. 142.

23. *Boya Ganganna v. State of A. P.*, 1976 Cri. L. J. 1158 at 1161; (1976) 1 S. C. C. 584; 1976 S.

C. C. (Cri.) 102; 1976 C. R. A. R. 83; 1976 M. L. J. (Cri.) 703; (1976) 2 S. C. J. 284; A. I. R. 1976 S. C. 1541.

24. *Govind v. Govind*, 18 Law Rep 681; A. I. R. 1968 Mys. 309, 314.

25. *Kalyani Amma Chinnappa v. Padmayati*, 1 I. R. 112; 12 Ker 140; 1972 Ker. L. R. 105; 1973 Ker. L. T. 1030.

1. *Mst. Dalbir Kaur v. State of Punjab*, (1976) 4 S.C.C. 158 at 175; 1976 Cr. L. R. (S.C.) 417; 1976 S.C.C. (Cri.) 527.

(3) *Contradictions and omissions.* In regard to appreciation of evidence regarding the contradictions and omissions, they generally arise under Section 162 of the Criminal Procedure Code. In *Ponnusami Chetty v. Emperor*,² Burn, J., of the Madras High Court took an extreme position and observed :

"Whether it is considered as a question of logic or of language, 'omission' and 'contradiction' can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To contradict means to 'speak against' or in one word to 'gainsay'. It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but it is not 'diction' and therefore it cannot be 'contradiction' The same conclusion follows from a consideration of Section 145, Evidence Act. If it is intended to contradict the witness by the writing, his attention must be called to those parts of the writing which are to be used to contradict him. It would be sheer misuse of words to say that you are contradicting a witness by the writing, when what you really want to do is to contradict him by pointing out omissions from the writing A witness cannot be confronted with the unwritten record of an unmade statement. It is impossible to state a case in which an omission amounts to a contradiction Section 162 can only be used in order to show that the witness in the box is contradicting something he had said before It is not permissible to use such statements in order to show 'development' of the prosecution case : it is only permissible to use them to prove contradictions"

In *In re Gurun Lallman*,³ it was held that if the point is of such importance that no police officer would omit to record it, if it had been made, the omission may be treated as a contradiction. Horwill, J., observed :

"All that investigating officers are expected to do is to make a short record of what the witnesses examined by them have said. They are not expected to record the unimportant details given by the witnesses ; and so the absence of such details in the case diary is no proof at all that the statements were not made by the witnesses. A court should permit a statement recorded under Section 162 to be used for the purpose of proving an omission only when it is sure that the omission would not have occurred if the statement had really been made."

In the same case Mockett, J., observed :

"It is not the duty of the investigating officer to do more than record a gist of the statements made to him It is not the duty of the police when investigating a crime to record a long and detailed deposition. Their business is to make a note of such facts and statements as then seem to them important and useful for the purpose of the case An omission from the record in a case diary of a statement is only of value, if it is of such importance that the witness would almost certainly have made it and the police officer would almost certainly have recorded it, had it been made. So much of the cross-examination in the Sessions Court seems now to be directed to irrelevant omissions in the case diary, that I think the above observations are necessary. An immense amount of unnecessary writing is

2. A. I. R. 1933 M. 372, 373; 56 M. 475; 143 I. C. 424; 37 M. L. W. 441.

3. A. I. R. 1944 Mad. 385; 57 M. L. W. 171; I. L. R. 1944 Mad. 897; 217 I. C. 275.

imposed upon the Sessions Judge The recording of this cross-examination, a complete waste of time, must have occupied the learned Sessions Judge several minutes"

In *State v. Ram Bali*,⁴ the Allahabad High Court observed:

"A statement recorded by the Police under Section 162 can be used for one purpose and one purpose only and that of contradicting the witness. Therefore, if there is no contradiction between his evidence in Court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposed in court that a certain fact existed but had stated under Section 162 either that that fact had not existed or that the reverse and irreconcilable fact had existed, it is a case of conflict between the deposition in the court and the statement under Section 162 and the latter can be used to contradict the former. But if he had not stated under Section 162 anything about the fact, there is no conflict and the statement cannot be used to contradict him. In some cases an omission in the statement under Section 162 may amount to contradiction of the deposition in Court: they are the cases where what is actually stated is irreconcilable with what is omitted and implicitly negatives its existence. If the statement under Section 162 can be reconciled with the deposition in Court, it cannot be used with it, there is absolutely no conflict. A statement under Section 162 contradicts what is said actually contradicts what is omitted to be said. The test to find out whether an omission is a contradiction or not is to see whether one can point to any sentence or assertion which is irreconcilable with the deposition in the Court. It would be quite meaningless to say that the entire statement under Section 162 contradicts the deposition. The latter cannot point to any sentence or assertion as being irreconcilable with the deposition."

The latest pronouncement of the Supreme Court is in *Tahsilidar Singh v. State of U. P.*,⁵ wherein a majority of the judges held:

"The procedure prescribed in contradicting a witness by his previous statement made during investigation is, that if it is intended to contradict him by the writing, his attention must before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The second part of Section 145, Evidence Act clearly indicates the simple procedure to be followed. The contradiction under the section should be between what a witness asserted in the witness-box and what he stated before the police officer and not between what he said he had stated before the police officer and what he actually made before him. In such a case, the question could not be put at all; only questions to contradict can be put and the question here posed does not contradict. It leads to an answer which is contradicted by the police statements."⁶

A witness who spoke in the Session Court about the deceased being equipped with pistol and cartridges, had not spoken about it to anyone else or the police or in the first information report. Such omission amounts to

4. Cr. App. No. 1036 of 1949.
5. A. I. R. 1959 S. C. 1012; 1959 Cr. L. J. 1231; 1959 S. C. J. 1042.

6. *Tahsilidar Singh v. State of U. P.*, A. I. R. 1959 S. C. 1012; 1959 Cr. L. J. 1231; 1959 S. C. J. 1042.

material contradiction within the meaning of Section 162, Criminal Procedure Code and is an obvious improvement.⁷

Version of prosecution witness in the Court being inconsistent with his version before the Police, conviction cannot be sustained on such evidence.⁸

In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The entire statement should be taken into consideration to find out whether they are due to a deliberate attempt to suppress or depart from the truth. Witnesses should not be disbelieved on basis of trifling discrepancies and omissions.⁹⁻¹¹

More contradictions in the evidence of witnesses, who are illiterate and uneducated, would not be the basis of an acquittal if on a thorough scanning the prosecution case is found to be substantially established.¹²

When the discrepancy is minor¹³⁻¹⁴ the statement can be relied upon after careful scrutiny.¹⁵ A witness who gives one version in chief examination, another in cross examination and a third version in re examination cannot be relied on for any purpose and no conclusion could be formed from such evidence.¹⁶⁻¹⁷ An eyewitness should not, however, be disbelieved on the ground that there is slight discrepancy between his version given in Court with that given by him to village Munsif.¹⁸

Where a witness has given a singular account of payment of money and another witness has given a different account of money, cannot be charged with inconsistency. The principal question i.e., the payment of money, is not affected. The discrepancies do not attack the credibility of the witnesses. The discrepancies are minor details related to the alleged transaction and do not by questioning the witnesses on the various details that the alleged transaction was of falsehood can be breached.¹⁹

(i) *Corroboration: Necessity of* Where the evidence is interested, it should not be relied upon without independent corroboration.²⁰ But this proposition, according to the Supreme Court is not of universal application.²¹ It is enough if the circumstances corroborate the testimony of the interested witnesses.²² The fact that the first information report was lodged within 35 minutes of the occurrence at the police station at a distance of two miles from

7. *Guljara Singh v. State*, 1973 Cri. L. J. 430.

8. (1975) 2 Cr. L. J. T. 119 (H.P.); *State of Haryana v. Gurdial Singh*, 4 Crim. L. J. 311 (Punjab).

9-11. *Dashitaj v. State*, A. I. R. 1964 Tri. 54.

12. *Balaram v. State*, 1964 80 Cut. L. T. 278, 284.

13-14. *Arjuna Pradhan v. State of Orissa*, 1965 60 Cut. L. T. 156 at 158.

15. *State v. Hadibandhu Mati*, (1973) 39 Cut. L. T. 619 at 625; 1. L. R. 801 (1973) 601 (1973) 39 Cut. L. R. (Cri.) 241.

16-17. *Naravana Pillai v. State*, 1971 Cri. L. J. 168 at 169; (1974) 1 Cri.

L. T. 233 (Delhi).

18. *Veeramuthu v. State of Madras*, 1971 Cri. App. R. 264 at 267, 268 (S. C.).

19. *Venkat Raghunath Andl v. Munnano*, A. I. R. 1976 Goa 60 at 61, 62.

20. *Murik Chand v. Bhagwan Das*, A. I. R. 1964 Pat. 358; (1971) 2 Cut. W. R. 797.

21. *Mangal Singh v. State of Madhya Bharat*, 1957 Cr. L. J. 325; A. I. R. 1957 S. C. 199, 202.

22. *Ibid* *State v. Bhoja Singh*, 1969 Cr. L. J. 1002; A. I. R. 1969 Raj. 219, 224.

the place of occurrence and the fact that in the aforesaid report the names of the accused as the culprits as well as the names of the eye witnesses were mentioned lends considerable corroboration to the testimony of prosecution witness regarding the participation of the accused appellants in the occurrence.²³ Prosecution evidence should not be disbelieved on the ground that father and brother of deceased were not examined to corroborate as to what witnesses said after incident was over.²⁴ The corroboration required of a witness who is a relation of the deceased in a murder case, is not that kind of corroboration which would be necessary to support the evidence of an approver or an accomplice, but only such corroboration as would be sufficient to lend assurance to the evidence before the court and satisfy the court that the particular persons were really concerned in the offence.²⁵ Where the evidence is neither wholly reliable nor wholly unreliable, the Court should seek corroboration from some independent evidence or from circumstances. But there can be no corroboration of a false or doubtful witness by another witness of the same character.¹ Evidence of hostile witnesses is not sufficient to corroborate evidence of partisan witnesses.²

Where the witness in question is an accomplice or in a position which can be considered somewhat analogous to that of an accomplice, though not exactly the same, the Court should want corroboration on material particulars.³ The tainted evidence of one accomplice cannot corroborate that of another.⁴ But where the witness is neither an accomplice nor anything near analogous to an accomplice, a Court can act on his testimony though uncorroborated. Unless corroboration is insisted upon by statute, Court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires, as a rule of prudence, that corroboration should be insisted upon. The question, whether corroboration of the testimony of a single witness is or is not necessary, must depend upon the facts and circumstances of

23. *Dargahi v. State of U.P.*, 1973 Cri. L. J. 1828 at 1832; 1973 S. C. C. (Cri.) 928; (1973) 2 S. C. W. R. 357; 1973 S. C. D. 1057; (1974) 3 S. C. C. 302; 1973 S. C. Cri. R. 465; 1973 Cri. L. R. (S. C.) 634; A. I. R. 1973 S. C. 2695.

24. *State of Bihar v. Ram Baid Singh*, 1966 Cri. App. R. 409 (S.C.).

25. *Indramani Singh v. State of S.C. J.* 210; 1952 A. I. J. 4; (1952) 2 M. L. J. 100; 65 M. L. W. 125; 1952 Cal. J. 100; A. I. R. 1952 S.C. 167, 169; *Karnail Singh v. State of Punjab*, 1963 S. C. R. 964; 1964 S. C. A. 220; 1964 A. L. J. 209; 1954 B. L. J. R. 179; 1954 M. W. N. 10; A. I. R. 1954 S.C. 204; *State v. Bhoji Singh*, 1960 Cal. J. 1002; A. I. R. 1960 Cal. 1004.

1. *State v. Jai Ram*, A. I. R. 1960 All. 280; 1960 A. I. J. 341; *Yadav v. State of M. P.*, 1971 desh. (1971) 3 S. C. C. 436; 1971

S. C. C. (Cri.) 684; 1971 S. C. D. 374; (1971) 2 S. C. Cr. R. 592; 1971 Cr. App. R. (S. C.) 247.

2. *Hemad Singh v. State of U.P.*, 1973 S. C. C. (Cri.) 951; 1975 Cri. L. J. 276; 1975 S. C. Cri. R. 177; 1975 A. Cri. C. 159; 1975 Cri. App. R. (S.C.) 18; (1975) 1 S. C. W. R. 75; 1975 L. L. R. 104; H. P. 1078; 1975 Cri. L. R. (S.C.) 68; (1975) 3 S. C. C. 343; (1975) 1 An. 1; J. S. C. 19; 1975 Pang. L. J. (Cri.) 98; A. I. R. 1975 S.C. 236. See *Vimireddy Satvanarayan v. State of Hyderabad*, 1956 S. C. R. 247; 1956 Cr. L. J. 777; 1956 All. L. J. 300; 1956 I. L. R. 1004, 1151; 1956 All. W. R. Sup. 75; 1956 S. C. J. 22; A. I. R. 1956 S.C. 204; *excluded in Ramesh v. State of R.*, 1969 A. I. R. 1969 S.C. 44; 1969 S. C. R. 90; 1969 J.S. C. J. 1002; 1962 M. L. J. 100; 1962 All. W. R. H. C. 100; *Bhaji Mal v. State*, 1969 Cal. L. J. 1553; A. I. R. 1969 Cal. 416, 418.

each case.⁵ Thus if there are reasons to think that a witness is not entirely disinterested and may have been exaggerating things, the Court may rightly insist on corroboration of his evidence.⁶ One can easily conceive cases of recovery of unlicensed weapons by members of the police force in circumstances in which it is not possible to lead corroborative evidence. In such cases it may very well be that a finding of conviction may legitimately be recorded on the evidence given by members of the police force without corroboration from members of the public. But where, according to the prosecution itself members of the public were present at the time of the alleged recovery and they are examined at the trial to support the version given by the police force but, far from supporting that version, they contradict it, it would not be proper to record a finding of conviction merely on the basis of the statements made by members of the police force.⁷ Testimony of witness swerving from the path of truth and suppressing or embellishing facts requires independent corroboration.⁸⁻⁹ Again, in a matrimonial dispute, for instance, when the relations between the spouses have become bitter, there may be some exaggeration in their respective versions by the spouses. In such cases, the matrimonial offence must be established to the satisfaction of the Court beyond reasonable doubt, and though not as a matter of law, as a rule of prudence, independent corroboration of the versions of the parties should be made. Such corroboration, however, need not be by direct testimony; it may be obtained from the conduct of the parties and the surrounding circumstances.¹⁰ But where, in an application by the husband for the wife for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 (25 of 1955), they alone are the witnesses, the husband's evidence can be sufficient corroborative evidence of general character having regard to the verities of that given by the wife on cruelty.¹¹ The Indian Evidence Act does not require corroboration of a party in civil cases. The rule of corroboration is generally a rule of prudence and practice to be applied reasonably having regard to all surrounding circumstances.¹² Mere publication in the report of a meeting in local newspaper is not sufficient to corroborate evidence of witnesses who depose that the offending statement was made by particular person at the meeting.¹³

Independent corroboration of the evidence of witnesses who are witnesses of the victim of a murder, is required to lend assurance to the conclusion that they are witnesses of truth.¹⁴

In a petition by the husband for dissolution of marriage on the ground of the wife's adultery, the husband alone gave evidence, yet it was not corroborated

5. *Vadivelu v. State of Madras*, 1957 S. C. R. 981; A. I. R. 1957 S. C. 614; 1957 Cr. L. J. 1000; [1956 M. P. C. 711; 1957 All L. J. 898; (1957) 2 Mad. L. J. (S. C.) 69; 1957 All. W. R. (H. C.) 610 cited with approval in *Ramratan v. State of Rajasthan*, A. I. R. 1962 S.C. 424.

6. *Vaikuntam Chandrappa v. State of Andhra Pradesh*, A. I. R. 1960 S. C. 1340; 1960 Cr. L. J. 1681.

7. *Jasrath v. State*, 1971 All. Cr. R. 334 at 335.

8-9. *State v. Dewari Behora*, 1976 Cr. L. J. 262; 42 C. L. T. 726.

10. *Meena v. Lachman*, I. L. R. 1960 Bom. 365; A. I. R. 1960 Bom. 418, 61 Bom. L. R. 1549.

11. *Siddagangiah v. Lakshamma*, 11 Law Rep. 486; (1967) 2 Mys. L. J. 185; A. I. R. 1968 Mys. 115.

12. *Shakila Banu v. Gulam Mustafa*, A. I. R. 1971 Bom. 166 at 169; 72 Bom. L. R. 623; 1970 Mah. L. J. 904; I. L. R. 1971 Bom. 714.

13. *Babu Rao Bagaji Karemore v. Govind*, A. I. R. 1974 S. C. 405 at 421; (1974) 3 S. C. C. 719; (1974) 2 S. C. R. 429.

14. *State v. Dhusa Kandy*, 35 Cut. L. T. 152; 1970 Cr. L. J. 1322, 1323.

ed, the respondent's remaining *ex parte*. Merely because the respondents did not care to contest the proceeding, the court will not be justified in coming to the conclusion that the evidence of the husband is true and worthy of credit.¹⁵

When the only witness, a child, at one stage the victim of tutoring, gives two contradictory versions and on the evidence the witness stands condemned as a liar, the court needs corroboration in support of the statement on which the conviction is to be sustained.¹⁶

In *State v. Bhatia*,¹⁷ the bare statement of the prosecutrix in a criminal case for an offence under Section 366, I. P. C., that she was compelled, threatened or otherwise coerced to go with the accused, when she had made several divergent statements, and the material evidence was that she had been used to sexual intercourse, there should be corroboration of some material particulars before the statement can be considered sufficient to sustain the accused's conviction.¹⁸ A witness does not need corroboration on all material particulars. Corroboration on some important and material particulars is sufficient.¹⁹ For other cases, when corroboration of women witnesses is required or not the following cases may be seen.²⁰

Any fact which renders it more probable that the witness's testimony is true on any material point can amount to corroboration but facts which are equally consistent with the truth of the testimony or the reverse are not corroborative. In order to be corroborative evidence must be independent testimony which connects or tends to connect the accused with the offence.²¹

Where the question is whether a Hindu has become converted to Buddhism, the evidence of conversion may be corroborated by evidence of subsequent conduct.²² In this sense of independent corroboration defendant's evidence is not trustworthy when it is at variance with the written statement and proof.²³

Evidence of opportunity does not amount to corroboration, nor does defendant's not giving evidence amount to corroboration.²⁴

Where a witness in a criminal case may be regarded as having some purpose of his own to serve, whether he be a fellow prisoner or a witness for prosecution, a conviction should not be based on that witness's evidence unless it is corroborated but if there be such clear and convincing evidence, as satisfies

15. *Antoniswamy v. Anna Manickam*, (1969) 2 M. L. J. 457; 82 M. L. W. 459; A. I. R. 1970 Mad. 91. (The court was asked to give relief to the respondent on the basis of the husband—see section 7, Divorce Act, 1869).
16. *Jogi Sahu v. State*, I. L. R. 1968 Cut. 748; 1970 Cr. L. J. 637, 638.
17. *Ram Murti v. State of Haryana*, 1970 S. C. D. 663 at pp. 671, 672.
18. *Ramdhani Pandey v. State of M. P.*, 1973 Cri. L. J. 1880 at 1884; 1973 Jab. L. J. 504; 1973 M. P. W. R. 326; 1973 M. P. L. J. 570.
19. *Madho Ram v. State of U. P.*, A. I. R. 1973 S.C. 469 (case under section 366 & 376 I. P. C.); *Ganga Rout v. The State*, (1975) 41 Cut.

- L. T. 1501 (Prior to her examination in Court a girl of tender years stayed in police station for four days and on examination, the police was found to have been seriously affected).
20. *Senat v. Senat*, (1963) 2 All E. R. 505.
21. See *Punjabrao v. D. P. Meshram*, A. I. R. 1965 S. C. 1179; 1965 M. P. L. J. 257; 67 Bom. L. R. 812; (1965) 2 S. C. A. 85; (1965) 2 S. C. J. 725; 1965 Mah. L. J. 162.
22. *Jyotirmoyee v. Durga Das*, A. I. R. 1976 Cal. 298 at 241, 242.
23. *Cracknell v. Smith*, (1960) 3 All E. R. 569.

the conscience of the Court, corroboration is not necessary.²⁴ Offences can be committed in the dead of night inside a house where no independent witness would be available and the only witnesses who can depose are the inmates of the house. In such cases the evidence of the inmates or the injured would be examined critically and the prosecution case may be accepted on their testimony without independent corroboration if it is reliable.²⁵ But where a witness swears his stand, so that his evidence is no better than that of an accomplice, corroboration by other independent reliable evidence is required in material particulars.¹

(u) *Rejecting and accepting part of the testimony.* The maxim "false in one false in all, *falsus in uno falsus in omnibus*" is based on the concept that when the witness makes a false statement, it affects his entire credibility. If a person lies as to one fact, he is a liar as to others. In other words, his veracity is so undermined as to render it uncertain as to when he is telling the truth. As the credit due to a witness is founded in the first instance on a general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Failure in a witness's reputation cannot be partial or fractional. But this rigid interpretation has come to be doubted and is now applicable in a modified form as the following extracts and decisions will show.

The maxim *falsus in uno falsus in omnibus* is in itself worthless; first, in point of veracity, and secondly in point of utility, because it merely tells the jury what they may do in any event, not what they must do or must not, and therefore it is a superfluous form of words. It is also in practice pernicious.²

In fact the function of the jury in drawing inferences from the evidence is set out by Underhill's Criminal Evidence, page 1359, summing up the American case law on the subject as follows:

"The jurors determine the weight to be given to the testimony of the witnesses by the demeanour in the stand, their interest in the case, the probability or improbability of their testimony, its corroboration, the facts bearing on their credibility, their intelligence and knowledge and not by the mere number of witnesses. Conflicting evidence should be reconciled by the jury, if possible, and, if they cannot reconcile it, they may base their verdict on that part of the testimony which they consider worthy of credit and reject that which they deem to be unworthy of belief. Inconsistencies and contradictions in the testimony of a witness do not make it necessarily unreliable. The jury cannot arbitrarily reject the evidence but the testimony of a witness which is willfully and corruptly false may be entirely disregarded by the jury. The jury may believe the testimony of one witness or any part of his testimony as against a great number of witnesses. They may regard the testimony of an unimpeached witness

24. See R. Prater, (1960) 1 All. E. R. 298.

25. Patil, alias Abdul Satar Khan v. State, 1975 Cr. L. T. 349 at 351, 352.

1. State of Karnataka v. K. S. Ram Das, 1976 Cr. L. J. 228 at 233.

2. Starkie on Evidence, p. 873.

3. Wigmore on Evidence, Vol. III, para. 1008.

and they are not bound to believe uncontradicted evidence which is incredible. But if the jurors disbelieve all the witnesses because their testimony seems improbable, they cannot adopt an equally improbable theory which is grounded on mere suspicion. In short, the present day tendency is that we must weigh evidence carefully in each case and not adopt any arbitrary formula or yardstick in measuring its worth or worthlessness.

There is almost always a fringe of embroidery to a story however true in the main. The falsehood should be considered in giving the evidence; and it may be so glaring as utterly to destroy confidence in the witness altogether. But, when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of want of veracity in perhaps some minor point.

In *Gur Charan Singh v. State of Punjab*,⁴ the Supreme Court held:

"Merely because two of the four accused have been acquitted, though the evidence against all of them so far as the defence testimony went was the same, it does not necessarily follow that the other two must be similarly acquitted. Where the lower court had differentiated the case of the accused who had been acquitted from the other two on the ground of absence of motive in the former case and in addition to that the evidence of the witnesses as against the convicted accused was consistent and not shaken by cross-examination, there is no sufficient reason for the appellate court to go behind the finding which was based by the lower court on that evidence."

In *In re P. Ramulu*,⁵ it was said that the appreciation of oral evidence by a court cannot conform to certain set formula, or be measured by the yardstick common to all cases. Ordinarily, a court should not convict an accused on the basis of evidence not accepted by it in connection with other accused, unless the evidence is corroborated otherwise; but this is not an inflexible rule of law but a rule of prudence in the appreciation of the evidence, and is not intended to prevent a judge of fact from appreciating the evidence, that is placed before him, having regard to the circumstances of each case. In *State of Punjab v. Hari Singh*,⁶ the Supreme Court held that Courts in this country do not act on the maxim "*falsus in uno falsus in omnibus*". When the effect of an allegation proved to be incorrect or which may be true or untrue has to be considered, it has to be viewed in the setting of facts in each particular case.

In *Nisar Ali v. State of U. P.*,⁷ the Supreme Court held that the maxim

4. A. I. R. 1956 S. C. 460; 1956 Cr. L. J. 827.

5. A. I. R. 1956 Andhra 247; 1956 Cr. L. J. 1389.

6. 1974 Cr. L. J. 822 at 827; 1974 Cr. L. J. 307; 1974 Punj. L. J. 101; 1974 S. C. R. 725; 1974 S. C. D. 58; 1974 Cr. L. R. S. C. 389; 1974 S. C. C. 110; 1974 S. C. Cr. R. 128; 1974, 4 S. C. C. 55; 1974 Mad. L. J. (Cri.) 519; (1974) 2 S. C. J. 52; 1974 S. C. D. 77; 1974 B. B. C. J. 526; 1975 A. I. R. 117; A. I. R. 1974 S. C. 1168.

7. A. I. R. 1957 S. C. 366; 1957 Cr.

L. J. 550; 1957 S. C. J. 392; 1957 M. P. C. 346; (1957) 1 Mad. L. J. Cr. 314; 1957 B. I. J. R. 352; 1957 All. L. J. 447; 1. L. R. (1957) 1 All. 361; 1957 A. W. R. (H.C.) 461; *Bishwanath Gosain v. Dalhin Lalmani*, A. I. R. 1968 Pat. 481, 485 (maxim no longer applied unconditionally even to criminal cases); *Wahengbam Nimal Singh v. Manipal Administration*, 1968 Cr. L. J. 1257; see *Wigmore on Evidence*, para 1608, the maxim is worthless. *Mid. Ayub Khan v. Abdus Samad Khan*, 1969 B. L. J. R. 992, 997; *Ram Kishore v. Ambika*

falsus in uno falsus in omnibus has not received the general acceptance in different jurisdictions in India; nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that the testimony may be disregarded and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called a mandatory rule of evidence. And in *Ugr v. State of Bihar*,⁸ Subba Rao, J. observed that the maxim *falsus in uno falsus in omnibus* (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the Court to scrutinise the evidence carefully and separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. Therefore, the court's duty in cases where a witness has been found to have given unreliable evidence in regard to certain particulars is to scrutinise the rest of his evidence with care and caution. If that part of the evidence takes away the very substratum of his case, the court cannot disbelieve the substratum and reconstruct a story of its own out of the rest. The same view has been taken in the following cases.⁹

Therefore the court's duty in cases where a witness has been found to have given unreliable evidence in regard to certain particulars is to scrutinize the rest of his evidence with care and caution. If that part of the evidence takes away the very substratum the court cannot reconstruct a story of its own out of the rest.¹ In *Ranbir v. State of Punjab*,¹¹ the Supreme Court held that in cases of party factions there is generally a tendency in the part of prosecution witnesses to implicate some innocent persons along with the guilty persons. In such cases the evidence has to be scrutinised with care and caution and if the substratum of the prosecution case remains unaffected and the remaining evidence is trustworthy, the prosecution case should be accepted to the extent it is considered safe and trustworthy.

Where one part of the evidence of a witness is disbelieved, judges of fact have the right to act on the rest of his testimony if it inspires complete reli-

Prasad, 1966 A. W. R. (H.C.) 57; A. I. R. 1966 All. 515, 516; Nathu v. State of Sikkim, 1969 W. L. N. (Part I) 361; I. L. R. 1971 (21) Raj. 400; Dharam Pal v. State of A.P. 1971 Cr. L. J. 1750; 1971 Sim. L. J. (H.P.) 211.

⁸ A. I. R. 1965 S.C. 194; 1964 B. L. J. R. 615; 1965 (1) Cr. L. J. 256; 1965 Mad. L. J. Cr. 105; 1965 All. W. R. (H.C.) 90; 1964 Cur. L. J. (S.C.) 220; 1964 S. C. D. 741.

⁹ Sohrab v. State of Madhya Pradesh, 1972 Cri. L. J. 1302; (1972) 3 S. C. C. 751; (1972) 2 Um. N. P. 481; (1972) 2 S. C. W. R. 294; (1973) 1 S. C. J. 308; 1973 U. J. (S.C.) 43; 1973 Mad. L. J. (Cri.) 192; (1973) 1 S. C. R. 472; 1972 S. C. C. (Cri.)

819; A. I. R. 1972 S.C. 2020; Ram Singh v. State of W. P. N. 567; 1972 Raj. L. J. 495; 1973 W. L. N. 401; 1973 Cri. L. J. 1113; Ghisa v. State of Rajasthan, 1975 W. L. N. 213; 1976 Cri. L. J. 39; Babu Lal v. State of Rajasthan, 1977 89 Cr. L. J. 29 (F.B.); Harsarup Dass v. Padanabhaiah, 1972 Cri. L. J. 956; 1971 Sim. L. J. (H.P.) 1.

¹⁰ Deep Chand v. State, 1970 C. A. R. (S. C.) 62, 67; 1970 S. C. D. 123; (1973) 2 S. C. W. R. 25; 1973 Cri. L. J. 1120; 1973 S. C. C. (Cri.) 858; 1973 Cur. L. J. 721; 1973 S. C. D. 723; 1973 Cri. L. R. (S.C.) 488; 1973 B. B. C. J. 505; (1974) 1 S. C. R. 102; A. I. R. 1973 S. C. 1409.

ance¹². Even the statements of witnesses who are not totally reliable can be acted upon where they are corroborated by other reliable evidence¹³. The maxim *in dubio pro reo*, *omnibus* should not be mechanically applied in India in appraising evidence.¹⁴

If part of statement of a witness is incorrect or doubtful, the statement is not to be rejected outright but acceptable truth is to be separated from falsehood.¹⁵ If the evidence of some witnesses is unsafe for convicting some accused, that by itself is no ground for rejecting the evidence of those witnesses against the other accused¹⁶. The duty of Courts in such cases is to disengage truth from falsehood and to accept what it finds to be true¹⁷. There is no rule of law that if the court acquits one accused on the evidence of a witness finding it to be doubtful against him, the remaining credible evidence cannot be used to convict other accused whose complicity is certain¹⁸.

If truth and falsehood in the evidence of a witness (for the prosecution) are so intermingled as to make it impossible to separate them, the evidence should be rejected in its entirety.¹⁹

A court has the right to disbelieve part of a witness's evidence and believe a part thereof.²⁰ It can accept the testimony of some of the witnesses against

12. *Jagdish v. State*, 1967 A. L. J. 82; 1966 A. W. R. (H.C.) 109; 1967 Cr. L. J. 1467; A. I. R. 1967 All.
13. *Mangal v. State*, 1967 Cr. L. J. 598; A. I. R. 1967 All. 204, 207; *Jahbar v. State*, 1966 A. L. J. 1046; 1966 A. W. R. (H.C.) 254; 1966 Cr. L. J. 1363; A. I. R. 1966 All. 590, 591.
14. *Bhagwan Tana Patil v. State of Maharashtra*, (1973) 2 S. C. W. R. 554; 1974 Cr. L. J. 145; 1974 Mad. L. J. (Cri.) 258; (1974) 1 S. C. J. 571; 1974 Cr. App. R. 15 (S.C.); 1974 S. C. C. (Cri.) 11; (1974) 3 S. C. C. 536; A. I. R. 1974 S. C. 21; *Bawa Haji Hamsa v. State of Kerala*, 1974 S. C. D. 449; 1974 Cr. L. J. 755; 1974 Cr. L. R. (S.C.) 317; 1974 S. C. C. (Cri.) 515; (1974) 4 S. C. C. 479; A. I. R. 1974 S. C. 902; *Laxman v. State of Maharashtra*, 1974 M. P. L. J. 227; 1974 S. C. C. (Cri.) 228; (1974) 3 S. C. C. 704; 1974 Mah. L. J. 229; 1974 Cr. L. R. (S.C.) 36; (1974) 2 S. C. J. 371; 1974 Chand L. R. (Cri.) 234; 1974 Mad. L. J. (Cri.) 571; 1975 Mad. L. W. (Cri.) 87; 1974 Cr. L. J. 369; (1974) 2 S. C. R. 505; A. I. R. 1974 S.C. 308; *Narasing Naik, In re*, (1971) 2 Mys. L. J. 552; 1972 Mad. L. J. (Cri.) 38; 1972 Cr. L. J. 1150; 1973 Cut. L. R. (Cri.) 320; I. L. R. (1976) 2 Punj. 362; 1975 Punj. L. J. (Cri.) 261.
15. *Laxman v. State of Maharashtra*, 1974 M. P. L. J. 227.
16. *Bawa Hazi Hamsa v. State of Kerala* Supra; *State v. Jittu*, 1972 A. W. R. (H.C.) 861 at 864; 1972 A. C. R. 558; *Patia alias Abdul Satar Khan v. State*, (1975) 41 Cut. L. T. 349; *Ahmad Sulaiman Bharat v. State of Gujarat*, A. I. R. 1971 S. C. 991.
17. *Bhagwan Tana Patil v. State of Maharashtra*, Supra; *Ramjan Ganai v. State*, 1973 Cr. L. J. 1378; 1974 J. & K. L. R. 58; 1973 (1) Chand L. R. 101; *Guljara Singh v. State*, 1970 W. L. N. (Part 1) 265; 1971 Cr. L. J. 498; A. I. R. 1971 Raj. 68; *Md. Yusuf Khan v. Mst. Zarina*, 1975 Raj. L. W. 322; 1975 W. L. N. 281.
18. *Mst. Dalbir Kaur v. State of Punjab*, A. I. R. 1977 S. C. 472 at 488; (1977) 1 S. C. J. 54; (1977) M. L. J. (Cri.) 50; (1976) 4 S. C. C. 158; (1976) S. C. C. (Cri.) 527; *Somabhai v. State of Gujarat*, 1975 Cr. L. J. 1201; 1975 S. C. C. (Cri.) 515; 1975 Cr. L. R. S. C. 421; A. I. R. 1975 S.C. 1453.
19. *Kambi Nanji Virji v. State of Gujarat*, 1970 S. C. Cr. R. 311; 1970 S. C. D. 244; 1970 Cr. L. J. 363; A. I. R. 1970 S. C. 219, 221; *Bhagwan Tana Patil v. State of Maharashtra*, Supra; *Balaka Singh v. State of Punjab*, 1975 S. C. 1962; *Sukha v. State of Rajasthan*, 1956 S. C. R. 288; 1956 S. C. A. 781; 1956 S. C. C. 355; 1956 S. C. J. 503; 1956 Andh. L. T. 583; 1956 A. W. R. (Sup.) 83; 1956 Cr. L. J. 923; A. I. R. 1956 S. C. 513; *Jagdip Singh v. State of Haryana*, A. I. R. 1974 S. C. 1978.

one and not accept the same against another²¹

A witness who tells lies on one point may be believed on another point, **provided there is corroboration.**²²

In *Chhotan Mahton v. The State*,²³ it has been held that where the court accepts the story of the prosecution in respect of the crime in essential particulars, that is to say, the manner in, and the circumstances under which, it was committed, and also that some of the persons, alleged to have taken part in it, had actually been participants in the crime, the court should endeavour to find out which of them were the actual participants, and should not throw out the case, merely because the prosecution partly had embellished the actual occurrence by making false embroideries to it, and there were discrepancies in the evidence of the prosecution witnesses, the doctrine of separating the grain from the chaff applies to such a situation. So:

(1) Where the prosecution account of the occurrence is not acceptable in material particulars forming the core of the happening, the court will not ordinarily be justified in such a situation to act upon any rival theory of the defence, attempted to be proved or suggested during the trial in such a way as to take out one part of it to supplement the prosecution evidence or to add strength to the case or to the evidence adduced by the prosecution in support thereof, and reject the other part of it, and then come to the conclusion that the prosecution had proved its case.

(2) Where the case of the prosecution regarding the occurrence is sought to be proved by evidence which is wholly unacceptable, e.g., witnesses are unreliable, by reason of enmity, by telling an extravagant story, by reason of inconsistencies in their evidence, want of corroboration in suitable cases on material parts of the story, and other like infirmities, the case of the prosecution **must be rejected outright.**

(3) Where the facts proved beyond doubt, or admitted, indicate that some sort of occurrence must have taken place, there is no rule of law preventing a judge from arriving at a theory of actual happenings, if this can be fairly done on all the evidence. But this is not permissible, when the prosecution story about the occurrence is found to be false in its fundamental aspects.

The rule that evolves itself out of a discussion of the decided cases is: that the courts are called upon to very carefully scrutinise the evidence adduced before them and separate the grain from the chaff and sift out the truth from falsehood. The case will, however, be different, if the essential circumstances of the story put forward by the witness or witnesses are seen to be clearly unfounded. This, to use the philosopher Hallam's expression, is "to pull a stone out of an arch, the whole fabric must fall to the ground." Otherwise, where the evidence is substantially correct, simply because there are falsehoods in it, it should not be totally rejected. In *Abdul Gani v. State of M. P.*,²⁴ their

21. *Callu Sah v. State of Bihar*, 1969 S. C. R. 861; A. I. R. 1958 S.C. 813, 815; *Dalim Kumar v. Smt. Nandarani Dassi*, 73 C. W. N. 877; A.I.R. 1970 Cal. 292; *Ajit Singh v. State of Punjab*, 1970 U. J. (S.C.) 388; 1971 S.C.G. (Cr.) 15.

22. *Devra v. State*, 1967 Jhb. I. J. 504, 506; 1967 M. P. L. J. 680.

23. A. I. R. 1959 Pat. 362; 1959 Cr. L. J. 1009.

24. A. I. R. 1954 S. C. 31; 1954 Cr. L. J. 323.

Lordships have said that every effort should be made by a court to discover the core of truth in the evidence and to separate the grain from the chaff.²

(iv) *Judge adopting intermediate theory.* A judge cannot adopt an intermediate theory. In *Meethum Bebee v. Bisheer Khan*,¹ it was held:-

"But between these two cases lies the theory adopted by the Principal Sudder Ameen. If this case had been established by satisfactory evidence, the Principal Sudder Ameen, in dealing with the second issue, might properly have adopted and acted upon it. If the Principal Sudder Ameen thought that his hypothesis was according to the truth of the case, and the real rights of the parties, he should have established it by pursuing the enquiry, and by calling for the production of proper proof. And the conclusion of the Principal Sudder Ameen seems to rest principally on his own knowledge and belief on public rumour grounds upon **which no judge is justified in acting.**"

The court, however, is not tied down, in a criminal case, as it is in a civil case, to the pleadings of the parties. It can uphold what it considers to be the correct version by partially discarding both the prosecution and the defence versions. The only limitation on the powers of the court to arrive at a version of its own in a criminal case is that it must rely on facts proved on the record from either side and not on bare conjecture, unsupported by evidence, as a **basis for conviction.**³

(v) *Party should put his case in cross-examination of witnesses.* A counsel, when cross-examining, must put to the opponent's witnesses so much of his own case as concerns that particular witness, or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety; such failure leads to miscarriage of justice, first by springing surprise upon the party, when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put, and secondly, because such subsequent testimony has no chance of being tested and corroborated. The law is clear that wherever the opponent has declared to avail himself of the opportunity to put his essential and material case in cross-examination, it may be taken that he believes that the testimony given could not be disputed at all.⁴

(x) *Confession of co-accused.* A confession cannot be treated as evidence which is substantive evidence against the co-accused. In dealing with a criminal case, where the prosecution relies upon the confession of one accused person

25. See also *Sukha v. The State of Rajasthan*, A. I. R. 1956 S. C. 513; 1956 Cr. L. J. 923; 1956 An. L. T. 583; 1956 All. W. R. S.C. 83; 1956 B. L. J. R. 511; *Gallusah v. State of Bihar*, A. I. R. 1958 S. C. 813; 1958 Cr. L. J. 1352; 1958 All. W. R. (H.C.) 766; 1958 All. L. J. 716; 1958 M. P. C. 670; 1958 B. L. J. R. 762; 1958 Mad. L. J. Cr. 970; I. L. R. 37 Pat. 1122; *Barisa Mudi v. The State*, A. I. R. 1959 Pat. 22; 1959 Cr. L. J. 71; *Surajmal v. The State*,

1959 Raj. L. W. 381; *Chellappan Nair v. The State of Kerala*, 1960 Ker. L. T. 965; Ch. *Razik Ram v. Ch. J. S. Chauhan*, (1975) 4 S. C. C. 769; A. I. R. 1975 S.C. 667; *Kayumuddin Mian v. Abdul Gafoor*, 1972 Cri. L. J. 182 (Assam).
1 11 Moore's Indian Appeals, 243 at pages 220-221.
2 *Sheolochan v. State*, 1971 All W. R. (H. C.) 92 at 96.
3 *A. E. G. Carapiet v. A. Y. Denderian*, A. I. R. 1961 C. 359.

against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the Court may turn to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. A confession can only be used to lend assurance to other evidence against a co-accused.⁴⁻⁵

A confession of a co-accused is evidence of a very weak type. It does not come within the definition of "evidence" contained in this section. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested, therefore, by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of these infirmities. Section 30 of this Act however provides that the court may take the confession into consideration and thereby make it evidence on which the Court may act but that section does not say that the confession is to amount to proof. Clearly, there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case. It can be put into the scale and weighed with the other evidence.⁶

In dealing with a case against an accused person, the Court cannot start with the confession of a co-accused. It must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.⁷

(y) *Examination of witnesses through interrogatories.* An examination through interrogatories cannot be as thorough and as satisfactory as a *voir dire* examination.⁸

(z) *Presumptions.* Courts have to be extremely caution in scrutinizing and accepting evidence, particularly where presumptions arise under special provisions of law.⁹

10. *Appreciation of evidence by Appellate Court.* (a) *General.* In adjudicating upon the rival claims brought before the Court, it is not always easy to decide where truth lies. Evidence is adduced by the respective parties in support of their conflicting contention, and circumstances are similarly pressed into service. In such cases it is the duty of the Judge to consider the evidence objectively and dispassionately, examine it in the light of probabilities

4-5. *Haricharan v. State of Bihar*, (1964) 2 S. C. J. 454; 1964 B. L. J. R. 501 A. I. R. 1964 S. C. 1184; 1964 2 Cr. L. J. 344; 1964 M. L. J. (Cr.) 535; 1964 Cur. L. J. (S.C.) 208; *Rafeeq v. State of Rajasthan*, 1974 W. L. N. 214; 1974 Raj. L. W. 213.

6. *Bhuboni v. The King*, L. R. 76 I. A. 147; 155 A. I. R. 1949 P. C. 257, 260; *Suresh Chandra Das v. State of Meghalaya*, 1961 Cr. L. J. 1292 (confession of co-accused is not evidence as governed by section 8).

7. *Haricharan v. State of Bihar*, Supra; *Kasmira Singh v. State of*

Madhya Pradesh, 1952 S. C. R. 526; A. I. R. 1952 S. C. 159; 1952 Cr. L. J. 839; 1952 M. W. N. 422; 1952 All W. R. Supp. 64; 1952 Mad. L. J. 754; *Budu v. State*, A. I. R. 1965 Orissa 170; 31 Cut. L. T. 401.

8. *Lakshmi Insurance Co., Ltd. v. Padmawati*, L. R. 1961 1 Patj. 53; A. I. R. 1961 Patj. 23; 63 P. L. R. 251.

9. *Ramlal Shiva v. The State of Gujarat*, 1967 8 Guj. L. R. 145; 162 (presumption under section 7 of G. Bombay Prevention of Gambling Act (IV of 1897)).

and decide which way the truth lies. The impression formed by the judge, about the character of the evidence, ultimately determines the conclusion which he reaches. It should not be overlooked that all judicial minds do not react in the same way to the evidence and it is not unusual that evidence which appears to be respectable and trustworthy to one judge does not appear to be respectable and trustworthy to another judge. This explains why in some cases Courts of appeal reverse conclusions of facts recorded by the trial courts on their appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in a case, acts as a sobering factor. The appellate Court must examine all the *pros* and *cons* carefully and scrupulously, and make a conscientious effort not to regard evidence which appears to be unreasonable or improbable as being false and perjured.¹⁰

Where a case turns entirely on questions of facts and the credibility of witnesses, the court of appeal should hesitate before it disturbs the findings of the trial judge based on verbal testimony of conflicting witnesses whom he has seen and heard. In such a case a heavy burden is of necessity, thrown upon those who challenge those findings. Where findings, as regards facts, have been drawn from argumentative inference drawn from the testimony oral and documentary and depend upon the weight of the evidence and the inherent probability of the story, and not merely on the credibility of witnesses induced by their demeanour of the manner in which they answer questions and where the documentary evidence has to be taken into consideration and weighed, the trial court is in no better position than the Court of appeal in **discovering the truth.**¹¹

Where there is a mass of conflicting oral testimony, it is always desirable—and indeed safe—to let the documents speak for themselves.¹²

(b) *Civil appeal.* As regards appreciation of evidence, the appellate court has, under Section 107 of the Civil Procedure Code, the same powers and duties as the trial court. On appeal the whole case, including the facts, is within the jurisdiction of the appeal court. But generally speaking, it is undesirable to interfere with the findings of fact of the trial Judge, who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses.¹³ The burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is merely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded.¹⁴ In practice two conflicting viewpoints have to be reconciled, namely, on the one hand, the indoubted duty of the court of appeal to review the recorded evidence to draw its own inferences and conclusions, and, on the other hand, the unquestionable weight which must be attached to the **opinion of the judge of the primary court** who has the advantage of seeing

10. *Ishwari Prasad v. Mohammad Isa*, A. I. R. 1963 S. C. 1728; 1963 B. L. J. R. 226.

11. *Meena v. Iachman*, I. L. R. 1960 Bom. 365; A. I. R. 1960 Bom. 418; 61 Bom. L. R. 1549.

12. *Ibid.*

13. *Bombay Cotton Manufacturing Co.*

v. Motilal Shivalal, 42 I. A. 110; 29 I. C. 229; A. I. R. 1915 P. C. 1; *Ramakka v. K. Muniappa*, A. I. R. 1973 Mys. 205 at 207; (1973) 1 Mys. L. J. 164.

14. *Naba Kishore v. Upendra Kishore*, 1922 P. C. 39, 40; 65 I. C. 303; 24 Bom. L. R. 346.

the witnesses and noticing their look and manner.¹⁵ "If the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at in the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is retreating from exaggeration. Like other tribunals, he may go wrong on a question of fact but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given. Where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the verdict of a judge trying the case should not be lightly disregarded.¹⁷ Where the question of credibility does not depend on the light thrown upon it by the demeanour of the witnesses in the box and the manner in which the witness answers and how he is affected by the question put to him, but the views on credibility are founded upon the argumentative inferences from facts not disputed, the court of appeal is really in as good a situation as the trial judge.¹⁸ But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not, and these circumstances may warrant the Court in differing from the Judge, even on questions of fact turning on the credibility of witnesses whom the Court has not seen.¹⁹ The uniform practice in the matter of appreciation of evidence has been that if the trial Court has given cogent and detailed reasons for not accepting the testimony of a witness the appellate Court in all fairness to it ought to deal with those reasons before proceeding to form a contrary opinion about accepting the testimony which has been rejected by the trial Court.²⁰ But, it has been laid down in a decision of the Privy Council that it is always difficult for judges who have not seen or heard the witnesses to refuse to adopt the conclusions of those who have done so, and that the difficulty is all the greater when the latter have formed an opinion adverse to the witnesses in question.²¹ In a later case, in the Allahabad High Court, it was said that, as a general rule, a trial judge in India has not as much opportunity of attaching importance to the demeanour of witnesses as a judge in England, because in this country many trials are not heard

15. *Prasannamoyee Debi v. Barkuntha Nath*, 1922 Cal. 260; I. L. R. 49 Cal. 152; 66 I. C. 782.
16. *Per Viscount Simon in Watt v. Mahalakshmana*, 1922 P. C. 315; 27 C. W. N. 414; *Sita Veer Swami v. Pillai Narayana*, 1949 P. C. 32; 75 I. A. 252; I. L. R. 1949 M. 487.
17. *Bombay Cotton Manufacturing Co. v. Motilal Shivalal*, 1915 P. C. 1; 42 I. A. 1; 1 I. L. R. 39 Bom. 386; 29 I. C. 229; *Surjan Singh v. The State*, 1971 W. L. N. 360.
18. *Palchur Sankara Reddi v. Palchur Mahalakshamma*, 1922 P. C. 315; 27 C. W. N. 414; 70 I. C. 949; *M. Nagendramma v. M. Rama Kotayya*, 1954 M. 713; (1955) 1 M. L. J. 25.

19. *Per Bowen J. in Coghlan v. Cumberland*, (1898) L. R. 1 Ch. 705; *Bombay Cotton Manufacturing Co. v. Motilal*, 1915 P. C. 1; 42 I. A. 110; 29 I. C. 229.
20. *T. D. Gopalan v. Commissioner of Hindu Religious and Charitable Endowments, Madras*, A. I. R. 1972 S. C. 1716 at 1719; (1972) 2 S. C. W. R. 69; (1972) 2 S. C. C. 329; 1972 S.C.D. 685; (1972) 3 Ubb. N. P. 522 (1973) S. C. J. 169; (1973) 1 Mad. L. J. (S.C.) 43; (1973) 1 Andh. W. R. (S.C.) 43; 1973 U. J. (S.C.) 135; (1973) 1 S. C. R. 584.
21. *Shunmugaroya v. Manikka*, (1909) 32 M. 400 (P.C.) and *Imdad v. Pateshri*, (1909) 32 A. 241 (P.C.).

continuously and judgments are often written some time after the evidence is heard.²²

In determining the compensation payable in land acquisition proceedings, the appellate Court cannot, after the conclusion of arguments look into documents which were not part of the record. If the appellate Court wanted to take into consideration any fresh evidence it should have admitted the same in accordance with law and give the parties opportunity to rebut the evidence.^{23 24}

The endorsement on a document by court prescribed by Order XIII, Rule 4, C. P. C., means that the document is admitted in evidence as proved. But if the objection is taken only to the mode of proof, it should be taken at the trial before the document is marked as an exhibit and admitted. A party cannot lie by until the case comes before the court of appeal and then complain for the first time of the mode of proof.²⁵

(c) *Criminal appeals.* In an appeal from conviction it is for the prosecution to establish that the judgment of the trial court is right. The presumption of innocence of the accused still persists and the appellate Court has to satisfy itself that judgment of the trial court is right.¹ It is for the appellate court, as it is for the first court, to be satisfied affirmatively that the prosecution case is substantially true, and that the guilt of the appellant has been established beyond all reasonable doubt. To hold that, unless reasonable ground is given to the appellate court for differing from the lower court, the appellate court must accept its findings of fact, is to approach the case from a wrong standpoint.² The sound rule to apply, in trying a criminal appeal where questions of fact are in issue, is to consider whether the conviction is right, and, in this respect a criminal appeal differs from a civil one. In the latter case, the court must be convinced, before reversing a finding of fact by a lower Court, that the finding is wrong.³ The Court is bound in forming its conclusions as to the credibility of the witnesses to attach great weight to the opinion which the Judge who heard them has expressed upon that matter.⁴ Accordingly, the High Court would be slow in disturbing in appeal a finding of fact based on the appreciation of evidence by the trial court.⁵

The sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look into because it amounts to an error of law apparent on the record.⁶⁻¹

22. *Mauladad v. Abdul*, (1917) 1. L. R. 39 A. 426; 39 I. C. 666; A. I. R. 1917 A. 35.

23 24. *Charanbhai Patil v. Collector Raigarh*, (1969) 1 S. C. J. 344; (1969) 1 S. C. W. R. 320; 1969 A. L. J. 159; 1969 B. L. J. R. 196; 1969 J. & L. 143; 1969 M. P. L. J. 46; 1969 M. H. L. J. 49; 1969 Ker. L. J. 212; A. I. R. 1969 S. C. 255, 256.

25. *Guberdhan Goura v. Labanya midhi Bhoj*, 33 Cut. L. T. 960, 965.

1. Per Sir J. in *Abdul Gani v. Emperor*, 1943 Cal. 46; 1 I. R. (1943) 1 Cal. 423; 209 I. C. 105.

2. *Kanchan Mallick v. Emperor*, 1917 Cal. 187; 1. L. R. 42 Cal. 374; 26 I. C. 174; *Mohammad Hussain v. Emperor*, 1945 Nag. 116; 1. L. R.

1945 Nag. 441; 219 I. C. 320.

3. *Protap v. R.*, (1882) 11 C. L. R. 25, per White, J. referred to in *Rehmanuddin v. R.*, (1872) 20 C. 353, 357; but see *R. v. Ramlochan*, (1872) 18 W. R. Cr. 15. The case of *Protap v. R.*, (1882) 11 C. L. R. 25 was followed in *Millan v. Sug*, 28 C. 347; 349; *Paljee v. Guzdar*, 1. L. R. 43 C. 833; 34 I. C. 807; A. I. R. 1916 C. 964. *R. v. Madhub*, (1874) 21 W. R. Cr. 13.

4. *State v. Anand Lakshman Chari*, 1969 Cr. 1 J. 467 A. I. R. 1969 Goa 40-42.

5-1. *State of Haryana v. Rattan Singh*, A.I.R. 1977 S.C. 1512 at page 1513 (1977) 2 S.C.C. 491; (1977) 2 S. C. J. 140.

Where all the three witnesses were named as eye-witnesses in the first information report which was lodged without loss of time the concurrent finding of both the courts that they are reliable witnesses was accepted by the Supreme Court.⁵⁻²

If the material part of the prosecution story is disbelieved as a rule of prudence it will not be safe to rely on another part of the story for convicting the accused.⁶

In *State v. Murlh*,⁷ it has been said that the weight to be attached to the appraisal of evidence by the trial Court would depend on several factors. But the court of appeal is not at all in an inferior position in that regard. If, for instance, the statement of a witness is inherently improbable—as when he says that he identified the accused by face whilst it was pitch dark, or had recognised his voice whilst in fact he had then been a mile away from him, or imputes to a lathi an injury done by a bullet, or when he gives mutually contradictory or inconsistent statements, or when he is found to be a bitter enemy of the opposite party, the court of appeal could exercise its own discretion in accepting the testimony. Therefore, it is only when the demeanour of the witness is found abnormal or unsatisfactory, that the trial Court could be deemed to be in a more favourable position. But then the demeanour of a witness is often deceptive, since the most brazen liar deposes impeccably.

Where vital improvements and embellishments have been made in the prosecution story or there is unexplained suppression of facts, it is impossible for the court to reconstruct for itself the occurrence on its notion of probabilities.⁸

If, in a murder case, a pistol alleged to have been recovered at the instance of the accused, is not sent to the ballistic expert, the recovery will not link the accused with the crime.⁹ Where the murders were not only pre-planned and cold-blooded, but were acts of treachery of the "worst kind" as stated by the High Court. The appellant was not an immature person as he was 60 years old at the time of the commission of the murders, and there were special reasons for imposing the extreme penalty of death under Section 302, I P C.^{9.1} Where no recovery of any weapon was made from the accused and he did not cause any injury to any person. The only evidence against him was that he was present at the time of occurrence armed with a double-barrelled gun, but he did not participate in the crime nor cause injuries with gun shots to the prosecution witnesses or the deceased. The possibility of his false implication along with his nephews in this case could not be excluded. Therefore by way of abundant caution the presence of accused at the time of occurrence was held to be highly doubtful. Giving him the benefit of doubt, his conviction and sentence under Sections 323-34, Indian Penal Code were set aside and he was acquitted.¹⁰

5-2. *Nathu v. State of U.P.* A.I.R. 1977 S.C. 2096 at page 2099; 1977 Cri. L. J. 1578; (1977) -4 S.C.C. 203.

6. *Raghubar Misser v. Mat. Khandari* 1969 Pat. L. J. R. 360; 1970 Cr. L. J. 64; A. I. R. 1970 Pat. 20; *Awadh Singh v. The State*, A. I. R. 1954 Pat. 483.

7. A. I. R. 1977 All. 55; 1956 Cr. L. J. 32.

8. *Bachan Singh v. State*, (1969) 71 Pun. L. R. 393, 399.

9. *State v. Bhola Singh*, I. L. R. 1969 19 Raj. 273, 289 Cr. I. J. 100; A. I. R. 1969 Raj. 216, 223.

9.1 *Raj. C. 202 v. State of Madhya Pradesh* A.I.R., 1977 S.C. 2407 at pages 2410, 2411; 1977 Cri. L. R. 444; 1977 U. J. (S.C.) 677.

10. *Tarlok Singh v. State of Punjab* (1974) 76 Punj. L. R. 84 at 97.

Where in a criminal case there was a significant omission in the First Information Report as to all the weapons and the individual acts of the accused and there was no reference in the inquest report to any specific overt acts alleged to have been committed by three of the accused who were brothers but the prosecution in the Sessions Court attributing the overt acts to the three brothers and giving no part to the fourth accused in the attack on the deceased, it would be unsafe to rely upon the improved version as to the parts played by the accused and convict them.¹¹

If the materials on record justify a finding in favour of the accused, no matter whether the accused made a defence of a specified type or not the court would be justified in finding the accused not guilty even though he did not take the specific ground of defence at the trial.¹²

In the matter of appreciation and credibility of witnesses, the opinion of the trial judge has necessarily to be given due weight.¹³

If trivial discrepancies in evidence have been duly noticed and considered by the lower court, its finding will not be interfered with by the High Court in revision.¹⁴

(d) Appeal's against acquittals. Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that, in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end; the second is that great weight could be attached to the view taken by the Sessions Judge before whom the trial was heard and who had the opportunity of seeing and hearing the witnesses.¹⁵ "It cannot be disputed that the High Court in hearing an appeal against an order of acquittal has full powers to review and re-examine the evidence on the record and reach its own conclusion upon its estimate of the evidence. But, in exercising these powers, the High Court should and must always give proper weight and consideration to such matters as—

(1) the views of the trial Court as to the credibility of witnesses;

(2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial;

(3) the right of the accused to the benefit of any doubt;

(4) the slowness of the appellate Court in disturbing the findings of fact arrived at by a Judge who had the advantage of seeing the witnesses."¹⁶

11. *Bova Hanurappa v. State*, (1969) 2 Andh. L. T. 200.

12. *Commissioner of Calcutta v. Calcutta Wholesale Consumers' Cooperative Society Ltd.*, A.I.R. 1970 Cal. 120 at pp. 123, 124; 1970 Cr. L. J. 340.

13. *Rama v. State*, 1969 Cr. L. J. 1393; A.I.R. 1969 Goa 116, 120.

14. *Devi Chandra Choudhary v. Crown Dis.* 1969 Cr. L. J. 1086, 1087 (Orissa).

15. *Wilayat Khan v. The State of U.P.*,

1953 S. C. 122; I. L. R. 1953) 1 A.I. 159; 54 Cr. L. J. 662.

16. *Madan Mohan Singh v. State of U.P.* 1954 S. C. 487, 55 Cr. L. J. 1659; see also *State of Swamip v. Emperor*, 1934 P. C. 227; 61 I.A. 398; 36 Cr. L. J. 786; C. M. Narayan Itiravi v. State of Travancore, 1953 S. C. 478; 1954 Cr. L. J. 16; 1954 K.L.J. 173; I.I.R. 1953 T. C. 181; *Prandas v. State*, 1954 S. C. 36; 55 Cr. L. J. 331.

It is well settled that it is not enough for the High Court to take a different view of the evidence; there must also be substantial and compelling reasons for holding that the trial court was wrong¹⁷ and, if the trial court takes a reasonable view of the facts of the case, interference under Section 417 is not justifiable unless there are really strong reasons for reversing that view¹⁸. The appellate Court must start with the realisation that an experienced Judicial Officer (with four assessors) had concluded that there was clearly reasonable doubt in respect of the guilt of the accused on the evidence put before the court. It, therefore, requires good and sufficiently cogent reasons to overcome such reasonable doubt before the appeal court comes to a different conclusion¹⁹. The presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons²⁰. Where the case turns on oral evidence of witnesses, the estimate of such evidence by the trial Court is not to be lightly set aside. General suspicions are not by themselves enough to dispute the credibility of witnesses whom a trial Magistrate was inclined to accept²¹. An Appellate Court is bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically.²²

(c) *Supreme Court appeal* The assumption that, once an appeal has been admitted by special leave under Article 136 of the Constitution, the entire case is at large and the appellant is free to contest all the findings of fact and raise every point which could be raised in the High Court or the trial Court is entirely unwarranted. The exercise of its extraordinary jurisdiction by the Supreme Court is not justifiable in criminal cases unless exceptional and special circumstances are shown to exist or substantial and grave injustice has been done²³. The accused was a cousin of one H and attempted to develop illicit connection with his wife and the latter resisted it. There was accordingly enmity between husband of deceased and accused. Death was caused by throwing acid over the body of deceased. Sessions Court and High Court believed dying declaration of deceased that acid was thrown over her body by accused. The Supreme Court held that it had no reason to take a different view²⁴. Having once formed the erroneous opinion that the F.I.R.

17. *Ajmer Singh v. State of Punjab*, 1953 S. C. 76 at 77, 78; 1953 S. C. R. 418; 54 Cr. L. J. 521; (1953) 1 M. L. J. 73; 1953 All W. R. (H.C.) 207.

18. *Suri Pal Singh v. State*, 1952 S. C. 52 at 54; (1952) 1 M. L. J. 426; 1952 A. L. J. 190; 54 Punj. L. R. 168; 1952 S. C. R. 193; 53 Cr. L. J. 331; *Aher Raja Khima v. State of Saurashtra*, 1956 S. C. 217 at 220; 1957 Andh. L. T. 92; 1956 Cr. L. J. 421; (1956) 1 Mad. L. J. 50; 1956 All W. R. (Sup.) 60; 1956 S. C. A. 440; (1955) 2 S. C. R. 1285.

19. *Tulsi Ram Kumar v. State*, 1954 S. C. 1; 1953 S. C. J. 612; 55 Cr. L. J. 225.

20. *Suri Pal Singh v. State*, 1952 S. C. 52 at 54; 1952 S. C. R. 193; 53 Cr. L. J. 331; (1952) 1 M. L. J. 423;

1952 A. L. J. 190; 54 Punj. L. R. 168.

21. *S. A. A. Biryabani v. State of Madras*, 1954 S. C. 645; 55 Cr. L. J. 1665.

22. *In re Chakraborty*, 1952 All W. R. Cr. 59.

23. *Pritam Singh v. State*, 1950 S. C. 169; 1950 S. C. R. 453; 51 Cr. L. J. 1270; 86 C. L. J. 120; 63 M. L. W. 875; 1950 M. W. N. 605; 55 P. L. R. 1; 5 D. L. R. (S.C.) 89; *Kaur Sain v. The State of Punjab*, 1974 Cr. L. J. 358; A.I.R., 1974 S. C. 329.

24. *Keshav Dev v. State of U. P.*, 1972 Cr. L. J. 1196 at 1196-1197; (1972) 2 S. C. C. 77; 1972 S. C. C. (Cri.) 644; 1973 S. C. Cri. R. 93; 1972 Cr. App. R. 320 (S.C.); 1973 U. J. (S.C.) 54; A. I. R., 1973 S.C. 482.

must not have been recorded at 8.25 p.m. the trial Judge had no other alternative but to discard the evidence of eye witnesses, and thus the trial Judge has done by attaching undue importance to minor details in the evidence of the witnesses. The High Court was, therefore, justified in its criticism of the judgment of the trial Judge as unreasonable and palpably wrong and coming to its own conclusion as to the guilt of the accused. In the case of an order of acquittal where the presumption of innocence of an accused person is reinforced by that order, the exercise of this jurisdiction would not be justified for merely correcting errors of fact or law of the High Court. An occasion for interference with an order of acquittal may arise, however, where a High Court acts perversely or otherwise improperly or has been deceived by fraud.

In a charge under Sections 302 and 307 read with Sections 148 and 149, I.P.C. the injured persons had not informed the names of assailants to anyone, and in the complaints, names of injured persons were not mentioned as eye witnesses but they were examined as Court witnesses. It was held by the Supreme Court that High Court was correct in disbelieving their evidence.

In *Sheo Swarup v. King Emperor*,²¹ the Privy Council has laid down the circumstances which should be kept in view in dealing with an appeal from an order of acquittal. Lord Russell of Kilowen made the following observations:

"Sections 417, 418 and 423 of the Code (Sections 378, 385, 386 of 1953 Code) give the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon the power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as—(1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the soundness of an appellate Court in disbelieving a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. A legitimate inference drawn by the High Court from the nature of injuries that each of these was sufficient, in the ordinary course of things, to cause death keeping in view the aforesaid circumstances would appear that the evidence in the case was upheld by the Supreme Court.³

21. *Onkar v. State of U. P.*, 1972 Cri. A. P. R. 67 (S.C.); 1972 S.C. Cri. R. 260; 1972 Cr. L. J. 109 at 1667.

1. The Supreme Court in *Pratap Kumar v. State of P. & C. S. C.*, (1972) 1 Cr. L. J. 109 at 1667, as to the practice of the Privy Council before the Abolition of Privy Council Jurisdiction Act, V of 1949, see *Dal Singh v. King Emperor*, 1917 P. C. 25; 44 I. A. 137; I. L. R. 44 Cal. 876; *Smt. Bibhabati Devi v. Ramendra Narayan Roy*, 1947 P. C. 19;

73 I. A. 246; I. L. R. (1947) 1 Cal. 85; 227 I. C. 177.

2. *Basdeo Singh v. Boota Singh*, 1906 Cr. App. R. 322 (S.C.).

21. 61 Ind. App. 398 at page 401; A. I. R. 1931 P. C. 227.

3. *Dappu Venka Reddy v. State of Andh. Pra.*, 1973 Cr. L. J. 223 at 227; (1972) 1 S. C. W. R. 939; 1972 Cr. L. J. 647; 1972 Cr. App. R. 389 (S.C.); 1973 U. I. S. C. 130; 1973 S.C.C. (Cal.) 151; (1973) 3 S. G. C. 89; A. I. R. 1973 S.C. 153.

11. Additional evidence in appeals. The provision of Section 107, Civil Procedure Code, as embodied by Order 41, Rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to so patch up the weak points in his case as to fill up omissions in the court of appeal. Under clause (1), (a) of the rule, additional evidence may be proved and admitted in the appellate court if the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted. Under clause (1), (b) it is only where the appellate court "requires" it "if it finds it needful" that any additional evidence can be admitted. It may be required to enable the court to pronounce judgment or for any other abstracted cause, but in either case it must be the court that requires it. The legitimate occasion for the exercise of this discretion is not whenever, before the appeal is heard, a party applies to adduce fresh evidence, but when examining the evidence as it stands some inherent *lacuna* or defect becomes apparent.⁴ It may well be that a defect may be pointed out by a party or that a party may move the court to supply the defect, but the requirement must be the requirement of court upon its appreciation of the evidence as it stands. Whenever the court adopts this procedure it is bound by rule 27 (2) to record its reasons for so doing and, under Rule 29, must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. The power so conferred upon the court by the Code ought to be sparingly exercised, and on a requirement that least of any new evidence to be adduced that it should have a direct and important bearing on a material issue in the case.⁵ The discretion given to the appellate court by the rule to receive and admit additional evidence is not an arbitrary one, but is a limited one, circumscribed by the limitations specified in the rule. If the additional evidence is allowed to be adduced contrary to the principles governing the admission of such evidence, it will be a case of improper exercise of discretion and the additional evidence so brought on the record will have to be ignored and treated as if it is non-existent.⁶

It is well settled that though an Appellate Court has power to take additional evidence in a case, yet the discretion should not be exercised to fill up gaps or lacunae in the prosecution evidence. Where the prosecution was not serious about the matter and did not examine the witnesses before the Sessions Court, the prosecution appeared to have accepted the plea of the law-abiding Officer and let him go free. In these circumstances the High Court was held not to be correct in exercising its discretion in examining the witnesses at its appellate jurisdiction. The Supreme Court carefully perused the evidence of the witness given before the High Court and took note that the witness was an utterly unimpeachable witness on whom no reliance could be placed at all. The question whether FIR was sent to Public Prosecutor and a complaint to Magistrate was not however a matter of which judicial notice could be taken. It had to be proved like any other fact.⁶⁻¹

4. Lord Robertson in *Kessowji Issur v. G. I. P. Ry.*, (1907) 31 Bom. 381; 34 I. A. 115 at 122; 9 Bom. L. R. 671 (P.C.); *Parsotim v. Lal Mohar*, 1 I. L. R. 10 Pat. 654; 1931 P. C. 143; 58 I. A. 254.
5. *Parsotim v. Lal Mohar*, 1931 P. C. 143; 58 I. A. 254; 1 I. L. R. 10 Pat. 654; see also *Sir Mohammad Akbar Khan v. Mt. Motai*, 1948 P. C. 36;

54 I. A. 285; 1 I. L. R. 1947 Lah. 727; 1948 A. L. J. 20; *Arjun Singh v. Kartar Singh*, 1951 S. C. 193; 1951 S. C. I 274; 1951 A. L. J. (S.G.) 78; 1951 M. L. J. 78; 1951 M. L. J. 243.

6. *Arjun Singh v. Kartar Singh*, supra. 6-1. *Bir Singh v. State of U. P.*, A.I.R. 1978 S.C. 59 at para 64.

The ordinary rule is, that a court should give its decision on the facts and circumstances as they existed at the date of the institution of the suit or at the date of any subsequent amendment of the pleadings, and should not take notice of events or decisions which have happened after such date. But the court has power, in a proper case, to take notice of events subsequent to the date of institution to shorten litigation, avoid unnecessary expense and do justice between the parties. Where the facts are not in dispute and the cause of action subsequent to the suit is under the terms of a statute or contract the court must take notice, a formal amendment of the plaint is not necessary, for, the court is bound to administer the law of the land at the date when it gives its decision on a dispute. An appeal being in the nature of a re-hearing of the cause, even the court in second appeal can consider the effect of legislation which came into force after the disposal of the suit by the trial court and during the pendency of the appeal in the appellate Court.⁷

12. **Review. "Strict proof".** It is provided by Order 47, Rule 4, proviso (b), C. P. Code that no application for review shall be granted on the ground of discovery of new matter without strict proof of the allegation of such discovery. The words 'strict proof' mean anything which may serve directly or indirectly to convince a court and has been brought before it in strict compliance with the formalities of law. The word 'strict' here refers to the formality and not to the sufficiency of the evidence.⁸

13. **'Proved'.** From the microscopic examination of hairs it is possible to say whether they are of the same or different colours or sizes and the examination may help in deciding where the hairs came from. In the instant case hairs of the victim of murder as well as of the accused were, according to the High Court, found on the scarf of the accused in which the dead body was taken.⁹

Ram receipts by themselves will not prove title but only possession.¹⁰ Just as the fact that a murder was committed by an accused may be inferred from circumstantial evidence, it is also permissible in law to infer the authorship and genuineness of a document from circumstantial evidence.¹¹ During the course of proceedings before the Magistrate the original documents were produced before him and he happened to make a note on each of those documents that they had been compared with the original and found correct. In addition there were affidavits of a large number of persons that all these documents had been put before them in their presence. Accordingly the documents were held to

7. *Lakshmi Ammal v. Narayana Swami Naicker*, 1950 M. 321; (1950) 1 M. L. J. 63; 1950 M. W. N. 7; see also *Lachmeshwar Prasad v. Keshwar Lal*, 1941 F. C. 5; 1 L. R. 20 Pat. 42; 191 I. C. 659; *Doorga Chamarla v. Secy. of State*, 1945 P. C. 62; 80 C. L. J. 13; *Padam Singh v. Ram Kishan*, 1954 M. B. 6; *Ram Udit v. Smt. Shyamkali*, 1954 All. 751; 1954 A. L. J. 271.
8. *Ahed v. Mohendar*, 42 Cal. 830; 29 I.C. 282; A.I.R. 1916 C. 521; *Prasad v. A. B. N. Sankar* (1918) 42 Bom. 295; 46 I.C. 14; A.I.R. 1918 B. 228; *Chiranjil Lal*

v. Tulsi Ram, (1820) 47 Cal. 568; 56 I.C. 734; 31 C.L.J. 134 (F.B.); A.I.R. 1920 C. 467.

9. *Kanbi Karsan Jadav v. State of Gujarat*, (1962) Supp. 2 S.C.R. 726; 1962 S.C.D. 618; (1963) 2 S.C.J. 364; (1962) 1 Ker. I.R. 511; (1965) M.L.J. (Cr.) 465; 1965 Cr. L.J. 605; A.I.R. 1966 S.C. 821, 823.

10. *Makheja Kunibhar v. Fagu Kunibhar*, I.L.R. 1966 Cut. 483; 32 Cut. L. T. 1041, 1045.

11. *J. R. Ranga v. P. R. Ranga*, I.L.J. 1226 at 1228; 1972 Mad. L. W. (Cri.) 48.

have been properly proved.¹² In disciplinary proceedings onus is on department to prove charges and mere conjectures and surmises cannot take place of positive proof.¹³

When the legal presumption of gratification being received as a motive or reward such as is mentioned in Section 161, I. P. C., arises under Section 4(1) of the Prevention of Corruption Act, 1947, the accused cannot discharge the burden on him to rebut the presumption, it is not enough for the accused to put forth a reasonable or probable story: the explanation of the accused must be supported by proof within the meaning of Section 3 of the Evidence Act.¹⁴

The presumption under Section 7 of the Bombay Prevention of Gambling Act (IV of 1887) cannot extend to Section 4. Section 7 only raises the presumption that the place which was raided and from which the instruments of gaming were seized was a common gaming house. In order to hold a person guilty under Section 4, the prosecution has also further to establish that the common gaming house was either kept or used by the accused on the date of the raid.¹⁵

Where the offence is highly antisocial and revolting and therefore likely to rouse emotional prejudice in the mind of the court, greater care in the scrutiny of the evidence is called for.¹⁶

If pursuant to the information given by the accused a part of the stolen thing is recovered and the circumstances irresistibly lead to the conclusion that the place of concealment was known only to him who concealed it and the accused does not explain as to how he came to know about the concealment and merely denied the statement to the police, it is fair to presume that he committed theft.¹⁷ No doubt in any particular case where the alleged weapons or offences are not produced before the Court, it is open to the Court to infer that there is an element of exaggeration in the evidence of the witnesses in regard to the weapons used in an occurrence, but such inference can be made only judiciously for valid reason. In the absence of reasonable material, it would not be proper to suppose a biller for a billhook or a penknife for a butcher's knife. When the witnesses have deposed that a billhook and butcher's knife were used, and the Court believes the witnesses, it is not proper for the Court to surmise that the billhook and the butcher's knife are not of normal size, merely because they were not seized and produced before the Court; the long sword spoken to by the witnesses cannot become a short sword just because it could not have

12. *Munji Singh v. Karam Bheanna Singh*, 1971 Cr. L. J. 62 at 67; A. I. R. 1971 Manipur 1.

13. *Bhinder Singh v. G. M. Northern Railway*, 1974 Lab. I. C. 755 at 756 (Punj.).

14. *Deshraj D. Dhanraj Mishra v. The State of Maharashtra*, 1965 Mah. L.J. 1060 (Cr. I. J. 2); A.I.R. 1967 Bom. 1 at pp. 6, 7, relying on *Dhanwantrai v. State of Maharashtra*, 1963 S.C.R. 450 (1963) 1 S.C.J. 133; 1963 I.S.C.W.R. 178; 1963 A.W.R. (H.C.)

358; *v. Bom. I.R. 332*; (1968) 2 Lab. L.J. 415; 1964 M.L.J. (Cr.) 65; A.I.R. 1964 S.C. 575.

15. *Ramchandra v. Thakurdas v. The State of Gujarat*, (1967) 8 Guj. L. R. 145 at pp. 161, 162.

16. *Petta v. The Food Inspector*, 1966 Ker. L.J. 1060; 1966 Ker. L.T. 788; 1966 M.L.J. (Cr.) 773; A.I.R. 1967 Ker. 192, 193.

17. *State of Kerala v. K. Chekkoothy*, 1966 Ker. L.J. 848; 1967 M.L.J. (Cr.) 47; 1967 Cr. L.J. 1832; A.I.R. 1967 Ker. 197, 198.

been seized by the police and produced before the Court¹⁸. Where the occurrence in the case was said to have taken place inside the jungle, the only three witnesses who had seen either the whole or a part of the occurrence were suffering from a sense of fear for the appellants. It was only after the Police arrived at the village that these witnesses were emboldened to come forward to speak what they had seen. In these circumstances the subsequent testimony given by them in the trial Court could not be discarded merely on the ground that at an earlier stage their statements were recorded under Section 164, Criminal Procedure Code.^{19 21} Where neither the prosecution nor the defence had, in the case, come out with the whole and unvarnished truth, so as to enable the Court to judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which so many persons were injured, courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits, to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case.²²

Adultery cases generally turn upon evidence of a circumstantial character. Thus, if an unmarried person is found alone with a young wife after midnight in her bedroom in actual physical juxtaposition, unless there is some explanation forthcoming which is compatible with an innocent interpretation, the only interpretation that a court of law can draw must be that the two were committing adultery together.²³

The mere fact that K's estate was mutated in favour of his reversioners by the revenue officer on the same day that W's land was mutated in K's favour does not prove that K had necessarily died.²⁴

Where the defendant pleaded that the plaintiff transferred only the tenancy and not the goodwill, in the context of the facts that the business ran by both the parties was the same and the premises are situate in a famous business locality, it must be held that the goodwill must have necessarily passed to the defendant.²⁵

The quantum of assessment on the basis of the figure of escaped turnover by the assessing authority itself to the best of its judgment on the material before it, though not admitted by the assessee would be one proved in the judgment of the assessing authority.²⁶

The definition of proved is wide enough to include, besides direct and circumstantial evidence, opinion evidence made relevant by Section 50 of the Act.²

18. *Public Prosecutor v. G. Venkatesee*, (1975) 2 Andh. W. R. 413 at 417; 1975 Mad. L. J. (Cri.) 671; (1975) 2 Andh. Pra. L.J. 49.
- 19-21. *State v. Raja Parida*, 1972 Cal. L. J. 193 at 196; 37 Cut. L. T. 667; 1972 Cut. L. R. (Cri.) 130.
22. *Jaimuna v. State of Bihar*, 1974 Cri. L. J. 890 at 893; A. I. R. 1974 S. C. 1822.
23. *Subbaruna v. Saraswathi*, I. L. R. (1968) 1 Mad. 205; (1966) 2 M. I. J. 263; 79 M. I. W. 382; A. I. R. 1967

- Mad. 85, 89; (1972) 1 C.W.R. 237.
24. *Mohanlal v. Jit Singh*, 70 Punj. L. R. 1047, 1051; 1968 Cur. L. J. 268.
25. *Kanhailal v. Kantilal*, 1968 Raj. L.W. 163; A. I. R. 1968 Raj. 278, 281.
1. *H. M. Eusufali v. Commissioner of Sales Tax*, M. P., 1969 Jab. L. J. 293; 1969 M. P. L. J. 228; A. I. R. 1969 Madh. Pra. 134, 137.
2. *Rabindra Kumar v. Smt. Pratiba*, A. I. R. 1970 Tripura 30, 35 (proof of ceremonies essential to valid Hindu marriage).

Proof of lessor's knowledge of alterations, substitutions, etc., in leased property is proof of consent thereto. The court will not totally put aside the inference flowing from probabilities, the normal course of conduct and the actings of parties for a long period.³⁻⁴

The conclusion reached in an assessment proceeding will not by itself be enough to hold that the assessee concealed his income or deliberately furnished inaccurate particulars of his income under Section 28(1) (c) of the Income Tax Act, 1922 [see the corresponding provision in Section 271(1) (c) of the Income Tax Act, 1961]. The decision in the assessment proceeding may be taken into consideration in the penalty proceedings but by itself it would not be enough to establish the necessary ingredients. Other evidence *de hors* the conclusion in the assessment proceeding would be relevant and admissible and on the basis of such evidence it may be held that there was concealment of income. The Income tax department must establish the necessary ingredients and the failure of the assessee to prove that he did not conceal any income cannot mean that the department has succeeded in establishing its case that there was concealment of income or furnishing inaccurate particulars of such income.⁵

The import of basic concepts 'proved', 'disproved' and 'not proved' even when incorporated in a comprehensive Code like the Act cannot be adequately understood unless one examines the sources, the context in which they were given statutory form, the purposes they were designed to serve and the functions they actually fulfil.⁶

14. "Disproved" and "not proved." The Evidence Act has drawn a clear distinction between the words "disproved" and "not proved". A fact is said to be disproved when after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist. On the other hand a fact is said to be not proved when it is neither proved nor it is disproved.⁷

15. Miscellaneous. When the section speaks of matters before it, the Court, it means of course the matters properly before it. In deciding a matter of fact, no judge is justified in acting on his own knowledge and belief or public rumour without proper proof of it.⁸ A written statement filed by an accused should be given due consideration but it is not legal evidence within Section 8.⁹ A writing obtained by court from the accused under Section 73 does not come within the expression "evidence" as it is not a docu-

3-4. *M.s. Isherdas Sahni and Bros. v. Rani V. Rameswar Rani*, 1968 1 M.L.J. 233, 253 : (1968) 81 M.L.W. 531.

Bhajuram Ganpatram v. C. I. T., Bihar and Orissa, 75 I.T.R. 285; 36 Cut. L. T. 346; A.I.R. 1970 Orissa 38, 40; *Commissioner of Income-tax v. Raja Mohamed Amir Ahmed Khan*, 1971 U. P. T. C. 390 (All).

6. *Rishikesh Singh v. The State*, I.L.R. (1969) 2 All. 289; 1969 A.L.J.

657; 1970 Cr. L.J. 132; A.I.R. 1970 All. 11 (F.B.) at p. 82 (per M. H. Beg. J.).

7. *Shukishan v. Bhanwarlal*, A. I. R. 1974 Raj. 96 at 99; *Emperor v. Shafi Ahmed*, (1929) 31 Bom. L. R. 315.

8. *Meethun v. Busheer*, 11 M.L.A. 213.

9. *R. v. Tuti*, A.I.R. 1946 Pat. 373; I.L.R. 25 Pat. 33; 226 I.C. 404.

ment produced for the inspection of the court.¹⁰ Confessions of co accused are not evidence as defined in Section 3; they can be referred to as lending assurance to the conclusion founded on oral evidence and fortified by it.¹¹ The statement under Section 342, Cr. P. C., is not evidence as defined in Section 3.¹² Statement in inquest report is not evidence by itself and it certainly cannot be pitted against the evidence of the medical witness produced in court.¹³

No adverse inference can be drawn from a confused statement made by a witness regarding the date of her statement recorded under Section 164, Cr. P. C., when it is clear that such statement was recorded only once and the same has been filed in court.¹⁴

An inference of illicit connection between two villagers, a man and a married woman cannot be drawn because they were talking in a field as villagers usually do.¹⁵

The mere fact that some male relation writes improper letter to a married woman, does not necessarily prove illicit relationship between the two.¹⁶

News item by itself is not evidence which can be admitted.¹⁷

An allegation as to bad faith or indirect motive or purpose cannot be held established except on clear proof thereof.¹⁸

Mere suspicion cannot amount to proof. In case of evidence of general repute, prosecution evidence despite defence evidence in rebuttal may be accepted if defence evidence is not fit to be acted upon or if prosecution evidence is supported by evidence of specific instances of commission of offences or by evidence of previous convictions.¹⁹

A vague and indefinite allegation in a suit for partition by a coparcener against the Karta of the family will not render the Karta liable to back accounting. A specific allegation of fraud or misappropriation should be made and proved before the account of the joint family properties is re-opened.²⁰

The clandestine method of carrying liquid in rubber tubes may create suspicion but this is not enough to determine whether the particular liquid was

10. *Rama Swarup*—See A.I.R. 1958 All. 119.

11. *Nathu v. State of U.P.*, A.I.R. 1956 S.C. 56; 1956 Cr. L.J. 152.

12. *Mohan Mehta v. State* A.I.R. 1958 Cal. 616; 1958 Cr. L.J. 1390.

13. *Sirjan v. State* A.I.R. 1956 Cal. 815.

14. *State of U.P. v. Ch. Tej Singh*, 1968 Cr. L.J. 584; A.I.R. 1968 All. 170, 176.

15. *Randha v. State*, 1967 A.W.R. (H.C.) 352, 354.

16. *Chandra Mohan v. Anant Prasad*, (1967) 1 S.C.R. 864; (1967) 2 S.C.A. 499; S.C.D. 184; 1967 1 S.C.W.R. 907; 1967 A.L.J. 167; 1967 A.W.R. (H.C.) 284; A.I.R. 1967 S.C. 581, 584.

17. *Nirmal Lal Ratan Kumar v. River Steam Navigation Co., Ltd.*, I. L. R. (1964) 16 Assam 395; A.I.R. 1967 Assam 74, 77 (news item of severe storm published in the Assam Tribune).

18. *Barium Chemicals, Ltd. v. Company Law Board*, (1966) Supp. S.C.R. 311; (1966) 1 S.C.A. 747; (1966) 2 S.C.L.J. 63; (1966) 2 S.C.W.R. 567; A.I.R. 1967 S.C. 295.

19. *Jagan Nath v. State*, 1966 A.W.R. (H.C.) 729.

20. *Appadanasimha v. Madhavalli*, (1967) 1 Andh W.R. 29; A.I.R. 1967 Andh Pra. 247, 252; *Bappu Ayyar v. Renganayaki* (1952) 2 M.L.J. 302; *Mohideen v. V. O. A. Mohamed*, A.I.R. 1955 Mad. 294.

liquor or not. The prosecution must prove beyond doubt that the liquid which was seized was liquor or prohibited liquor.²¹

Mere entries in a record of rights cannot be taken as conclusive evidence of self-acquisition especially in face of evidence that the property even where separately recorded continues to be joint family property.²²

For proof of adultery there must be some evidence showing opportunity and desire to commit the offence or access by the man to the woman.²³

A subordinate officer cannot influence a superior officer in giving a finding against a person in a departmental inquiry and making an order regarding the transfer of that person. The impugned order, or transfer was, therefore, not shown to be *mala fide*.²⁴

The evidence of a witness, who has signed the statement to the police under Section 162 Cr. P. C. given in open court at the trial does not on that account only become inadmissible. There are no words for such prohibition in the Criminal Procedure Code or in the Evidence Act nor can it be said that the entire proceedings and investigation were vitiated by taking signed statements. The effect of signature on a statement may in most cases seriously impair the evidence of the witness.²⁵ Where a person writes a letter to the police officer and hands over to the investigating officer in course of the investigation, that being so manifestly, it could not be used by the prosecution in support of its case. Under proviso to Section 162 (1) of the Code of Criminal Procedure it can be used with the permission of the Court by the prosecution only to contradict the witness in the manner provided under Section 145 of the Indian Evidence Act. The two expressions that is "the period of investigation" and "course of investigation" are not synonymous and the statements made and sought to be excluded from evidence must be so related to the enquiry conducted by the investigating officer and not one which is *dy hors* the enquiry. The letter given to the investigating officer in course of investigation and not during the period of investigation is clearly hit by proviso of sub-section (1) of Section 162 of the Criminal Procedure Code and the evidence given by reference to such letter is also inadmissible.¹

There is a merit for proposition that even if evidence is lawfully obtained it is inadmissible. Over a century ago it was said in an English case where a constable searched the pocket of a felon and found a quantity of offending articles in his pocket that it would be a dangerous mistake to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence.²⁶ The Judicial Committee in *Kumari Son of Kanai v. R.*²⁷ dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered

21. *State v. Madhukar Gopinath Lolge*, 1 I. R. 1965 Bom. 257; 67 Bom. L. R., 226 (1967) Cr. L. J. 167; A. I. R. 1967 Bom. 61, 64. [See Bombay Prohibition Act 25 of 1949, Section 66 (1) (b)].

22. *Kalandi Parida v. Sadhu Parida*, 33 I. L. J. 768; A. I. R. 1967 Orissa 74.

23. *Madan Mohan Rai v. Niludri Dei*, 1 Cr. L. T. 827, 832; see *Jodhan v. Mt. Kulwanti Kuer*, A. I. R. 1948 Patna 25.

24. *Lachman Dass v. Shiveshwarkar*, A. I. R. 1967 Punj. 76, 77.

25. *P. Sirajuddin v. Government of Madras*, I. L. R. (1967) 3 Mad. 659; (1968) 1 M. L. J. 480; 1968 Cr. L. J. 493; A. I. R. 1968 Mad. 117 at pp. 128, 129.

1. *State of Bihar v. S. Haque*, 1973 B. L. J. R. 304 at 306, 307.

1-1. See *Jones v. Owen*, (1870) 34 J. P. 759.

1-2. 1955 A. C. 197.

either on the connection, usually found by experience to exist between certain things, or on natural law, or on the principles of justice, or on motives of public policy. Conclusive presumptions of law are:

"rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long experienced connection, just alluded to, has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty and the promotion of peace and quiet in the community, and therefore, it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden."¹¹

The Evidence Act notices two cases of conclusive presumptions (Sections 112 and 113). It is a question, however, whether the presumption mentioned in Section 112 is not after all a rebuttable presumption, for the section permits of evidence being offered of non access;¹² and Section 113 has been held to be *ultra vires*.¹³

Rebuttable presumptions of law are, as well as the former,

"the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class, is not so intimate or so uniform as to be conclusively presumed to exist in every case; yet, it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other in the absence of all opposing evidence. In this mode, the law defines the nature and the amount of the evidence which is sufficient to establish a *prima facie* case, and to throw the burden of proof upon the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption.¹⁴ A contrary verdict might be set aside as being against evidence. The rules in this class of presumptions as in the former, have been adopted by common consent from motives of public policy and for the promotion of the general good, yet not as in the former class forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised. Thus, as men do not generally call for the Penal Code

11. Taylor, Ev., s. 71; Best, Ev., p. 317, s. 304.

12. Norton, Ev., 97.

13. Whitley Stokes, 835; see also Steph. Introd., 174, and notes to Ss. 112-3, for the proceedings of the Legislative Council, 12th March, 1872, pp. 231-237, and the Statement to the Governor of India, 28th March 1872.

14. Ch. VII of the Act deals with this subject of presumptions, as follows: First, it lays down the general principles which regulate the burden of proof (Ss. 101-106). It then enumerates the cases in which the burden of proof is determined in parti-

cular cases not by the relation of the parties to the cases but by presumptions (Ss. 107-111). Such presumptions affect the ordinary rule as to the burden of proof that he who affirms must prove. He who affirms that a man is dead must prove it, but if he shows that he has not been heard of for seven years, he shifts the burden of proof upon his adversary, who must displace the presumption which has arisen. Steph. Introd., 173, 174; see Norton Ev., 97 and proceedings of the Legislative Council cited ante.

necessarily mean that the evidence of more than one customer should be adduced. It would be enough if the facts established entitle the court to raise an inference that she carries on prostitution as contemplated under Section 7(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956).⁸

Account slips seized during a search under the Foreign Exchange Regulation Act, 1947, which were part of the things discovered during search, are evidence and if the entries therein are carried out in the account books, these things can be looked at.⁹

4. 'May presume' Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

'Shall presume' Whenever it is directed by this Act that court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved;

'Conclusive proof' When one fact is declared by the Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

SYNOPSIS

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|---|---|
| 1. Presumptions: | 4. Inference. |
| (a) General. | 5. "May presume". |
| (b) Of Law. | 6. "Shall presume". |
| (c) Of fact. | 7. Conclusive proof. |
| (d) Distinction between presumptions of law and presumptions of fact. | 8. Rule when one of evidence and when of substantive law? |
| (e) Mixed presumptions. | 9. Distinction between "evidence conclusive as to the existence of fact" and "evidence which is made conclusive". |
| 2. Classification in the Act. | |
| 3. Scope of the Section. | |

1. Presumptions (a) *General* Inferences or presumptions are always necessarily drawn, whenever the testimony is circumstantial; but presumptions specially so called are based upon that wide experience of a connection existing between the *facta probantia* and the *tertium probandum* which warrants a presumption from the one to the other, wherever the two are brought into contiguity.¹⁰ Presumptions, according to English text writers, are either (a) of law, or (b) of fact.

(b) *Of law* Presumptions of law, or artificial presumptions, are arbitrary inferences which the law expressly directs the Judge to draw from particular facts, and may be either conclusive or rebuttable. They are founded

8. *Rai Shanta v. State of Gujarat*, 1. L. R. 1966 Guj. 100; (1966) 7 Guj. L. R. 1082; 1967 Cr. L. J. 473; A. I. R. 1967 Guj. 211.
9. *Girdhari Lal Gupta v. D. N. Mehta*, 1971 Cr. L. J. 1; A. I. R. 1971 S. C. 28, 32.

10. Norton, Ev., 97. Best, Ev., ¶. 299, 42, 43, 296, et. seq. and Wills Circ. Ev., 22; Powell: Ev., 385-387. See S. 114; post: *Sita Ram v. Nanku*, 1928 A. 16; 25 A. L. J. 833; 106 I. C. 250.

in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.

In *Yusufali Esmail Nagree v. State of Maharashtra*¹ the appellant offered bribe to Sheikh a Municipal Clerk. Sheikh informed the police. The police laid a trap. Sheikh called Nagree at the residence. The police kept a tape recorder concealed in another room. The tape was kept in the custody of the Police Inspector. Sheikh gave evidence of the talk. The tape record corroborated his testimony. Just as a photograph taken without the knowledge of the person photographed can become relevant and admissible so does a tape record of a conversation unnoticed by the talkers. The Court will take care in two directions in admitting such evidence. First the Court will find out that it is genuine and free from tampering or mutilation. Secondly the Court may also secure scrupulous conduct and behaviour on behalf of the police. The reason is that the Police Officer is more likely to behave properly if improperly obtained evidence is liable to be viewed with care and caution by the Judge. In every case the position of the accused, the nature of the investigation and the gravity of the offence must be judged in the light of the material facts and the surrounding circumstances.²

A document produced from proper custody is proved.³ The fact that a document was procured by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved. But while examining the proof given as to its genuineness the circumstances under which it came to be produced into court have to be taken into consideration.⁴

Court is entitled to look into not only such documents as are formally proved in accordance with the rules of proof of documents contained in the Evidence Act but is bound to consider and peruse such materials which have been put into evidence by the parties before the Court. Even under the Evidence Act, formal proof of documents can be waived. Therefore, a document cannot cease to be a piece of evidence unless it has been formally proved.⁵

In order to prove that a woman carries on prostitution, plural and indiscriminate sexuality on her part has got to be established but that does not

1 8 1967, 8 S.C.R. 720; A.I.R. 1966 S.C. 147.

2 *R. M. Malkani v. State of Maharashtra* 1973 Cr. J. 238 at 239, 1972 2 S.C.W.R. 276, 1973 Mad. L.J. 2, 1973 Cr. App. R. 31, S.C. 1973 M.P. 1, J. 24 (1973) 1 S.C.C. 471; 1973 S.C. Cr. J. 29, 1973, 2 S.C.R. 417, 1974 Mad. L.W. Cr. 2 121 A.I.R. 1973 S.C. 157.

3 *Mohan Lal v. Keshu Bhatt* 69 Pat. L.R. 58, 583.

4 *Machhi Lal v. R. K. Bala*, A.I.R. 1971 S.C. 129, at 1303, 1970, 2 S.C.C. 898, 1970 U.J. S.C. 965, 1971 2 S.C.R. 118, 119 W.L.N. (Part III) 29, 45 F.L.R. 2921.

5 7 *R. T. Kothari v. B. Singh* 1971 Cr. J. 625 at 626 A.I.R. 1971 Pat. 115.

the law presumes every man innocent ; but some men do transgress it ; and therefore evidence is received to repel this presumption¹⁵

A statutory presumption cannot operate and prevail against *res judicata*. Hence, a presumption of law in favour of the accuracy of the entry in the record of rights cannot arise when the point in issue has already been decided on evidence between the interested parties by a decision of the civil court¹⁶

(c) *Of fact*—Presumptions of fact, or natural presumptions, are inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. They are always rebuttable¹⁷ "Such inferences are formed not by virtue of any law but by the spontaneous operation of the reasoning faculty, all that the law does for them is to recognise the propriety of their being so drawn, if the Judge thinks fit."¹⁸ They can hardly be said with propriety to belong to that branch of the law which treats of presumptive evidence¹⁹ "They are in truth but mere arguments of which the major premiss is not a rule of law, they belong equally to any and every subject-matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments.²⁰ They depend upon their own natural efficacy in generating belief, as derived from those connections which are shown by experience, irrespective of any legal relations

(d) *Distinction between presumptions of law and presumptions of facts.* The presumptions of fact differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the system of jurisprudence, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case by means of the common experience of mankind without the aid or control of any rules of law. Such, for example, is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house which, by means of such an instrument, had been burglariously entered. These presumptions remain the same under whatever law the legal effect of the facts, when found, is to be decided²¹. So, when from certain set of facts, a Court infers a lost grant, the process is one of inference of fact and not of legal conclusion²². Presumptions

15. Taylor, Ev., ss. 109, 110; Best, Ev., s. 314. See observations as to the treatment of rebuttable presumptions by this Act in Whitey Stockes, 835.

16. Kar: Mahmood Hussain v. Sibram Boodipootyaya, 70 C. W. N. 1066; A. I. R. 1967 Cal. 10, 12.

17. Popson, Ev. 11th Ed. 10.

18. Cunningham, Ev. 84; Wills' Circ. 12, 6th Ed. ss. 29-30.

19. Taylor, Ev., S. 214.

20. Sir James Fitzjames Stephen divides presumptions of fact in English law into two classes—(1) Bare presumptions of fact which are nothing but arguments to which the Court attaches whatever value it pleases; (2) certain presumptions which though liable to be rebutted are regarded as being something more than mere

maxims; though it is by no means easy to say how much more. An instance of such a presumption is to be found in the rule that recent possession of stolen goods unexplained raises a presumption that the possessor is either the thief or a receiver, Steph. Introd., 174. In this Act presumptions of fact partake of the character of class (1), v. post; see Taylor, Ev., s. 111.

21. Taylor, Ev., s. 214; see Wills' Circ. Ev., passim; see also other instances of this class of presumptions s. 114 post and Best, Ev., s. 315.

22. Kasmath v. Murari, 31 C. 1 J. 501-57; 1 C. 350, where it is stated that the gist of the principle upon which a lost grant is presumed, is that the state of affairs is otherwise unexplained.

and there are others to be found in the Indian Statute Book¹⁰. The third clause of this section embraces those presumptions described by these text-writers as conclusive presumptions of law. The Evidence Act appears to create two such presumptions by Sections 112 and 113¹¹ and there are some others to be found in the Indian Statute Book¹². Where, under a given rule of law, extreme evidential value is to be assigned to a given piece of evidence, the probative force of such piece of evidence cannot be extended to collateral matters. Where one fact is declared by law to be conclusive proof of another, the court cannot allow evidence to be given in rebuttal¹³.

English text writers have, it has been said, in treating of the subject of presumptions, engrafted upon the Law of Evidence many subjects which in no way belong to it and numerous so-called presumptions are merely portions of the substantive law under another form¹⁴. "All notice of certain general legal principles, which are sometimes called presumptions but which in reality belong rather to the Substantive Law than to the Law of Evidence was despatchly omitted" (from this Act) "not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them. The most important of these is the presumption, as it is sometimes called, that everyone knows the law. The principle is far more correctly stated in the maxim that ignorance of the law does not excuse a breach of it which is one of the fundamental principles of Criminal Law". Of such a kind also is the presumption that everyone must be held to intend the natural consequences of his own acts¹⁵. The like presumptions and others of a similar character belong to the province of substantive law and have been dealt with by statute¹⁶ or have gradually come to be recognised as binding rules that govern the course of judicial decision¹⁷. In this sense, the subject of presumptions is so extensive with the entire field of law, and each particular presumption must in each case, be sought under the particular head of law to which it refers.

The term "shall presume" means that the Court is bound to take the fact as proved until evidence is adduced to disprove it; and the party interested in disproving it must produce such evidence if he can¹⁸.

10. See also *King-Emperor v. Ali Husein*, (1901) 23 All. 306. Every man is to be regarded as legally innocent until the contrary be proved and criminality is never to be presumed. *Siva Prakash Singh v. Rawlins*, (1901) 28 Cal. 594.

11. But see *Norton's Ev.*, 97.

12. See for example, Act XI, VII of 1947, S. 6 (2) (Foreign Jurisdiction and Extradition); Cr. Pr. Code S. 82 (Proclamation for person absconding); (Land Acquisition Act 1 of 1894, S. 6 (3); Act IX of 1856, S. 3 (Bills of lading); see *Nicol & Co. v. Castle*, (1872) 9 B. H. C. R. 321; see notes to Sec. 35, post.

13. *Parbhu Narain v. Jang Bahadur*, 1932 All. 35; 131 I. C. 555; 1931 A. L. J. 360; *Collector of Moradabad v. Equity Insurance Co. Ltd.*, 1948 Oudh 197; 1948 O. W. N. 172; see also *Jagatchandra N. Vora v. Prayag of India*, 1970 B. L. 144; 5 Bom. L. R. 997. No distinction between "conclusive evi-

dence" and "conclusive proof"

14. Sir Fitzjames Stephen, *Proceedings of the Legislative Council*, ante.

15. *Steph., Introd.*, 175; *Powell, Ev.*, 82.

16. See for example Specific Relief Act, 1953, Sec. 10, Explanation, Presumption that breach of contract to transfer immovable property cannot be adequately relieved by compensation in money). For an instance of the conversion of presumption of the substantive law into statutory rules. See S. 45, XXXIX of 1925 (Succession Act). In England the rule as to substantial or cumulative gifts are treated as rules of presumption; the above-mentioned section deals with these rules without any reference to presumption. See G. S. Henderson: *The Law of Wills in India*, p. 192.

17. See notes to S. 114, post.

18. See *Cunningham, Ev.*, 301, 303.

19. *Public Prosecutor v. A. Thomas*, A. I. R. 1959 Mad. 166.

2. **Classification in the Act.** The following tabular classification of presumptions may be of assistance to the reader:

Presumption

of fact
(natural—"May presume")
Ss. 86, 87, 88, 90, 114

of law
(artificial)

Rebuttable
("Shall presume")
Ss. 79-85, 89, 105.

Irrebuttable
("Conclusive proof")
Ss. 41, 112, 113.

3. **Scope of the section.** The section appears to point at two classes of presumptions, those of fact and those of law. The first clause points at presumptions of fact, the second at rebuttable presumptions of law, and the third, at conclusive presumptions of law.⁴ As has been already mentioned, presumptions of fact are really in the nature of mere arguments or maxims. The sections which deal with such presumptions have been noted above.⁵ Of these Sections, Section 114 is perhaps the most important. The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration.⁶ Of course others besides these selected may be, and are in fact frequently drawn.⁷ In respect of such presumptions, Courts of Justice are enjoined to use commonsense and experience in judging of the effect of particular facts and are subject to no rigid rules, whatever. This section renders it a judicial discretion to decide in each case whether the fact which under Section 114 may be presumed has been proved by virtue of that presumption. Circumstances may, however, induce the Court to call for confirmatory evidence.⁸ The prosecutor must prove that the required step had been duly taken or the required condition had been duly fulfilled, before the final official act can be presumed to have been regularly performed. In the instant case the steps necessary to be taken before a Public Analyst's report can be said to be a regularly performed official act are those which are laid under Section 11(1) of the Prevention of Food Adulteration Act, 1954, and Rules 7 and 15 of the Rules framed under that Act. Each of these steps must be proved to have been taken before the presumption under Section 114 of the Evidence Act can be applied for the benefit of the prosecutor.⁹

Sections 79-85, 89 and 105 of this Act create presumptions corresponding to those described by English text-writers as rebuttable presumptions of law,

4. Norton, Ev., 96.

5. Ss. 86, 87, 88, 90, 114, in fact all the sections from Ss. 79 to 90 and 114 inclusive are illustrations of, and founded upon, the maxim, *Omnia esse rite acta*. Norton, Ev., 260; Powell, Ev., 9th Ed., 386.

6. Steph. Introd., 174, 175. Proceed-

ings of the Legislative Council, cited in App. B. See s. 114, post.

7. See notes to S. 114, post.

8. Raghunath v. Hoti, (1904) 1 A. L. J. 121.

9. *Board of Patna v. Baijoo Sao*, 1975 Pat. L. J. R. 70 at 76; 77: 1974 B. C. J. 772.

of law are based, like presumptions of fact on the uniformity of deduction which experience proves to be justifiable; they differ in being invested by the law with the quality of a rule, which directs that they must be drawn; they are not permissive, like natural presumptions which may or may not be drawn.²³

The distinction between presumption "of law" and presumption "of fact" is in truth the difference between things that are in reality presumptions and things that are not presumptions at all.²⁴ Presumptions of law are true presumptions sometimes rebuttable, sometimes irrebuttable, which courts are bound by statute and sometimes by other binding authority to set up, positions which they are bound to take up beforehand, *a priori*, before they ever consider the evidence in the case or the part of the case to which the presumptions apply. These presumptions are correctly called presumptions, positions which a court must take up beforehand. The use of the word presumption, in what are spoken of as presumptions of fact, is a little unfortunate. Presumptions of fact are not necessarily taken up at the beginning of the consideration of a case or of any particular part of it. They are really assumptions of fact which may be made at any stage of a case. They are assumptions of fact for which courts do not ask any proof. These presumptions are always presumptions or inferences of fact, based upon our ideas and experience of the course of nature, the course of human business and the course of human conduct. They are the presumptions or assumptions of a reasonable man. There is no special magic about such presumption or assumptions of fact as they are used in courts of law; and no Full Bench, however numerous and however distinguished, can lay down by ruling that courts shall make certain inferences or assumption of a fact in future cases.²⁵

A presumption of fact means a fact otherwise doubtful which may be inferred from a fact which is proved.¹

(c) *Mixed presumptions*. English textwriters also deal with a third class of "mixed presumptions" or, as they are sometimes called, "presumptions of mixed law and fact," and "presumptions of fact recognised by law." These hold an intermediate place between presumptions of fact and presumptions of law, "and consist only of certain presumptive inferences which, from their strength, importance or frequent occurrence, attract, as it were the observation of the law and then being constantly recommended by Judges and acted on by juries, became in time as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice. Some also have been either introduced or recognised by statute. They are, in truth, a sort of *quasi-presumptio* *provisoria*."² These "mixed presumptions of law and fact" are chiefly confined to the English law of real property. The Indian practitioner need not give them much study, nor is it necessary to pursue the subject further here. The Act provides only that a few of the ordinary presumptions recognised by law may or shall be drawn.³

23. Norton, Ev., 97.

24. Wigmore, s. 2491.

25. Sri Raja Bommaldevara Chayadevanama v. Sana Venkataswami, 1932 M. 343; 138 I. C. 40; 62 M. L. J.

311; 1932 M. W. N. 264.

† Bir Singh v. Badai I. I. R. 1956 Punj. 800.

2 Bst. Ev., s. 324.

3 Norton, Ev., p. 97.

The expression 'shall presume' in Section 4 of the Prevention of Corruption Act has the same meaning as that expression has in the Evidence Act, as the former Act is in *pari materia* with the latter Act. The presumption under Section 4 of the Prevention of Corruption Act thus is a presumption of law and therefore it is obligatory on the Court to raise this presumption.²⁰

4. Inference. This Chapter, as originally drafted, contained the following section: "Courts shall form their opinions on matters of fact by drawing inferences: (a) from the evidence produced to the existence of the facts alleged; (b) from facts proved or disproved to facts not proved; (c) from the evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;²¹ (d) from the admissions, statements, conduct and demeanour of the parties and witnesses, and generally from the circumstances of the cases." "The Select Committee decided to omit this section 'as being suitable rather for a treatise than an Act'. The object of its introduction was originally stated to be to point out and put distinctly upon record the fact that to infer and not merely to accept or register evidence is in all cases the duty of the Court." Further, as has been already observed, a distinction must be drawn between the general act of inferring facts in issue from relevant facts, and those inferences which for the reasons above given, are specifically known as presumptions.²²

5. "May presume". Having regard to the definition of "may presume" in the first para. of the section, the trial court has a discretion to **presume a fact or to call for proof of it.**²³

6. "Shall presume". The section enacts that whenever it is directed by this Act that the Court shall presume a fact, it must regard such fact as proved, unless and until it is disproved. Thus, an accused is presumed to be innocent. Therefore, the burden rests on the prosecution to prove the guilt of the accused beyond reasonable doubt. Thus, in a case of homicide, the prosecution must prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Penal Code. This general burden never shifts, and it always rests on the prosecution. But, Section 84 of the Penal Code provides that nothing is an offence if the accused, at the time of doing that act, by reason of unsoundness of mind was incapable of knowing the nature of his act, or that what he was doing was either wrong or contrary to law. This being an exception, under Section 105 of this Act, the burden of proving the existence of circumstances, bring the case within the said exception, lies on the accused, and the Court shall presume the absence of such circumstances. Under Section 105 of this Act, read with the definition of "shall presume" in this section, the Court must regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or that their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. In other words, the accused will

20. *State of Madras v. Vaidyanathan*, Iyer, A. I. R., 1958 S. C. 61; 1958 S. C. R. 580; 1958 Cr. L. J. 232; (1958) Mad. L. J. (Cr.) 299; 1958 All W. R. (H.C.) 871 (1958) 1 Andh. W. R. (S.C.) 136

21. See S. 114, ill. (g), *post*.

22. As to the ambiguity attending the use of the term "presumption", see Best, Ev., p. 306; *ib.*, s. 299 (v. ante).

23. *Kunju Vithoba v. Rambha Dana*, 69 Bom. L. R., 559; A. I. R., 1967 Bom., 382.

be correct whether or not in respect of certified copies tendered by the Railway authorities under Section 139 of Railways Act, was left open in the under-noted case after pointing out that Section 139 of the Railways Act, 1890, undoubtedly authorises the Railway authorities to tender certified copies of their records in evidence. That Section, however, nowhere provides that the contents of such Certified Copies would be presumed by the Court to be correct unless there is evidence to the contrary.¹

The basic electoral roll and its amendments and corrigenda being public record prepared and maintained by the Government functionaries in exercise of statutory duty in the prescribed form and having been produced from proper custody under the authority of the Chief Electoral Officer, the Court is bound to presume the genuineness of these documents, and the burden of rebutting the presumption lies on the petitioner in view of this section.^{2,3}

An entry in the school register stating the fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law upon him is relevant under Section 35 of the Evidence Act. But the question as to how such weight should be attached to the entries contained therein is a pure question of fact.⁴

7. Conclusive proof. The section lays down that when one fact is declared by this Act to be conclusive proof of another, the Court must, on proof of the one fact,—

(a) regard the other as proved, and

(b) not allow evidence to be given for the purpose of disproving it.

Thus, the statement in an order of the Court has been said to be conclusive of what happened before the Presiding Officer of that Court.⁵

The element of carrying on a business is present in the definition of partnership in Section 4 of the Partnership Act, 1932 (4 of 1932). And if this element is lacking, registration under that Act will not be conclusive on the point that a partnership was really in existence.⁶

The voters list is conclusive on the question of age of a voter and the Election Tribunal is not permitted to hold an inquiry on the question of minimum age as required by Article 325 of the Constitution of India.⁷

1. *I. S. P. Trading Co. v. Union of India*, A. I. R. 1973 Cal. 74 at 77.
- 2-5. (1972) 49 E. L. R. 545 (Pun. Har.).
4. *Abdullah v. State of Rajasthan*, A. I. R. 1972 Raj. 272 at 274; 1972 W. L. N. 245; 1972 Raj. L. W. 573.
5. *M. M. B. Catholicos v. M. P. Athanasius*, (1955) 1 S. C. R. 520; A. I. R. 1954 S.C. 526; 1954 Ker. L. J. 385; 1. L. R. (1954) T. C. 567; *Ratan Lal v. Nathu Lal*, A. I. R. 1961 M. P. 108 (Rule 3 in Schedule 3 of the Rules made under

Section 18 of the Citizenship Act, 1955 makes the passport conclusive proof)

6. *Sunil Krishna Pal v. C. I. T., W. Bengal*, (1966) 59 I. T. R. 457.
7. *Mohammad Husain v. Onali Fidaali*, (1967) 10 Guj. L. R. 925; *Kantilal v. Village Panchayat of Shivrajpur*, I. L. R. (1963) Guj. 1172; (1963) 4 Guj. L. R. 929; *Roop Lal Mehta v. Bhan Singh*, A. I. R. 1968 Punj. 1 (F.B.); *Ghulam Mohi-ud-din v. Town Area, Sakit*, A. I. R. 1959 All. 357 (F.B.).

The court cannot ignore the provisions of Section 31 and assume that whatever was written down in the form of admissions was conclusive proof of the words and happenings mentioned therein.⁸

8. Rule when one of evidence and when one of substantive law. In *Izhar Ahmad Khan v. Union of India*,⁹ the question arose whether the Citizenship Rules, 1962, prescribing irrebuttable presumptions were rules of evidence or of substantive law. Gajendragadkar, J., with whom Wandhoo and Rajagopala Ayyangar, JJ., concurred, observed that in deciding the question as to whether a rule about irrebuttable presumption is a rule of evidence or not, the proper approach to adopt is to consider whether fact A from the proof of which a presumption is required to be drawn about the existence of fact B is inherently relevant in the matter of proving fact B and has inherently any probative or persuasive value in that behalf or not. If fact A is inherently relevant in proving the existence of fact B, and to any rational mind it would bear a probative or persuasive value in the matter of proving the existence of fact B, then a rule prescribing either a rebuttable presumption or an irrebuttable presumption in that behalf would be a rule of evidence. But if fact A is inherently not relevant in proving the existence of fact B or has no probative value in that behalf, and yet a rule is made prescribing for a rebuttable or an irrebuttable presumption in that connection, that rule would be a rule of substantive law and not a rule of evidence. He held that the question can be answered only after examining the rule and its impact on the proof of facts A and B. He observed further that this section recognises three rules of evidence, the rules which prescribe (1) for a presumption which may be drawn, (2) for a presumption which shall be drawn subject to rebuttal, and (3) for a presumption which shall be conclusively drawn. He concluded that it has been accepted in India that a conclusive presumption is a part of the law of evidence.

Das Gupta, J. with whom A. K. Sarkar, J. concurred, observed that when even the question arises whether a particular rule is one of substantive law, or of evidence, we have to ask ourselves does it seek to create, or extinguish or modify a right or liability, or does it concern itself with the effective function of reaching a conclusion as to what has taken place under the substantive law? In the first case, the rule is a rule of substantive law; in the other case, it is a rule of evidence.

When the rule goes further and says that a particular relevant fact will be conclusive proof of a fact, it can be said that a specified right or liability may arise from it, what is being done is to directly affect a substantive right or liability, and it is not providing for evidence only. A rule of conclusive presumption is not with a view to affect a specified substantive right is a rule of substantive law as it is intended to affect a substantive right and does not merely intend to use the conclusive presumption that its conclusive proof of the existence of another fact is rested on a fact which is relevant to it. The point is whether the rule is intended to affect a specified substantive right or to provide a method of proof. Where the purpose of a rule of conclusive presumption is that the Judge should, on that basis, hold that a specified right or liability exists, or does not exist, the rule is really

8. *Dr. N. G. Dastane v. Mrs. Sucheta*, 1 L. R. 1969 Bom. 1024; 71 Bom. L. R. 569; 1969 Mah. L. J. 789; A. I. R. 1970 Bom. 312, 319.

9. (1963) 1 S. C. A. 136; A. I. R. 1962 S.C. 1052; 1962 (2) Cr.L.J. 215; 1963 B. L. J. R. 99; (1963) 1 S. C. A. 136.

saying that this particular relevant fact will create, or extinguish, or modify the right or liability. A rule of conclusive presumption as to the existence of a certain fact operates for establishing or destroying a substantive right. The right results in assuming that right and ceases to be a mere evidence.

9. Distinction between "evidence conclusive as to the existence of fact" and "evidence which is made conclusive". When the law says that a particular kind of evidence would be conclusive as to the existence of a particular fact, it implies that that fact can be proved either by that evidence or by some other evidence which the Court permits or requires to be adduced. Where such other evidence is adduced, it would be open to the Court to consider, whether, upon that evidence, the fact exists or not. Where, on the other hand, evidence which is made conclusive is adduced, the Court has no option but to hold that the fact exists. Once the law says that certain evidence is conclusive it shuts out any other evidence which would detract from the conclusiveness of that evidence. In substance, therefore, there is no distinction between conclusive evidence and conclusive proof. Statutes may use the expression "conclusive proof" where the object is to make a fact conclusive.¹⁰ But the Legislature may use some other expression such as "conclusive evidence" for achieving the same result.¹⁰

10. *Somawanti v. State of Punjab*, (1963) 2 S. C. R. 774; (1963) 1 S. C. A. 548; (1963) 2 S. C. J. 35; A.I.R.

1963 S.C. 151; (1963) 2 Mad. L.J. (S.C.) 18; (1963) 2 Andh. W. R. (S.C.) 18

CHAPTER II OF THE RELEVANCY OF FACTS

SYNOPSIS

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| 1. Logical relevancy and legal relevancy.
2. Relevancy and admissibility.
3. Meaning of relevancy.
4. Definition of relevancy.
5. Acts and representations of third persons when relevant. | 6. Agency.
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8. Companies.
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10. English and Indian law.
11. Importance of provisions.
12. Scope of the Chapter. |
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1. **Logical relevancy and legal relevancy.** As with many other questions connected with the Law of Evidence, the theory of relevancy has been the subject of various opinions. Relevancy has been said by the framer of the Act to mean the connection of events as cause and effect¹². But this theory, as was admitted afterwards, was expressed too widely in certain parts, and not widely enough in others¹³. For the former definition the following was substituted: "The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other"¹⁴. But this is relevancy in a logical sense. Legal relevancy, which is essential to a matter of evidence requires a higher standard of evidentiary force. "In modern usage," relevancy, and for reasons of particular convenience, cannot be distinguished from materiality in the fact to be proved and the fact offered in proof of it. A fact which is not logically relevant (that is, absolutely essential) to the fact to be proved, though it is logically relevant does not ensure admissibility; it at least must be found to be relevant (a fact which "in connection with other facts renders probable the existence of fact in issue," may still be rejected, if in the opinion of the Judge or jury or the circumstances of the case it be considered **essentially misleading or remote.**"¹⁴

11. Steph. Dig., Art. 1, CS. in particular 25 to Relevancy, Introduction.

12. Steph. Dig., Art. 1, CS. in particular 25 to Relevancy, Introduction.

13. Steph. Dig., Art. 1, CS. in particular 25 to Relevancy, Introduction.

not because I think it (the former definition) wrong, but, because I think it gives rather the principle on which the rule depends than a convenient rule," *ib.* p. 158.

14. Best, *Ew.*, p. 251.

2. Relevancy and admissibility. The tendency, however, of modern jurisprudence is to admit most evidence logically relevant. Logical relevancy may not thus be assumed to be the sole test of admissibility; relevancy and admissibility are not co-extensive and interchangeable terms. "Public policy, considerations of fairness, the particular necessity for reaching speedy decisions, these and similar reasons cause constantly the necessary rejection of much evidence entirely relevant. All admissible evidence is relevant, but all relevant evidence is not admissible."¹⁵ The question of relevancy strictly so called presents as a rule, little difficulty. Any educated person, whether lay or legal, can say whether a circumstance has probative force, which is the meaning of relevancy. This is an affair of logic and not of law. It is otherwise with the question of admissibility which must be determined according to rules of law. A fact may be relevant but it may be excluded on grounds of policy as already noted. A communication to a legal adviser may be in the highest degree relevant, but other considerations exclude its reception as a privileged communication. Again, a fact may be relevant but the proof of it may be such as is not allowed as in the case of the 'hearsay' rule.¹⁶

3. Meaning of relevancy. In this Chapter the word "relevancy" seems to mean the having of some probative force. In the title of this Part it appears to denote admissibility.¹⁷ However, the considerations mentioned go merely to the theory of relevancy and to the construction of the definitions given in the Act as based on that theory. For practical purposes one fact is relevant to another and admissible,¹⁸ "when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."¹⁹

4. Definition of relevancy. Relevancy in the sense in which it is used by the framers of the Act, is fully defined in Sections 6-11, both inclusive: "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly worded very widely, and in such a way as to overlap each other. Thus, a motive for a fact in issue (Section 8) is part of its cause (Section 7), subsequent conduct influenced by it (Section 8) is part of its effect (Section 11). Facts relevant under Section 11 would, in most cases, be relevant under other sections."²⁰

15. *Best, Ev.* 272. "It is a communication to a legal adviser, or a confessional confession improperly obtained may, undoubtedly, be relevant in a high degree, and yet, under the less favourable view, be inadmissible." *Ev.*, ss. 293-316; *Powell, Ev.*, 527, 528; *Steph. Introd.*, Dig. Arts. 1 and 2; *Appleston, loc. cit.* "The Theory of Relevancy by G. C. Whiteworth, *Bom.*, 1881.

16. As to the meaning of the expression 'evidence is not evidence' see *Steph. Introd.*, p. 189; Arts. 14 and 67; cf. *Stokes* to S. 60, post.

17. *Whitley Stokes*, 849.

18. *Lala Lakshmi Chand v. Sayed*

1901, 30 Cal. 1, 30 Cal. W. N. 66; *XVI*, Relevant in this Act means admissible).

19. S. 5, ante, v. Ss. 5-55, post.

20. *Steph. Introd.*, p. 189; and *Stokes*, p. 819; "two of these sections are so drawn (Ss. 7, 11) as to permit evidence to be made wholly irrelevant," *ib.*, and see notes to Sec. 11 post; but see also *Steph. Introd.*, 160; and *Best, Ev.* 272. "If the sections mentioned in the text the question of circumstantial evidence is distributed among the chapters. First Report of the Select Committee, 31st March 1871.

5. Acts and representations of third persons when relevant. Not only may the acts and words of a party himself, if relevant, be given in evidence, but when the party is, by the substantive law, rendered liable, civil or criminally for the acts, contracts or representations of third persons, such facts are material, though the person is to be given in evidence for an identification, as if they were his own.

The particular relationship rendering such evidence receivable must be proved, for not at least to the satisfaction of the court; and it is except as against themselves, to be established by the declarations of such third persons. The rule above stated, which is one rather of substantive law than of evidence, is based on the identity of interest between the parties.²¹ The following are the principal relationships of this kind.

6. Agency. In civil cases, the acts, contracts and representations of the agent bind the principal when they have been expressly or impliedly authorised, or subsequently ratified, by him.²² There is a general authority to conduct the principal's business in the usual way, where no authority for that purpose being determined by the nature of the business, and the character of those engaged in such business.²³ If the act be within the scope of the agent's authority, civil liability is incurred, though done against his express instructions²⁴ or in bad faith, and for the agent's sole benefit, or even negligently.²⁵

In criminal cases, a party is not in general criminally liable for the acts and declarations of his agents and servants unless they have been expressly directed, or assented to by him. In general, the principal is not to be criminally liable, if the agent is not acting within the scope of his authority.²⁶ But, there are certain well recognised exceptions to this rule, one of the exceptions is, that where a statute prohibits an act or enforces a duty, in such words as to make the prohibition, or the duty absolute, the master will be liable, if the act is in fact done by a servant. To ascertain whether a statute and a statute has that effect or not, regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.²⁷

21. Phipson, *Ev.*, 11th Ed., p. 106.

22. Contract Act IX of 1872, Ss. 186—189, 196, 226.

23. *In re Cunningham*, (1887) 36 Ch. Div. 532; *Bank of Baroda v. Punjab National Bank*, 1944 P. C. 58; 71 I. A. 124; 57 L. W. 571.

24. *Watteau v. Fenwick*, (1893) 1 Q. B. 346.

25. *Lloyd v. Grace* (1912) A. C. 716. See also *Lloyd's Bank v. Chartered Bank of India*, (1929) 1 K. B. 40.

1 *Citizens Co. v. Brown*, (1904) A C 423.

2. *Penny v. Wimbledon Council*, (1899) 2 K. B. 72.

3. *Coppen v. Moore*, (1898) 2 Q. B. 306; *R. v. I. C. R. Haulage*, 1934 K. B. 551.

4. *Barker v. Levinson*, (1951) 1 K.B. 312; see also *Ferguson v. Weaving*, (1951) 1 K. B. 814; see *Roscoe, Cr. Ev.*, 16th Ed. 1005, as to admissions by agents. See Ss. 17, 18, post.

5. *Mausell Brothers v. L. & N. W. Railway*, (1917) 2 K. B. 836; 87 L. J. K. B. 82; 118 L. T. 25; *Allen v. Whitehead* (1930) 1 K. B. 211; 99 L. J. K. B. 146; 142 L. T. 141; *Mahomed Bashir v. Emperor*, 1946 Bom. 315; 1. L. R. 1946 Bom. 173; 225 I. C. 430; *Uttam Chand v. Emperor*, 1946 Lah. 54 (F B.); 1. L. R. 1946 L. 284; 224 I. C. 199; *Harish Chandra Bagla v. Emperor*, 1945 All. 90; 1. L. R. 1945 All. 540; 219 I. C. 87; 46 Cr. L. J. 472.

7. Partnership. The liability of partners for the acts of their co-partners is established on the ground of agency, each partner being the agent of the firm for the purposes of the business of the firm.⁶

8. Companies. A company is liable for the acts and representations of its directors or other lawful agents, which are within the scope of their real or apparent authority, even though such acts may be fraudulent. A company is not liable for acts done *ultra vires*.⁷

9. Conspiracy in Tort and Crime. See Section 19 post, and notes thereto.

10. English and Indian law. The principle of the Act differs from the English law in that it denies the evidence which may be given, so that, in order to produce any particular evidence, it must be shown to be admissible under some section of this Act: whereas the principle of the English law is to assume that everything is admissible subject to two main exceptions, namely,

(a) that the best evidence that is available must be tendered and that best evidence only;

(b) that hearsay evidence is not admissible.

Working on these main principles, the law is clothed, as it were, with exceptions to these general rules. The first of these English rules is nowhere expressly laid down in the Act, but it can be inferred by the exclusion of secondary evidence, by the exclusion of statement of persons not called as witnesses except in special cases, and by the presumption which is to be drawn from the absence of material witnesses or documents. The rule excluding hearsay evidence is dealt with in Sections 32 and 33.

11. Importance of provisions. The following sections have been considered by the author and others to be the most important, as all will admit: they are the most original part of the Act as they affirm positively what facts may be proved, whereas the English law assumes this to be known and merely declares negatively that certain facts shall not be proved. In the opinion of many others, the English law proceeds on a so crude and more practical grounds. While importance is claimed for these sections in that they are said to make the whole body of law on evidence more easily intelligible, yet such importance cannot outweigh the provisions of Sections 165 and 167, which are so often weight to be attached to their strict application when a failure to so strictly apply them has not been the cause of an improper decision of the case. For the improper admission or rejection of evidence in

6. S. 18, Indian Partnership Act IX of 1932; as to the implied authority of a partner as the agent of the firm, see *ib.*, S. 19.

7. *Pearson v. Dublin Corp.*, 1907 A. C. 351; *Refuge Co. v. Kettlewell* (1909) A. C. 419; see also *Moore v. Bresler*, (1944) 2 All E. R. 515.

Smt. Premila Devi v. Peoples' Bank of Northern India Ltd., 1938 P. C. 281; 178 I. C. 659.

8. *Russel*, 12; *Price on Ultra Vires*; see also *Anand Behari Lal v. Dinshaw & Co. (Bankers), Ltd.*, 1942 Oudh L. 200 I. C. 485.

Indian Courts has no effect at all unless the Court thinks that the evidence improperly dealt with either turned, or ought to have turned, the scale.⁹ A Judge, moreover, if he doubts the relevancy of a fact suggested, can if he thinks it will lead to anything relevant ask about it himself.¹⁰

12. Scope of the Chapter. The rules in the following sections declare relevant—

(1) all facts in issue;

(2) all facts which are relevant to the issue (Section 5), which—

(a) form part of the same transaction (Section 6);

(b) are the immediate occasion, cause, or effect of facts in issue (Section 7);

(c) show motive, preparation or conduct affected by a fact in issue (Section 8);

(d) are necessary to be known in order to introduce or explain relevant facts (Section 9);

(e) are done or said by a conspirator in furtherance of a common design (Section 10);

(f) are either inconsistent with any fact in issue, or inconsistent with it, except upon a supposition which should be proved by the other side, or render its existence or non-existence morally certain (Section 11);

(g) affect the amount of damages, in cases where damages are claimed (Section 12);

(h) show the origin or existence of a disputed right or custom (Section 13);

(i) show the existence of a relevant state of mind and body (Section 14);

(j) show the existence of a series of which a relevant fact forms a part (Section 15); or

(k) show, in certain cases, the existence of a given course of business (Section 16);

(3) admissions and confessions (Sections 17—31);

9. Steph. Introd., 72, 73; *aliter* in England.

10. *ib.*, 72, 73, 162; s. 165, *post.* Best,

Ev., 86; as to "indicative" evidence, *ib.*, s. 93.

(4) statements by persons who cannot be called as witnesses (Sections 32, 33);

(5) statements made under special circumstances (Sections 34—39);

(6) judgments in other cases (Sections 40—44);

(7) opinion (Sections 45—51); and

(8) character (Sections 52—55).

5. *Evidence may be given of facts in issue and relevant facts.* Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others.

Explanation. This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.¹¹

Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue :

A's beating B with the Club ;

A's causing B's death by such beating ;

A's intention to cause B's death.

(b) A's attorney does not bring with him and have in readiness for production at the first hearing of the cause, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

s. 3 ("Evidence").

s. 3 ("Fact in issue").

s. 3 ("Fact").

s. 3 ("Relevant").

ss. 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44.

s. 64, 165 Prov. 2 (Proof of document by primary evidence).

ss. 136, 162 (Judges to decide as to admissibility).

ss. 145, 146, 153, 155, 158 (Relevancy of evidence).

s. 160 (Judge's power to put questions).

s. 167 (Improper admission or rejection of evidence).

Civil Procedure Code, Order XIII, and Order XVIII; Steph. Introd., 12 Ch. II, III; Steph. Dir. App., 1; Best, Ev., 251; Taylor, Ev., Section 316; Wigmore, Ev., Sections 9—12.

11. See now the Code of Civil Procedure, 1908 (Act V of 1908).

SYNOPSIS

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| 1. Scope. | (a) General. |
| 2. Principle. | (b) Varying decisions as to admissibility. |
| 3. "And of no others" | |
| 4. Relevancy not affected by the provisions of Cr. P. Code | 10. Objections by parties |
| 5. Explanation. | 11. Waiver of rights |
| 6. Admissibility. | 12. Appeal, objection in. |
| 7. Object for which evidence is tendered and purposes for which it is admissible. | 13. Omission to object, effect of. |
| 8. Evidence partly admissible and partly inadmissible. | 14. Evidence on commission |
| 9. Admissibility in civil and criminal cases. | 15. Fresh objections. |
| | 16. Consent. |
| | 17. Waiver in criminal case. |
| | 18. Miscellaneous. |
| | (a) General. |
| | (b) Trap witness. |

1. **Scope.** The section declares that in a suit or judicial proceeding evidence may be given of the existence or non existence of (1) facts in issue and (2) of such other collateral facts as are declared to be relevant in the following sections. The expression "facts in issue" is defined in Section 3. The facts "declared to be relevant" are facts which, though they do not directly tend to prove or disprove a fact in issue, are so connected with facts in issue that they indirectly and presumptively tend to prove or disprove facts in issue.

2. **Principle.** The reception in evidence of facts, other than those mentioned in the section, tends to distract the attention of the tribunal and to waste its time. *Frutra probatur quod probitum non debet*. This law of evidence is framed with a view to a trial at *Nisi Prius* and a proceeding at *Nisi Prius* ought to be restrained within practical limits¹²

3. **"And of no others".** This section excludes everything which is not covered by the purview of other sections which follow in the statute. All evidence tendered must, therefore, be shown to be admissible under this or some one or other of the following sections,¹⁴ or the provisions of some other statute, saved by Section 2 ante (repealed by the Repealing Act, 1938) (1 of

12. *Best Ex.* 251, R. v. Parbhudas, (1874) 11 Bom. H. C. R. 90, 91; *Laver Ex.* 5, 316, Managers, Asylum District v. Hill, 47 L. T. H. L. 29, 34, per Lord O'Hagan; see also judgment of Lord Watson as to the distinction between evidence having a direct relation to the principal question in dispute and evidence relating to collateral facts which will or seem likely to tend to elucidate that question; and ante. Introduction. "Facts" which are not themselves in issue may affect probabilities of the existence of facts in issue, and these may be called collateral facts. First Report of the Select Committee, 31st March, 1871.

13. *The Collector, Gorakhpur v. Palakdhar*, (1899) 12 A. 1 at p. 43; R. v. Panchu, 1920 Cal. 500; 47 C. 671; 58 L. C. 925. (F.B.), per

Mockerjee. J. "But the principle of exclusion should not be so applied as to exclude evidence which may be essential for the ascertainment of truth", R. v. Abdullah, (1885) 7 A. 96. (F.B.) see observations on the modern rule as to admissibility in *Luck v. Ashford & Co. Assurance*, (1878) 4 C. P. D. 94. But the question in India is whether the Act permits the reception of evidence. If it is essential in any case for the ascertainment of the truth probably it does. But the question again is, does the Act allow the evidence sought to be produced.

14. *Lekraj v. Mehpal*, 5 C. 744 (1874); 6 C. L. R. 593; 7 I. A. 63; *Abinash v. Paresh*, (1904) 9 C. W. N. 402, 406; *Dwijesh v. Naresh* 1945 Cal. 492; 49 C. W. N. 791.

1988), Section 2 and Sch.)' or enacted subsequent to this Act. Any fact, intended to be established, has to be, in accordance with the scheme of the Act, found to be relevant under a provision contained in the Act before it can be allowed to be proved. Any argument based on possibility can have no effect. The court must, therefore, ignore any other consideration and confine itself strictly to the provisions of the Act and come to a conclusion as to the relevancy of a fact on the interpretation of the relevant provisions of the Act, regardless of the fact whether the conclusion at which one ultimately arrives is in accordance with what is generally characterised to be a commonsense view of things or not.¹⁵ It is not open to any Judge to exercise a dispensing power and admit evidence not admissible by the Statute because to him it appears that the irregular evidence would throw light upon the issue.¹⁶ Conversely, he cannot, on the ground of public policy, exclude evidence legally admissible under this Act.¹⁷ Nor can he exclude such evidence on the ground that it is not admissible under English law.¹⁸ The words 'and of no others' must be read in conjunction with the language of other portions of the Act, and further tend to show that the Court should, of itself and irrespective of the parties, take objection to evidence tendered before it which is not admissible under the provisions of this Act.¹⁹ This section must be read as subject to the restriction of Part II as to proof, and Part III as to the production of evidence. Thus, the terms of a contract between the parties might be relevant, but oral evidence of it will be excluded, if those terms have been reduced to writing.²⁰ Though a document may not be legal evidence of a fact within the provisions of this Act, it may yet be a document which the parties by the contract have made proof of that fact.²¹

4. Relevancy not affected by the provisions of Cr. P. Code. The Evidence Act is a special law dealing with the subject of evidence including the admissibility of evidence. Hence, no rule about the relevancy of evidence in the Act is affected by any provision of the Criminal Procedure Code.²²

5. Explanation. For the provisions of the law relating to Civil Procedure Code referred to see Order VII, Rules 14 to 18, Order XIII, Rules 1 to 3 and 10 and Order XLJ, Rule 27, Civil Procedure Code Act V of 1908.

The credibility of a witness is not affected by the fact that he was not summoned but requested or asked to give evidence by the party who produced him. He cannot be regarded as untruthful for that reason.²³

15. *B. N. Kashyap v. Emperor*, 1945 Lah. 23 I. L. R. (1944) Lah. 408; 217 I. C. 284; 46 Cr. L. J. 296 (F.B.).

16. *Sris Chandra Nandy v. Rakhala Nanda*, 1941 P. C. 16; 68 I. A. 34; I. L. R. (1941) 1 Cal. 408; 11 I. L. J. 100; see also *Chand Lal v. Bibi Khatemonnessa*, 1943 Cal. 76; I. L. R. (1942) 2 Cal. 299; 205 I. C. 344; 46 C. W. N. 729.

17. *Katikineni V. G. Narsimha Rama Rao v. C. Venketaramayya*, 1940 Mad. 768; I. L. R. 1940 Mad. 969; (1940) 2 M. L. J. 257 (F.B.).

18. *King v. King*, 1945 All. 190; I. L. R. 1945 All. 620; 1945 A. L. J. 162.

19. *Whitley Stokes*, 1945. See following paragraphs.

20. S. 91, post; and cf. Ss. 92, 115–117, 121–127.

21. *Osman Assurance Company, Ltd. v. Sarat*, (1895) 20 B. 99 at 105.

22. *Ram Nares v. Emperor*, 1939 All. 242; I. L. R. 1939 All. 377; 181 I. C. 646.

23. *Asharfi Devi v. Tirlok Chand*, A. I. R. 1965 Punj. 140; 66 P. L. R. 1130; *Bibhuti v. Ramendra Narayan*, 1947 P. C. 19; 73 I. A. 246; I. L. R. 1947 Cal. 85.

In a case, appealable to a higher tribunal, the court ought not to reject evidence essential to the case of either party if it can possibly admit it,—at any rate where the court has doubt upon the matter of admissibility, and its decision is open to appeal it is better to admit than to exclude document¹⁰ Even if the Judge holds the evidence to be inadmissible, it is safest for him to contemplate its being regarded as admissible and express his view as to its weight.¹¹

In criminal cases, the court should lean always in favour of the accused and exclude all evidence tendered by the prosecution which is of doubtful or remote relevance¹² To avoid prejudice to the accused, the court has a discretion to hear argument as to the admissibility of evidence in the absence of the jury.¹³ But, if the admissibility of the evidence depends upon facts, not affecting the merits, for which proof is needed, then such proof (e.g., as to a witness being able to understand the obligation of an oath, must be given in the presence of the jury¹⁴ "Whether the court does or does not consider evidence, given on another occasion and between other parties appropriate and valuable for the decision of the case which is before it is not of itself a reason for the admission or rejection of such evidence." The Court is bound to try the matter between the parties who are before it upon such evidence as those parties in their discretion produce for the purpose and at the time when the evidence is tendered to decide whether or not it is legally admissible.¹⁵ The value of evidence cannot affect its admissibility.¹⁶ Questions as to the admissibility of evidence should be decided, as they arise, and should not be reserved until judgment in the case is given.¹⁷ In a criminal case, the opening for the prosecution is not the stage where a doubtful question of admissibility should be either raised or decided.¹⁸ Where the question was as to the admissibility of certain documents, it was remarked:

"What, if all such documents are excluded shall we have left but oral evidence? That this is not a desirable result probably no one will deny, and in all discussions on the law of evidence, it seems to me very desirable to consider how that result can be avoided."¹⁹

10. *Kali Kishore v. Bhusan Chunder*, 17 I.A. 159; 18 Cal. 201 (P.C.), judgment of High Court cited at p. 203.

11. *M. H. V. v. D. S. K.*, 21 Bom. 695, 698.

12. *Benoyendra Chandra Pandey v. Emperor*, 1927 Cal. 78; 11 I.R. 13; Cal. 929; 101 I.C. 74; see also *Laijam Singh v. Emperor*, 1925 All. 405; 86 I.C. 817.

13. *R. v. Ball* (1911) A.C. 47, 50; *R. v. Thompson* (1917) 2 K.B. 630 (C.C.A.); see also *Archie v. Perce* v. King, 1937 P.C. 24; 166 I.C. 330; (1937) 1 M.L.J. 600.

14. *R. v. Reynolds*, (1950) 1 K.B. 606.

15. *Gorechand v. Ramnarain* (1858) 9 W.R. 587.

16. *R. v. Roden* (1874) 12 Cox 630.

17. *Ponnaminal v. Modern Stores*, 1950 Mad. 62; (1949) 2 M.L.J. 142; *Parmanand v. Emperor*, 1940 Nag. 340; 1 I.L.R. 1941 Nag. 110; 100 I.C. 87; *Rajeshwar Singh v. Ram Raj Singh*, 1939 All. 61; 179 I.C. 974; 1939 A.L.J. 128; 1 I.L.R. 1939 Cal. 173; *Ramjibun v. Oghore Nath*, 25 Cal. 401; 2 C.W.N. 188.

18. *Padam Prasad v. Emperor*, 1929 Cal. 617; 119 I.C. 139; 33 C.W.N. 1121 (S.B.).

19. *Chandrasekhar v. Abdul Subhan* (1867) 8 W.R. p. 167 at 169; per Markby, J., for the procedure with regard to the admission of documentary evidence, see *W.B. Manson v. Emperor*, 1937 K.B. 157; 15 W.R. 190; *Issur v. Russek*, (1868) 11 W.R. 576.

No argument in favour of the exclusion of evidence can be founded on the inability of Judicial Officers to perform the task of attributing to it its proper influence in the decision: to exclude evidence because, in some cases, Judges might found upon it a wrong conclusion would be utterly inconsistent with the assumption, on which, all rules of law are founded, that the constituted tribunals are fairly competent to carry them out.²⁰ In the undernoted case it was said:

"To admit documents, not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the *chittahs* which have been laid aside by the High Court is shown to have been admissible in evidence according to the law of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from or statements in, documents not legally admissible in proof against them."²¹

When a Judge is influenced in his estimate of parol testimony by the result of his consideration of documents which he ought not to have dealt with as evidence, there is no proper trial of the case.²²

7. Object for which evidence is tendered and purposes for which it is admissible. Where certain decisions of the Privy Council were referred to, in which it was said that with regard to the admissibility of evidence in the native courts in India no strict rule can be prescribed, it was remarked as follows:

"But these cases, it must be borne in mind, occurred many years ago, at the time when the practice in the *mohtasil* in this respect was very lax and before the Evidence Act was passed, and the observations of the Privy Council²³ were made, as I firmly conceive, not as approving of this laxity of practice, but rather as excusing it upon the ground that the *mohtasil* courts were not at the time sufficiently acquainted with our English rules of evidence as to be able to observe them with anything like accuracy. I conceive that one great object of the Evidence Act was to prevent this laxity, and to introduce a more correct and uniform rule of practice than had previously prevailed."²⁴

In the undernoted case Lord Tenterden, C. J., said:

"In considering the question whether certain evidence be admissible or not, it is necessary to look at the object for which it is produced and the point it is intended to establish; for it may be admissible for one purpose and not another."²⁵

20. *Gopalchandra v. Anandabai*, 8 W. R. 167 and as to standard of value as applied to evidence it at p. 169.

21. *Fckowrie v. Heeralal*, (1868) 11 W. R. (P.C.) 2; s.c. 12 Moo. I.A. 136 ("Each relaxation is apt to become a precedent for another," *ib.* at p. 4); see notes to S. 36 *post*.

22. *Bordonath v. Russick*, (1868) 9 W. R. 274.

23. *Unide v. Pennasamy*, (1856) 7 M.I.A. 128 at p. 137; s.c. 4 W.R.

P.C. 141. *Narainity v. Vengama*, (1861) 9 M.I.A. 66 at p. 90; *Ajodhya Pershad v. Omerao*, (1870) 13 M.I.A. 519; 15 W.R. (P.C.) 1.

24. *Gujja v. Fatch*, (1880) 6 C. 171 at p. 193, per Garth, C.J., and as to the reception of loose evidence v. *ib.*; *Hurechur v. Churn*, (1874) 22 W.R. 355, 356, 357.

25. *Taylor v. Willans*, (1830) 2 B. & Ad. 815, 855, per Lord Tenterden, C.J.

Evidence properly admitted may be treated as evidence for all purposes. Thus, the evidence of a witness given at the preliminary enquiry may, at the trial, be treated as evidence in the case for all purposes subject to the provisions of this Act.¹

8. Evidence partly admissible and partly inadmissible. If inadmissible evidence is so mixed up with admissible evidence as to make it impossible to separate one from the other, the whole of the evidence has to be rejected. But this result will not follow, if the admissible material is quite independent of the inadmissible material. Where a document consists of two separate parts, one of which is admissible and the other inadmissible, the document cannot be rejected as a whole. Though, no doubt, where portions of a statement are admitted, the person affected thereby may demand that the statement should be admitted and considered as a whole. Yet the principle that portions of a statement or evidence may be admitted and the rest excluded is recognised in the Evidence Act itself, e.g. Section 24.

9. Admissibility in civil and criminal cases. Generally, in civil and criminal cases the same rules of evidence in the trial of the admissibility of evidence, though there may be difference in their application. It may be that a piece of evidence is admissible in a civil case or even in a criminal case, but not without further evidence. Thus, in a civil case, the Appellate Court has said that it is not necessary to prove that a proper motive existed. The moment a witness is shown to be a person who is not admissible, he should be stopped by the Court. It is not necessary to rely on a subsequent expectation to the jury to report the hearsay evidence as to do so on the legal evidence alone.² If the Court is concerned with the admissibility of evidence, the utility of the Law of Evidence may be somewhat limited. Further

1. S. 288, Cr. P. Code; *Fakira v. King-Emperor*, 1937 P.C. 119; 64 I.A. 148; 167 I.C. 790; *Hanuman Prasad v. Crown*, 1949 Nag. 254; 1 I.L.R. 1949 Nag. 405; 1949 S.L.J. 456; *Rang v. Emperor*, 1944 Sind 178; 1 I.L.R. 1944 Kar. 75.
2. *Gurmukh Singh v. Commr. of Income Tax*, 1944 Lah. 353, 363 (F.B.).
3. *Fazal Din v. Karam Hussain*, 1936 Lah. 81, 83; 162 I.C. 404.
4. *Emperor v. Lalit Mohan Singh*, 1921 Cal. 111, 112; 62 I.C. 578; 25 C.W.N. 788.
5. *R. v. Mallory*, (1884) 13 Q.B.D. 33; 15 Cox 458, 460, per Grove, J. *ante*, notes to S. 3, and cases there cited; and see also *R. v. Francis*, (1874) 12 Cox C.C. 612, 615, 616; Lord Melville's Trial 29 How. St. Tr. 736, 764 (a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is totally different question in the consi-

- deration of criminal as distinguished from civil justice, how the accused may be affected by the fact when so established), per Lord Eversham, 1 C.C. Rest. Ev., s. 94.
- 5-1. *R. v. Amrita*, (1873) 10 B.H.C.R. 497.
6. *R. v. Pitambar*, (1867) 7 W.R. Cr. 25. Where hearsay is not admissible as evidence it should not be taken down; *Pitamber Doss v. Ruttun*, (1864) W.R. 213; and a prior consent to abide by the testimony of a certain witness cannot bind the consenting party to hearsay testimony, but only to such evidence as is legally admissible, *Luckemonee v. Shunkar*, 2 W.R. 252; *R. v. Alum Sheikh*, 5 W.R. Cr. 2; *R. v. Ramgopal*, (1868) 10 W.R. Cr. 57; *R. v. Sah Churn*, 7 W.R. Cr. 2 (hearsay evidence prohibited); *R. v. Kolarnath*, (1872) 18 W.R. Cr. 10; *R. v. Chunder*, (1875) 21 W.P. Cr. 77.

having regard to the imperative language of sub-sections 104, 104A, and 105 of the Act, and of other portions of the Act, it would seem that it was the intention of the Legislature that a Court should not permit evidence to be given by parties, **compel observance of the provisions of the law.** If evidence is irrelevant and inadmissible, omission to take objection to its reception does not render it admissible.⁷ It is the duty of the Court to exclude irrelevant evidence, even if no objection is taken to its admission by the parties.⁸ **Procedure as to admission and rejection of documents** is laid down in the aforementioned Order of the Code.⁹ The Judge's duty is to the relevancy of evidence, and may ask in what manner any evidence which is relevant is relevant. He is bound to try a collateral issue when the reception of evidence depends on a **preliminary question of fact.**¹⁰ **The rules of evidence cannot be departed from,** because there may be a strong moral conviction of guilt.¹¹ **The moral weight of evidence is not the test.**¹²

(b) *Lawyer's decision as to admissibility.* An interlocutory order by the Court holding that certain evidence is admissible can be may be varied by it, though in practice it is not often done.¹⁴ But a Judge who has refused to accept certain evidence at the first instance has no power to take it again into consideration, unless some explanation is given for his refusal.¹⁵

10. Objections by parties. An objection to the reception of evidence is properly made in the Court of first instance. If it is made at the time when the evidence is tendered, it may be taken up by the party tendering the evidence to obviate the objection, if available. It has been held that

7. *v. S.* 5 "... and of no others," S. 60, "oral evidence must be direct"; S. 64, "Documents must be proved by primary evidence except etc."; S. 165, "nor shall he dispense with primary evidence, etc." S. 136, "shall admit evidence if relevant and not otherwise."

8. *Kamakshya Narain Singh v. Karannura Development Co.* 1950 Pat. 134; 11 I.R. 20 Pat. 19; *Pandappa v. Shivalingappa*, 1946 Bom. 193; 224 I.C. 169; 47 Bom. L.R. 962; *Nanak Chand v. Shahbaz Khan*, 1936 Lah. 114; *Krishnaswami v. Ramchandra Ayvar*, 1931 Mad. 601; 135 I.C. 572; 1931 M.W.N. 261; *Jagdish Chandra De v. Harihar De* 1924 Cal. 1042; 78 I.C. 219; 40 C.L.J. 89.

9. *Dwijesh Chandra Roy v. Naresh Chandra Gupta*, 1945 Cal. 492; 49 C.W.N. 791; *Abdul Khahque v. Sushil Chandra*, 39 C.W.N. 530.

10. Civ. Pr. Code, O. XVIII.

11. S. 136, post, and see S. 162 post; *Cleave v. Jones*, (1852) 7 Ex. 421; *Phillips v. Cole*, (1839) 10 A. & E. 106.

12. *Barindra v. R.*, (1909) 37 C. 467.

13. *R. v. Baijoo*, (1876) 25 W.R. Cr. 43; *R. v. Oddy* (1851) 5 Cox C.C. 210, 213; "convictions must be

based on substantial and sufficient evidence not merely "moral convictions"; *R. v. Sorab Roy*, 5 W.R. Cr. 28 (1866) as to judicial disbelief see dictum in *Re. Nobo-*

... (1880) 7 C.L.R. 387, 391. *Cameron Chamarette v. Mrs. Phyllis E. Chamarette*, 1937 Lah. 176; 17 I.C. 619.

Ram Keshan v. Ramsahag, 1939 Pat. 530; 182 I.C. 407.

Kissen v. Ram, (1869) 12 W.R. 13; *Shastul v. Junmejov*, 12

W.R. 241; *Chooni v. Nilmadhub* 1925 Cal. 1034; 41 C.L.J. 374; 80 I.C. 874; *Radha v. Kedar*, (1924) 46 A. 815; 80 I.C. 874; 1924 All. 845; *Bundeswari Singh v. Ramraj Singh*, 1939 All. 61; 179 I.C. 974; 1939 A.L.J. 128; *Gopal Dass v. Sri Thakurji*, 1943 P.C. 88; 207 I.C. 553; (1949) 2 M.L.J.

... *Saturatnam Anyar v. Goundan*, 1920 P.C. A. 76; 43 Mad. 567; 56

I.C. 117; *Ghulam v. Kalimullah*, 1928 Lah. 428; 109 I.C. 728;

Ramanuj v. Dakshinewar, 1926 Cal. 752; 93 I.C. 101; 30 C.W.N. 259; *Padam Prasad v. Emperor*,

1929 Cal. 617; 119 I.C. 193; 33 C.W.N. 1121 (L.D.). *Wignore*,

Ev. s. 10.

where a valid objection is taken to the admissibility of evidence it is his responsibility on the part of the Bench to allow the objection to be withdrawn. Some instances occur where a member of the Bench, insisting in the course of the case upon his question being taken down, or his objection not being allowed, the court thinks the question inadmissible or the objection untenable. There ought to be a spirit of give and take between the Bench and the Bar in such matters, and every little insistence on the part of a pleader should not be turned into the occasion of a criminal trial unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to mislead or to interrupt the Court.¹⁹

11. Waiver: Onus. An objection may be waived, but waiver cannot operate to confer on evidence the character of relevancy.²⁰ If the objection is *prima facie* sustainable, then the opponent must show the Court that the evidence satisfies the test.²¹ If, however, the evidence appears to the Court to be *prima facie* admissible it is for the objector to make out the grounds of his objection. The objection should be specific. It should declare that the evidence violates a named principle or rule of evidence. The cardinal principle is that a general objection, if overruled, cannot avail. The only modification of this broad rule being that, if on the face of the evidence, in its relation to the rest of the case, there appears no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to have been sufficient. The opposing counsel can take no reply to a general objection except to throw the whole responsibility upon the Bench at once, or else begin systematically and argue that under any possible objection the testimony should come in. Many trials under such conditions would practically never end. The admissibility of documents can be questioned though admitted without objection, when the question is not of their value as proof but of the evidentiary value of their contents.

12. Appeal, objection in. When dealing in appeal with the admissibility of evidence admitted by the lower Court, a distinction has been drawn between the cases—

(a) those in which evidence wholly irrelevant has been erroneously admitted by the Lower Court; and

(b) those cases in which a relevant fact has been erroneously allowed to be proved by a method different from that which the law requires—e.g., where secondary evidence of the contents of a document has been admitted without the absence of the original having been proved, or

17. *Per Cur.* in *In re Dattatraya*, (1904) 6 Bom. L. R. 541.

18. *Barbat v. Allen*, (1852) 7 Exch. 609.

19. *Per Cur.* in *In re Dattatraya*, (1904) 6 Bom. L. R. 541.

20. *v. post*; *Bommidala Poornaish v. Union of India*, (1967) 2 Andh. L. T. 141; A. I. R. 1967 Andh. Pra. 338, 348 (document mere certificate of genuineness).

21. See Wigmore, *Ev.*, §. 18.

22. See Wigmore, *Ev.*, s. 18 and see per Lord Brougham in *Bain v.*

Wetherden, 1800 P. 6 H. 1 C. 1, 16.

23. *Shashi v. Sarat*, 1927 Cal. 327; 45 C. L. J. 557; 100 I. C. 713; 31 C. W. N. 310.

24. *Ambar v. Lufte*, 45 C. 159; 21 C. W. N. 996; 41 I. C. 116; 25 C. L. J. 619; A. I. R. 1918 C. 971 and note to S. 167, post.

As to proof of absence of original contract admitted without objection, see Article in 14 Mad. L. J. 189.

person who has been proved to be a party to the transaction, and is admitted as a surety only.¹¹ Unless a party can be shown to have been stopped from objecting to the admissibility of the evidence, or to have been misled that evidence not otherwise admissible, or which would have been inadmissible in the first instance, were taken to it, may be perfectly good evidence if admitted by the consent of parties.¹² Where a piece of evidence, not put in by the proper party, has been admitted without objection, it is not open to the opposite party to challenge the admission at a later stage of the litigation. But where evidence has been received without objection, in violation of a provision of an imperative provision of the law, the principle of which has not been acquiesced in, acquiescence, evasion, or estoppel, cannot be set up. It is available only where a positive legislative enactment does not exist. In the A. S. Section, 10, it is enacted that the judgment must be based on the evidence proved that is proved in accordance with the provisions of the Act to prove contained in the Act. Where no proof has been offered, as where a document has been admitted in the lower Court without being proved, the Court of Appeal may reject the document notwithstanding that it has been admitted by the other party.¹³ Where proof has been given of a document, and a party has taken an improper and apparent exception exists in evidence, but a party has taken it to estoppel, as where no objection is taken to the admission of a document, its being given. In this case, want of objection may be used by the party tendering the evidence and prevent him from proving that the evidence is not admissible, or from showing that the secondary evidence offered is not admissible. So, it has been held that if no objection is taken in the Court of first instance to the reception of a document in evidence (e.g., as being the copy of a document), it is not within the province of the Appellate Court to raise or recognise it in appeal.¹⁴ Where, the Court of first instance

272; *Ramaya v. Devappa*, (1906) 30 B. 109. In *Pudmayati v. Doolar*, (1847) 4 M. I. A. 259 at pp. 285, 286, the Privy Council observed that the evidence "was, however received below and, therefore, we do not apprehend that we can treat it, as not being evidence in the cause." These observations appear, however, to have referred to the weight and not to the admissibility of the evidence. See also *Ningawa Bharmappa*, (1897) 23 B. 63 at 62.

11. *Harek v. Bishun*, (1903) 8 C. W. N. 101, 102.

12. *Ayyavar Thevar v. Secretary of State*, A. I. R. 1942 Mad. 528: 202 I. C. 274.

13. *Shib Chandra v. Gour*, 1922 Cal. 160; 68 I. C. 86; 35 C. L. J. 473; 27 C. W. N. 134. See also *Luchiram v. Radha*, 1922 Cal. 267; (1922) 49 C. 93; 66 I. C. 15; 31 C. L. J. 107.

14. *Kanto v. Jagat*, (1895) 23 C. 335, 338: in this case the contention that a map was admissible in evidence was held to be open to the appellant on special appeal although he had not appealed against an order of remand made by the

lower Appellate Court rejecting the map as not being admissible: but see *Gurindra v. Rajendra*, (1897) 1 C. W. N. 530.

15. See *Robinson v. Davies*, (1879) 5 Q. B. D. 26, where secondary evidence of the contents of written documents was received under a commission to take evidence abroad without objection.

16. *Kissen v. Ram Chunder*, (1869) 12 W. R. 13.

Chinnaji v. Dinkar, (1886) 11 B. 320, followed in *Lakshman v. Anant*, (1900) 24 B. 591 in this case the copy from which the copy was taken had been filed in a suit between the predecessors in title of the parties; *Akbar v. Bhvea*, (1880) 6 C. 606 at pp. 669, 670; *Kissen v. Ram Chunder*, (1869) 12 W. R. 13, in which the case was remanded with liberty to supply the necessary proof; see *Ningawa v. Bharmappa*, (1897) 23 B. 63, 65; see notes to S. 165, post. No objection should be allowed to be taken in the Appellate Court as to the admissibility of a copy of a document which was admitted in evidence in the Court below without any objec-

admitted in evidence the deposition of certain witnesses in a previous litigation and no objection was taken, but in appeal it was objected that the witnesses who were admitted have been called and examined, and the Court excluded the evidence. It was held in second appeal that as a consequence of the want of objection, the facts being that the deponent had admitted his application to have his witnesses admitted the lower Court ought either to have admitted the evidence, or if required to exclude the evidence to bring the deponent before it for examination. It was held to give him an opportunity of showing that in the lower Court it resulted in excluding the evidence at all and where the deponent had admitted the remaining evidence on the record. The appeal was dismissed. But the Appellate Court has a perfect right to exclude such weight to the deponent's words as it thinks proper, or to say what it thinks to be correct where it is against particular parties to the suit. Where a deponent's statement is without proof but without objection in the trial Court, no objection to its admissibility on the ground of want of proof can be taken in second appeal. Where no objection is taken in the first Court to the admissibility of the deponent's words, its not inter partes, objection cannot be taken in second appeal, if it has not been proved, that the conditions exist which prevent admission of such an appealable act. Where both sides admitted the evidence in the trial Court, no objection in the trial Court and no objection was taken in second appeal, cannot be raised in second appeal.²²

In the meantime, the learned Judge observed that the examination of a material witness of the plaintiff in the absence of the defendant, his vakil having been removed and no other vakil appearing for him was such an irregularity that, if corrected to at the proper time, would have been fatal to the reception of such evidence; but that, no objection having been urged during the time or until an appeal was interposed, the objection came too late, and could not be sustained; notwithstanding such irregularity, that fact did not turn the whole proceedings so as to prevent the plaintiff recovering upon the other evidence which was sufficient to establish his case.

14. **Evidence on commission.** Objections to the admissibility of documents attached to the report of a commission, if not previously made, cannot be taken at the hearing of the suit.¹ If, when evidence is taken before Commissioners, a document is tested and objected to on any ground, the opposite party is precluded from objecting to its admission at the trial on any other ground.

tion: *Kishore v. Rakhal*, (1903) 31

v. Amanutulla. (1898) 26 C. 53:

44 C. 1059 (P.C.); *Theet v. Maung*,

94 C. 1059 (P.C.); Inet v. Maung,
91 B.E. 111; Inet v. Maung,
v. Aungmye Thazan M.

18

19. Akbar v. Bhyea, (1880) 6 C. 666
at pp. 669, 670.

20 Chamber v. Ka... 4 F. I. W.
21 41 I. C. ... A. I. R. ...

Pat. 537: see Narhari v. Anandabhai
1920 B. 244.

869

J. 761: (1924) 46 A. 815: 80 I. C

1. The first part of the document is a letter from the author to the editor, dated 1962. It discusses the author's interest in the history of the book and the author's intention to publish it. The letter is signed by the author, who is a member of the American Historical Association.

23. Bommarauze v. Rangasamy, (1855)
6 M. I. A. 232.

Struthers v. Wheeler, (1880) 6 C

15. Fresh objections. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection to the document when the document tenders it in evidence.²⁵

16. Consent. The Appellate Court has no jurisdiction to reject a copy of a document exhibited in the lower Court with the consent of both parties, at any rate without giving the parties an opportunity of producing the original.¹ It is, however, correct that the parties cannot by consent admit irrelevant evidence as relevant.²

17. Waiver in criminal case. It has been held that the ground of waiver cannot be allowed to prevail in criminal cases³ and that a prisoner on his trial can consent to nothing.⁴ As to objections to the reception of evidence by the Court itself, see the last but one paragraph, and as to the procedure when a question is objected to and allowed by the Court, see the Civil Procedure Code.⁵

A Court is bound to decide upon the evidence without reference to any previous arrangement between the parties as to the mode in which the evidence is to be dealt with.⁶ Upon the question of placing a favourable construction on doubtful evidence, so as to entitle the Court to treat it as substantive evidence in the case and not exclude it as inadmissible⁷ and as to the case where both parties have put in different portions of inadmissible proceedings and rested arguments thereon,⁸ see the cases cited below.

18. Miscellaneous. (a) *General.* Evidence illegally obtained is admissible. It has long been held, that the admissibility of evidence is not affected by the illegality of the means by which the evidence has been obtained, though a person taking recourse to illegality may be accountable under the law.⁹ If evidence is relevant, the court is not concerned by the method by

25. *Radh v. Gada*, 1881 9 C. 990.

1. *Ramalammal v. Athikari*, 35 M. L. J. 11 (1881) C. C. 1200 M. L. J. 185 (2).

2. *Nathubhai v. Chhotubhai*, A. I. R. 1962 Guj. 68.

3. *R. v. Amrita*, (1873) 10 B. H. C. R. 477 (1873). On the question how far the rule of evidence may be relaxed by consent, Mr. Best remarks: "In criminal cases, at least in treason and felony, it is the duty of the Judge to see that the accused is not charged according to law and the rules of evidence forming part of that law; no admissions from him or his counsel will be received", see also s. 58, post.

4. *R. v. Bismarck*, 1869 12 W. R. 615. *See also* *Attorney-General v. New South Wales v. Bertrand*, (1867) 36 L. J. P. C. 51; S. C. L. R. 1. P. C. 100 (2); see also *R. v. Navvori*, (1872) 9 Bom. H. C. R. 468; *R. v. Bhola Nath*, 1876 2 C. 23; *R. v. Allen*, (1880) 6 C. 83; *Hossein v. R.*, 6 C. 96, 99, as

to the violation of *Travelyan J.* in *Girish v. R.*, (1893) 20 C. 857; *Best* P. 3, 67 as to admission of fact by legal practitioners, see ss. 17, 18, 58, post.

5. Civ. Pr. Code, O. XVIII, R. 11. Cf. also ss. 275 (3), 276 (3), 278 Cr. Pr. Code, 1973 Act 2 of 1974.

6. *Gordon v. Bykinto*, (1880) 6 W. R. 82.

7. *Dwarka v. Sant*, (1895) 18 A. 92. *Bir v. Bhansi*, (1869) 3 B. L. R. V. C. 201, followed in *Bhadeswar* 1873 10 Pat. N. S. 81 C. 26. See also footnotes 14 and 15 above.

9. *Elias v. Passmore*, (1934) 2 K. B. 164. (See *Wigmore*, s. 2185); *R. M. Mahajan v. State of Maharashtra*, 1972 2 S. C. W. R. 16 (1973) Cr. L. J. 228; 1973 Mah. L. J. 92; 1973 Cri. App. B. 108 S. C. 1973 M. P. 1 J. 224; (1973) 1 S. C. C. 471; 1973 S. C. C. (Cr.) 199 (1973) 2 S. C. R. 417; 1974 Mad. L. W. (Cri) 121; A. I. R. 1973 S. C. 157.

which it was obtained, or with the question whether that method was tortious but excluded. There is no difference in principle for this purpose between a document and a photograph. No doubt, in a criminal case, the judge always has the discretion to exclude the evidence, if the strict rules of the Act would otherwise require it, as against an accused, e.g. where a document is obtained by a trick.¹⁰ The Court may rule it out. But, if it is sought to be introduced with warrant may, nevertheless, be used as evidence.¹¹

Rule 13 of the Act prohibits the employment of any kind of evidence not specifically authorised by it. Therefore, the principle of exclusion adopted by the Act should be applied so as to exclude matters not admissible by the Statute.¹² In *Sri Chandra v. Kakkulananda*,¹³ Lord Atkin observed:

"What matters should be given in evidence as essential for the ascertainment of truth is the purpose of the law of evidence... to define. Once a statute is passed which purports to contain the whole law, it is imperative. It is not open to any judge to exercise a dispensing power, and admit evidence not admissible by the statute, because to him it appears that the introduction of evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing... to confine evidence to particular forms and to exclude others which it is conceivable might assist in the ascertainment of truth. But that which has been eliminated has been considered to be of such doubtful value, as, on the whole, to be more likely to mislead than to help to discover it. It is therefore, discarded for all purposes and in all circumstances. To allow a judge to introduce it at his own discretion would be to destroy the whole object of the general rule."

The Act prohibits the employment of any kind of evidence not specifically authorised by it. Therefore, there must be a specific provision in the Act before facts can be proved as relevant, and facts must also be proved as laid down in the Act. It is only those facts which are declared to be relevant and duly proved which can be the basis of a judgment.¹⁴

If the fact in issue is to be a forged document in the absence of any suggestion by the defendant to that effect, particularly when it is registered and over a century old, it is a right in favour of plaintiff.¹⁵ Suggestions, if denied, cannot take the place of evidence.¹⁶

10. *Kuruma v. Rex*, (1955) 1 All E. R. 236 (P.C.).

11. *Mamsa v. Emperor*, A. I. R. 1937 Rang. 206; 170 I. C. 870; *Bonobhai v. Emperor*, A. I. R. 1939 Cal. 85; I. L. R. 1939-1 C. 210; 186 I. C. 471; *Ramarao Ekoba v. R.*, I. L. R. 1951 Nag. 349; A. I. R. 1951 Nag. 237; *State v. Raoji*, A. I. R. 1956 Bom. 528; *Lal Bahadur v. State*, I. L. R. 1957 A. I. R. 1956 S. C. 411; 1956 Cr. L. J. 801.

12. *Khedra v. Turia*, A. I. R. 1962 Pat. 420; 1962 B. L. J. R. 323.

13. L. R. 68 I. A. 34; A. I. R. 1941 P. C. 16.

14. *Hasan Abdulla v. State of Gujarat*, A. I. R. 1962 Guj. 214.

15. *Fattle v. Bashi Lal*, 1973 M. P. L. J. 617; 1973 M. P. W. R. 605; A. I. R. 1974 M. P. 16 at 20, 21; 1973 Jab. L. J. 754.

16. *Sri Ram Pandey v. State of Bihar*, 1966 Cr. L. J. 800 at 803, I. L. R. (1975) 54 Pat. 5.

(b) *Trap Witness*. A trap witness is not an accomplice but a partisan witness. The law settled by a series of decisions of the Supreme Court is that as regards the evidence of a partisan witness, the conviction of an accused person can be sustained on that evidence if the court is satisfied that the evidence is reliable, but the court may in appropriate cases look for corroboration.¹⁷

(c) *Relevancy of facts forming part of the transaction*. Facts which though not in issue are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating or so shortly before or after it as to form part of the transaction is a relevant fact.

(b) A is accused of murder committed by Government of India by taking part in a riotous assemblage in which property is destroyed, troops are attacked, and persons are wounded. The occurrence of these facts is relevant, as forming part of the same transaction, though A may not have been present at all of them.

(c) A accuses B of having committed a crime forming part of a correspondence. Letters forming the correspondence relating to the subject out of which the crime arose, and forming part of the correspondence in which it is contained, are relevant facts, though they may not contain the crime itself.

(d) The letters and telegrams received from B were delivered to A. The persons to whom they were delivered, one person successively. Each delivery is a relevant fact.

S. 3 ("Fact").
S. 3 ("Fact in issue").

S. 3 ("Relevancy").

17. *Bhanuprasad v. State of Gujarat*, 1968 S. C. D. 1026; 9 Guj. L. R. 853; 1968 Cr. L. J. 1505; A. I. R. 1968 S. C. 1323, 1327; *The State of Bihar v. Basaran Singh*, 1959 S. C. R. 195, 1958 S. C. J. 856; 1958 A. L. J. 608; 1958 A. W. R. (H.C.) 609; (1958) 2 Andh. W. R. (S.C.) 136; 1958 B. L. J. R. 618; (1958) 2 M. L. J. (S.C.) 136; 1958 M. L. J. (Cri.) 641; 1958 Cr. L. J. 976; A. I. R. 1958 S. C. 500 (a decision of a Bench of five Judges) overruling the decision in *Rao Shri Bahadur Singh v. State of Vindhya Pradesh*, 1954 S. C. R. 1098; A. I. R. 1954 S. C. 322; *Manka Hari v. State of Gujarat*, I. L. R. 1967 Guj. 457; 8 Guj. L. R. 588; 1968 Cr. L. J. 746; A. I.

R. 1968 Guj. 88; See also *Ganpat Singh v. State*, I. L. R. (1966) 16 Raj. 456; 1966 Raj. L. W. 163; 1967 Cr. L. J. 121; A. I. R. 1967 Raj. 10. The decision to the contrary in *Gavadesh Khandeparkar v. State*, 1968 Cr. L. J. 925; A. I. R. 1968 Goa 63, 64 (*Bhanuprasad's case*, supra; was not before the court and must be deemed to be overruled). The observations to the contrary in *F. G. Barsay v. State of Bombay*, A. I. R. 1961 S. C. 1762, which was bound by the decision in *Basaran Singh's case*, supra, must be confined to the facts of that case (*Bhanu Prasad v. State of Gujarat*, supra).

18. Subs. by the A. O. 1950 for "Queen".

Steph. Dig. Art. 8; Roscoe, Cr. Ev., 86, 13th Ed., 78; 80, 14th, Introd., Ch. III; Phipson Ev., 11th Ed., 70; Norton Ev., 111; Cunningham, Ev., 87; Whitley Stokes, 854; Taylor Ev., Sections, 320, 326, 328; Wharton Ev., Section 258; Thayer's Cases on Evidence, 629; Rice on Evidence, 369, 392.

SYNOPSIS

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1. Principle. The rule is derived from the general consideration that no disputed event or transaction ever occurs wholly apart from other events or transactions. It must, however, be detached from all other events or transactions.¹⁹ If facts form part of the transaction which is the subject of enquiry, manifestly evidence of them ought not to be excluded. Moreover, facts forming part of the *res gestae*, if most of them are to be excluded without rendering the evidence unintelligible.²⁰ For every part of a transaction is connected with every other part as cause or effect. The proper decision will always be whether they do form part of the transaction to be considered really part of the transaction before the Court.²²

2. Scope. This section states the law which is already laid down in England in various authorities, that acts, declarations and movements which constitute or accompany and explain the fact or transaction in issue are admissible for or against either party as forming part of the *res gestae*. It renders relevant facts which form part of the same transaction as the fact in issue. Even hearsay statements are admissible, and this is so, if they form part of the transaction and not merely uttered in the course of the transaction.²⁴ This section permits proof of collateral statements or admissions which are so connected with the facts in issue as to form part of the same transaction.²⁵ They are admissible, though hearsay, because, in each case, it is the act that creates the hearsay, not the hearsay itself.²⁶ As Lord Stirling says:

"The theory of the Hearsay rule is that when a fact is asserted, it is offered as evidence of the truth of the fact asserted, and the truth of the assertion becomes the basis of the inference and creates the objection."

19. Phipson Ev., 11th Ed., p. 71.

20. See Norton, Ev., 101.

21. Roscoe, Cr. Ev., 13th Ed., 78.

22. Norton, Ev., 101. In *Fazluruddin v. R.*, 90 I. C. 433; 1926 Cal. 105; 42 C. L. J. 111, it was held that the fact was not part of the same transaction.

23. *Jalpa Prasad v. Emperor*, 50 I. C. 487; 17 A. L. J. 760; Phipson, Ev. 11th Ed., p. 71.

24. *Hadu v. State*, 1951 Orissa 53; 1 I. R. (1950) Cal. 509.

25. *Chhotka v. State*, A. I. R. 1958 Cal. 482; 1958 Cr. L. J. 1170.

can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra-judicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received according as it has any relevancy in the case, but if it is not received, this is in no way due to the Hearsay rule."¹

There is no distinction with regard to the admissibility of the declarations between civil and criminal proceedings. In both they may be used for or against a party² whether he be called as a witness or not,³ or even though he would be incompetent, if so called.⁴

Where the accused inflicts injuries on the person of the deceased resulting in fracture of his ribs and the deceased when questioned, soon after, states that it was the accused, who inflicted the injuries, the statement is admissible under this section, as it was made by the deceased very shortly after he sustained the injuries.⁵ So where a deed of adoption forms part of the transaction of adoption and a statement was made by the deceased adoptive mother about relationship by adoption, the statement is relevant under this section.⁶ But evidence pure hearsay does not become admissible under this section. Thus, where the accused is charged under Section 294, Penal Code, for using obscene words towards a school girl and teasing her on road, and the prosecution relies on the sole testimony of a witness who had reached the spot after the incident and was told about the words used by the girl, the evidence being pure hearsay is inadmissible.⁷ However, evidence as to other offences is relevant and admissible if there is a nexus between the offence charged with the other offence, or the two acts form part of the same transaction, so as to fall within this section.⁸ In the abovementioned case, the accused was charged under Section 302, Penal Code with murder. In the morning of the day of the incident, a threat was uttered to have been given by the accused that he would finish off the deceased and also finish himself off. The defence of the accused was one of *alibi*. His case was that he sustained serious injuries on that day as a result of an attack on him by another named person and that the injuries sustained by him were not inflicted. It was held, that the evidence as to the manner in which according to the prosecution, the injuries came to be sustained by the accused, was so closely connected with the offence charged against him as to form part of the evidence upon which the offence charged was sought to be proved, the Sessions Judge could refer to that evidence to the jury on the ground that it was a part of the same transaction.

A fact besides being relevant under this section, by virtue merely of its being so connected with a fact in issue as to form part of the same transaction

1. Wigmore, s. 176, 3rd Ed.
2. *State v. Williams*, 1879, 10 Mo. & Mal. 303; *Milne v. Leisler*, (1862) 7 H. & N. 759; *R. v. Huggins* (1820) Ald. 566.
3. *People v. Thompson*, 1861, 5 App. Cas. 510.
4. *People v. Bell*, 1879, 11 T. R. 512; *Avonford Pearce*, case No. 1, Cas. 1; *Phipson, Ev.*, 11th Ed., p. 84.
5. *Krishna Ram v. The State*, A. I.

R. 1964 Assam 55; (1964) 1 Cr. L. J. 27.
6. *Punjabrao v. Sheshrao*, 1 L. R. 1960 B. 857, A. I. R. 1962 B. 173; 63 Bom. L. R. 726.
7. *Kishore Singh v. State*, A. I. R. 1965 J. & K. 37.
8. *Waseemullah v. State*, 1 L. R. 1961 B. 183, A. I. R. 1961 B. 114, 62 Bom. L. R. 857.

may also be relevant on the grounds mentioned in one or other of the succeeding sections. So, where several offences are connected together and form part of one entire transaction, then the one is evidence to show the character of the other⁹. Statements relevant under this section may also be used to impeach the credit of a witness under Section 155, or to corroborate his testimony under Section 157,¹⁰ or as evidence of intention¹¹. The section shows only one of the ways in which a fact can be relevant, and it cannot be said that because a fact or statement is not relevant under this section, it is not relevant at all. A statement may not be relevant under this section but may yet be admissible, e.g., under Section 32,¹² or Section 15.¹³

The section requires that the statement sought to be admitted must have been made contemporaneously with the act or transaction to which it and not at such an interval of time as to allow of fabrication or to reduce the statement to a mere narrative of past events.¹⁴

3. Res gestae. Few phrases in the law of evidence are more persistent than the Latin phrase *res gestae*. The earlier term was *res gesta*. Its original meaning seems to have been quite untechnical in pointing 'a fact', 'a transaction', 'an event'. The plural sometimes indicated not so much the plural of the English equivalent facts, transactions, as the details or particulars of which a single fact or transaction might be composed.¹⁵

(a) *History of doctrine.* The use of the plural form first met with in the present relation in *Ayreson v. Kitchard*,¹⁶ led to confusion and gave rise to at least four conflicting conceptions, e.g.—(i) one which applies the term *res gestae* to the main fact in relation to its constituent details, (ii) one which applies it to the details of such fact merely, (iii) one which applies it to the "surrounding circumstances" of some central fact (called a "contradistinction, the 'principal fact' and (iv) one which applies it to the total whole composed of both "principal fact" and "surrounding circumstances". Not infrequently, indeed two or more of these meanings are combined in the same definition.¹⁷ That is how an ambiguous phrase is apparent from the numerous attempts to define it, a few of which are given below as they are given in Chamberlayne's **Trial Evidence**.¹⁸

The circumstances surrounding the principal fact. Statements accompanying the act are to be proved, which explain it and are necessary to its proper understanding.¹⁹ Words and declarations accompanying an

9. *R. v. Parbhudass*, (1874) 11 B. H. C. R. 90, 94; S. 14.

10. *Nga San Pu v. Empetor*, 19 Cr. L.J. 155; 43 L.C. 445; A.I.R., 1918 L.B. 81.

11. *Muthu Krishna v. Ramchandra*, 47 I.C. 611; 37 M.L.J. 489; A.I.R., 1919 M. 659 (statement by testator).

12. *Ram Bharose v. Rameswar Prasad Singh* 1938 Oudh 26; I.L.R. 13 Luck. 697; 171 L.C. 481; 1937 O. W.N. 1058.

13. *Kameswar Prasad Singh v. Rex* 1951 A.L.J. 149.

14. *Pratap Singh v. State of M. P.*, 1170; A.I.R., 1958 Cal. 482, 487; *Pratap Singh v. State of M. P.*, 1970 Jhb. L.J. 797.

15. Thayer's *Cases on Evidence*, 629, same in XV *American Law Review*, 5.

16. (1805) 6 East, 188.

17. *Phipson on Ev.*, 11th Ed., 70.

18. 2nd Ed., p. 752.

19. *Greenleaf, Ev.*, 15th Ed., s. 108.

20. *Stephen's Dig. Ev.*, Art. s. 108, (Am. Ed.) Stephen had little or no use for the phrase, however, preferring the word "transaction."

act, the nature of act, motives of which are the subject of inquiry,²¹ declarations which are part of same fact itself are admissible.²²

A more complete definition is that of the Earl of Halsbury: "Facts which form part of the *res gestæ*, and are consequently provable as fact relevant to the issue in the case, declarations and incidents which themselves constitute, or accompany, and explain the facts or transaction in issue."²³

All this must be so that the *res gestæ* shall be so connected with the main fact in issue as to form one transaction and that, in contemplation of law, the *res gestæ* shall be itself, and the test of admissibility is that "the declaration or fact in issue must make up one transaction."²⁴

Res gestæ in England and America. In England the phrase has been used in a limited meaning to the effect that facts which constitute the *res gestæ* must be such as are so connected with the main transaction or fact under investigation as to constitute a part of it, and it has been declared that the expression "so connected with the transaction" indicates that the words must accept the meaning of such a way as to be identified with it.²⁵ The American view is somewhat broader and covers all relevant facts necessary to the specific proof of the principal fact.¹

The English view is succinctly summed up in Dr. Kenny's *Outlines of Criminal Law* (11th Edition, page 463 (Section 570)) as follows:

It is unfortunate that owing to the lack of a clear formulation of the meaning of *res gestæ*, and of the principles which govern its exclusion, there has arisen a confusion of that topic with what is fundamentally a different one, namely, the law relating to that which has for a long time been called *res gestæ*, two Latin words which are mostly used without any attempt to explain precisely what their meaning is. The Latin words may be translated simply as the "the events which happened," and for legal purposes this term of art is restricted to events which happened in the affair which is now being considered by the Court. It is obvious that, in any inquiry into the existence of any actual situation which has been selected for trial by a Court of law in a trial (i.e., a fact 'in issue'), there are an infinite number of other events or facts which existed, contemporaneously with the fact in issue which has to be proved. Of these other events we would be bound to help to establish the existence or non-existence of the fact in issue, and the rules as to relevance adequately restrict the evidence to these few. *Res gestæ* therefore comprises only those other events which are either in issue, or which though not themselves in issue, yet accompany some fact which is in issue so as to constitute a part of evidence which goes to explain or establish that fact."

21. Phillips, *Ev.*, 10th Ed., s. 152.

22. Thayer's *Prelim. Tr. Ev.*, p. 531.

23. Halsbury's *Laws of England*, Vol. 15, 522 (1934).

24. Chamberlayne: *Trial Evidence*, 2nd

Ed., s. 804, p. 753.

25. Chamberlayne: *Tr. Ev.*, 2nd Ed., s. 808, p. 755; Citing *Rex v. Beddingfield*, (1879) 14 Cox, 341.

1. *Ibid.*

From this point of view, the question of admissibility is really quite a simple one, namely whether the evidence offered is circumstantial or direct. Lord Normend in *Lee v. R.*² enunciated this principle when he said (omitting the words which make the passage inclusive) at page 587 :

Words sought to be proved should be an item of part of real evidence and not merely a reported statement."

It may be well at this point to warn that if spoken words are themselves a fact in issue, then they are admissible whatever their character; for example, in an action for libel, the words spoken, of course, constitute the libellatory words which the law of the defendant must establish though they be a statement at third hand. For instance, in *Wainwright v. Home Sec.*³ the question in issue was "What did that man say?" As a result, the court had to consider every sort of relevant evidence or fact associated with the fact in issue, unhappily, both in the books and in the judgments the expression of the law is somewhat defective except when there is a dispute as to the admissibility of the evidence purporting to state the words spoken by some other person than the present witness, then because of the failure to grasp clearly what are the basic principles of exclusion or admission, there has been ever since an erroneous proposition to the effect that if the words are part of the issue, they are admissible and therefore are an exception to the rule against hearsay, from what has been stated above it will be seen that such a proposition contains a *double non sequitur*.

The American view is set out in the following passage from Underhill's *Criminal Evidence*, 4th Edition, Volume I, page 664 and following (Section 266) :

Relevance is from the Latin meaning 'things done', and includes the circumstances, facts and declarations incidental to the main fact or transaction, necessary to illustrate its character, and also includes acts, words and declarations which are so closely connected therewith as to constitute part of the transaction. The expression *res gestae* is applied to a crime, means the complete criminal transaction from its beginning to its termination, and includes the cause until the end is reached. What in any case constitutes the *res gestae* of a crime depends wholly on the character of the crime and the circumstances of the case.

It is interesting to see under which it is said that acts and facts which are a part of the *res gestae* are admissible as a rule determining the relevancy and the materiality of evidence to or of the evidence. If the court determine that the act or fact is a part of the *res gestae* it will be accepted, because it is a part of the *res gestae*, as relevant. Relevance is always a judicial question to be determined according to the issue which is to be tried. If the facts or acts which are embraced in the commission of any crime are essential to be proved, it will be found, in most instances, that they are connected with others which are not essential to be proved, and which tend more or less to prove those acts which are to be proved. Every occurrence which is the result of human agency is more

2. (1952) A.C. 480; (1952) 2 All E.R. 447.

or less implicated and involved with other occurrences. One event is the cause or the result of another, or two or more events or incidents may be collaterally connected or related. Circumstances constituting a criminal transaction which is being investigated by the jury, and which are so interwoven with other circumstances and with the principal facts which are at issue that they cannot be very well separated from the principal facts without depriving the jury of proof which is necessary for it to have in order to reach a direct conclusion on the evidence, may be regarded as *res gestae*.

These facts include declarations which grow out of the main fact, shed light upon it, and which are unpremeditated, spontaneous, and made at a time so near, either prior or subsequent to the main act, as to exclude the possibility of fabrication. A statement made as part of *res gestae* does not narrate a past event, but it is the event speaking through the person and therefore is not excluded as hearsay, and precludes the idea of design. This rule is applicable to all facts which are relevant, explanatory, or illustrative of, or which characterize the act. Whether utterances may be admissible as *res gestae*, though separated by time or distance from the principal transaction, depends on the circumstances of the particular case. Whether evidence is admissible as a part of the *res gestae* rests largely in judicial discretion."

Whatton's Criminal Evidence, 12th Edition, page 624 and following (Section 279) :

"When strictly defined, *res gestae* refers to those exclamations and statements made by either the participants, victims, or spectators to a crime immediately before, during, or immediately after the commission of the crime, when the circumstances are such that the statements were made as a spontaneous reaction or utterance inspired by the excitement of the occasion and there was no opportunity for the declarant to deliberate and to fabricate a false statement. Such *res gestae* statements may be testified to in court by the declarant or by persons who heard them. This is allowed as an exception to the hearsay evidence rule, on the theory that the circumstances under which the utterances were made stand as a guaranty of their truthfulness.

Many courts give *res gestae* a broader scope than above defined and allow the introduction in evidence of statements made under circumstances where no shock or excitement element was present. Under this view, declarations of intention made prior to the occurrence of an event or the commission of a crime have been held admissible as *res gestae*. Similarly, fears expressed by the victim prior to the commencement of the fatal encounter, and statements made by the defendant upon being arrested, have been admitted as *res gestae*, although the danger of self-serving declarations in such cases is obvious unless the questioning or the arrest follows the commission of the crime so quickly that there is no time for reflection or fabrication. Explanations made by the parties after the occurrence as the explanation of a robbery have also been held admissible under this broader definition of *res gestae*.

"In some States, *res gestae* is given an even broader definition to include not only spontaneous utterances, and declarations made before and after the commission of the crime, but also to include real or demonstrative evidence relevant to the crime, and to include testimony, offered at the trial, of witnesses and police officers as to what they heard or observed before, during, or after the commission of the crime; all that occurred at the time and place of the crime, or immediately before or after the crime, if casually related thereto, confessions and admissions of the defendant, and declarations and conduct of co-conspirators and accomplices. In these jurisdictions, it would seem that *res gestae* has become a term which means little more than a logical relevancy or relationship of the evidence to the crime."

"It view of these three concepts of the *res gestae* rule, namely (1) the spontaneous concept, (2) the relevant statement concept, and (3) the relevant evidence concept, it is difficult to define the exact scope of the *res gestae* rule."

(c) *Phrase criticised*. According to Prof. Wigmore, "The phrase '*res gestae*' has long been not only entirely useless, but even positively harmful. It is useless because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because, by its ambiguity, it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought, therefore, wholly to be repudiated, as a vicious element in our legal phraseology. No rule of Evidence can be created or applied by the mere muttering of a shabboleth." In Phillips' Treatise on Evidence, which was published in 1814, it was said:

"Hearsay is often admitted in evidence as part of the '*res gestae*.' But in the 4th Ed. (1816) he struck out the phrase and substituted for it the English word 'transaction.' The framers of the Indian Evidence Act have also scrupulously avoided the use of the phrase in this Act."

(d) *Its place in the law of Evidence*. In dealing with such a vague and uncertain concept the first problem to be tackled is to discover what exactly is meant by *res gestae* and what is its place in the law of evidence. Some judges have used the phrase as a convenient ground for the admission of evidence for which they could find no other basis of its admissibility. So recklessly has the phrase been used by the advocate in adversity that Lord Blackburn once sarcastically remarked: "If you wish to tender inadmissible evidence, say it is part of the '*res gestae*.' But it is submitted that if in the cases in which the term is improperly applied are marked off and *res gestae* is confined to its proper sphere, then a formula of greater or less precision will be found to exist."

(e) *Cases in which the term has been frequently cited*. (1) The phrase has been frequently referred to as the basis for the admission of **declarations as to physical and mental feelings**.³ Greenleaf⁴ and Taylor⁵ are of opinion that such declarations are original evidence and have no connection either

3. Wigmore, Ev., 3rd Ed., s. 1767.

4. Ev., Vol. 1, p. 292.

5. See s. 24, post.

6. Ev., Vol. 1, p. 137.

7. Ev., 10th Ed., para. 580 at p. 409.

with the hearsay rule or the *res gestae* doctrine. Professors and Phipson⁸ take the view that they are admissible as part of the *res gestae*. But, as pointed out by Wigmore,¹⁰ Morgan¹¹, Wills¹² and Powell¹³ these statements are offered to prove the truth of the matters contained in them and are therefore, admitted only by virtue of a special exception to the hearsay rule.

(2) Complaints in case of rape are sometimes regarded as being an application of the *res gestae* doctrine and are dealt with under that head,¹⁴ but the rule as to admissibility of these complaints is an exceptional rule outside both the *res gestae* doctrine and the rule against hearsay.¹⁵

(3) In agency cases, the doctrine of *res gestae* is sometimes invoked for the admissibility of agents' declarations against the principal. Wills¹⁶ for example, adopts this treatment. But when the substantive law of agency makes one person responsible for the declarations of the latter they are admissible against the former only where his own declarations would be admissible against him.¹⁷ The *res gestae* doctrine is not in point.

(4) Declarations of co-conspirators.¹⁸ By a rule of substantive law, the acts of all the conspirators, in furtherance of their common purposes, are regarded as parts of the facts in issue against each conspirator. In the same way, and subject to the same limit, their declarations are admissible against each other to the extent they would be admissible against the other conspirator.¹⁹ In such a case the use of the phrase *res gestae* is unnecessary and confusing.

(5) Completeness. Similar facts.²⁰ Professor Stone²¹ claims that the term is unobjectionable and eminently suitable when correlated with the principle of completeness.²² But the principle of completeness, the necessity of having a complete picture, may be an explanation of why *res gestae* declarations are received, but we are still left in the position of, *being to define the limits of 'the picture.'* Most of cases cited by Professor Stone are decisions on the admissibility of similar facts, a head of evidence, which though illustrative of the general principle of completeness in no way depends upon the *res gestae* doctrine for its reception.²³

(6) Facts in issue.²⁵ In this chapter on *res gestae*, Phipson declares²⁴ that fact admissible under this doctrine fall into two classes:—(1) constituent facts and (2) accompanying facts. An examination of the former reveals that what the learned author includes under constituent facts are simply facts in issue and facts relevant to them. There is, by one's not only no necessity for using a shadowy phrase like *res gestae* to cover the admission of this kind of evidence

8. Legal Essays, p. 292.

9. 11th Ed., 96.

10. ss. 1714-1715.

11. 31 Yale Law Journal, 229, 233.

12. at p. 210.

13. 10th Ed., p. 68.

14. Best on Ev., 9th Ed., p. 411; see also Phipson, 11th Ed., 84 (reference to the *res gestae* principle erroneous); Taylor, p. 369.

15. R. v. Osborne, (1905) 1 K. B. 551, 560; Thayer, Legal Essays, p. 223.

16. at p. 94.

17. Wigmore, s. 1769; Phipson, 11th Ed., 87.

18. See s. 10, post.

19. See Stodd. 55 L.Q.R., p. 79; Thayer, Legal Essays, pp. 268-9; Wigmore, s. 1769.

20. See s. 7, post.

21. See Stone, 55 L.Q.R., p. 80.

22. See also Wigmore, s. 2114.

23. e.g., R. v. Salisbury, (1831) 5 C. & P. 155; R. v. Rearden, (1864) 4 F. & F. 76; R. v. Ellis, (1826) 6 B. & C. 145; R. v. Cobler, (1862) 3 F. & F. 833.

24. Phipson on Evidence, 11th Ed., pp. 71, 74 and 75 includes similar facts cases under *res gestae*.

25. See S. 5, ante.

1. See pp. 50 and 65 of 9th Ed.

but also every reason "or not doing it" for example in connection with a contract the testimony of a witness as to statements he had heard witness attested the offer or acceptance or revocation is admissible under the issue. Similarly, with the words of an alleged slander or an insult, charge for defamation. Therefore, it only makes for uncertainty to talk about *res gestae* in such cases.

(7) Statements relevant to issue. Lastly, the *res gestae* phrase is occasionally used in connection with cases in which the statements are treated and admitted as being relevant to the existence or non-existence of a particular fact. For example, of an a case of "dispute over the competency" and a witness testifies that he had heard the deceased say "I was Napoleon". This statement is inadmissible to prove the competency of the condition and the *res gestae* doctrine is quite inapplicable.

(f) *Res gestae proper*. The fields of evidence in which the *res gestae* doctrine has place having been thus marked out, other domains or various situations are indicated in which the phrase is commonly used to justify exclusion of evidence. This is in connection with what Philipson calls "declarations of intent" (i.e., "utterances constituting a verbal part of the act, the *res gestae* doctrine") and which may be simply excluded, "because they are not part of the act". It is with respect to these declarations that the term *res gestae* is commonly used and the only application. Here too it must be noted that the exclusion of declarations which accompany a particular act is not the same as the exclusion of declarations which the statement is made in connection with the act. As Lord Hale said in *Regina v. Turner* (1709) 10 Mod. 1042, 27 Car. 2. 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(g) *Declarations of intent*. The *res gestae* doctrine. A declaration of intent is admissible only if they must conform to the following conditions:

(1) The words must explain "or justify" for example, the words "I am taking over or receiving money" can be construed as "I am taking over or receiving money for payment". The words which accompany the act will be admissible under the *res gestae* doctrine, if they tend to show which it was.²

(2) The statement must be made in connection with the act, i.e., made either during or immediately after the act, and not at such an interval from it as to render it a mere narrative of a past event.³

2. See Wigmore, s. 1770; Wills, p. 94, 8th Ed.

3. p. 65, 9th Ed.

4. Wigmore, s. 1772.

5. R. v. Bliss, (1837) 7 A. & E. 550; Pritam Singh v. State, 1972 All W. R. (H.C.) 521; 1972 All. Cr. R. 332; 1972 All. L. J. 744.

6. Wright v. Tatham, (1838) 7 A. & E. 364, 361. See also Hyde v. Palmer, (1863) 32 L. J. Q. B. 126.

7. See Hayslep v. Gymer, (1834) 1 A. & E. 162; Chhotka v. State, A I R, 1958 Cal. 482.

8. Philipson Ex. 11th Ed., 82; Thom. L. E. 43.

9. See Trevanion, (1693) Skin. 511; R. v. Christie, (1914) A C 545, 556, 566. See C N. Peters v. State, A I R, 1959 All. 483; 1959 Cr. L. J. 921-When the accused gives a spontaneous explanation right at the moment the crime is committed, the explanation becomes *res gestae*; Chhotka v. State, 1958 Cr. L. J. 1170; A I R, 1958 Cal. 482, 487; Pritam Singh v. State of M P., 1970 M P L J 978, 981; 1970 Jbh. L. J. 797 (statement not contemporaneous, and "belated").

3. It is sometimes said that the statements must have been made by the person who did the act to which the statements accompany⁹. But this limitation cannot be taken as variable, for the exclamations of mere bystanders may sometimes be relevant, valid and admissible¹⁰. In Stephen's Digest, Art. 9, it is said that statements accompanying an act are limited to those made "by or to the party doing the act," but this article should probably be read with Art. 3 in which *R. v. Jackson*¹¹ is cited in illustration. In cases of conspiracy, riot and the like, the declarations of all concerned in the common object, although not defendants, are admissible¹². But, it has already been seen that in such cases, the use of the phrase *res gestae* is unnecessary and confusing.

de Debetur, et de oportet. It is immaterial whether declarations accompanying and explaining an act are oral or written¹³.

4. **Facts forming part of the same transaction.** A "transaction" as the definition indicates is something which has been concluded between persons by a cross-cutting reciprocal action as it were. The word "transaction" in its largest sense means "that which is done."¹⁴ For the purpose of this section, it must be held that a transaction is group of facts so connected together as to be referred to by a single legal name, e.g., a contract, tort or crime. Whether any particular fact is or is not, part of the same transaction as the fact in issue is a question of law on which no principle has been stated by authority and on which Judges have given different decisions¹⁵. There are many incidents which do not strictly constitute a fact in issue, may yet be regarded as part of the transaction, in the sense that they closely accompany and explain the fact. These constituents or accompanying incidents are in law said to be part of the same transaction or part of the *res gestae* or main fact¹⁶.

The phrase 'same transaction' occurs also in Sections 235 and 240 of the Criminal Procedure Code and it has been held in numerous cases that whether a series of acts are connected together as to form the same transaction is purely a question of fact depending on proximity of time and place, continuity of action and unity of purpose and design.¹⁷

The area of facts covered by the term *res gestae* depends upon the circumstances of each particular case. There is obvious scope for considerable

9. *Howe v. Malkin*, (1878) 40 L.T. 196; 27 W.R. 340.

10. *R. v. Fowkes*, (1856), Times, March 8th (1856) cited in Stephen, Dig. Ev. Art. 3n; *Milne v. Liesler*, (1862) 7 H. & N. 786. See also *Bennison v. Cartwright*, (1864) 5 B. & S. 1; *Stanley v. White*, (1811) 14 East 382; *The Schwalbe Swab* 52, 1860 Moore P.C. 211, Wharton Ev., para 260.

11. The Times March 8. (1856)

12. *R. v. Gordon*, (1781) 21 How. St. Tr. 535; *R. v. Hunt Schwalbe*, (1820) 3 B. & Ald. 546, 5746; *R. v. O'Connell*, (1844) 1 Cox 403.

13. *Home v. Newman*, (1931) 2 Ch. 112; *Young v. Schuler*, (1883) 11 Q.B.D. 631 (C.A.); *Parrott v. Parrott*, 14 East 423; *Parrott v.*

Watts, 37 L.T. 577; *R. v. Podmore*, 22 Cr. App. R. 36.

14. *Gujja Lal v. Fatch Lal*, 6 Cal. 171, 185 (F.B.), per Jackson, J.

15. Steph. Dig. Art. 3; *R. v. Vya-poory*, (1881) 6 C. 655, 662.

16. Halsbury's Laws of England, 3rd. Ed., Vol. 15, para. 509, *B. Choukhani v. Western India Theatres, Ltd.*, A. I. R. 1957 Cal. 709; *Pritam Singh v. State*, 1972 All W. R. (H.C.) 521; 1972 All Cr. R. 332; 1972 All L. J. 744.

17. *Becharam v. Emperor*, 1944 Cal. 224; I.L.R. (1944) 1 Cal. 398; 213 I.C. 401; *Hirday Singh v. Emperor*, 1946 Pat. 40; I.L.R. 24 Pat. 501; 227 I.C. 404; I.L.R. (1973) 2 Delhi 479.

difference of opinion as to what facts together constitute the event or transaction in dispute and also as to what facts accompanying it are necessary to be proved in order that it should be brought before the Court in its due light. If the existential fact in question is, in the particular circumstances, either an integral part of the event or transaction itself, or so connected with it as to be of real value in determining its existence or its true nature, then such fact is admissible as part of the *res gestae*, otherwise not.¹⁸

The contemporaneous dialogue or conversation between the complainant and the accused forms part of the *res gestae*.¹⁹

5. Constituents of *res gestae*. The *res gestae* are those circumstances which are the automatic and undeliberated result of a particular litigated act and which are admissible when that act is in issue. These incidents may be separated from the act by a lapse of time great or less appreciable. A transaction may last for weeks. The incidents may consist of sayings and doings of any one absorbed in the event, whether participant or bystander; they may comprise things left undone as well as things done. They must be necessary incidents of the litigated act in the sense that they are part of the immediate preparation for or emanations of such act and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about the act. In other words, they must stand on an immediate causal reaction to the act, a reaction not broken by the interposition of voluntary individual will or skill to manufacture evidence for itself.

6. Test of admissibility. The test of the admissibility of evidence as part of the *res gestae* is—

(a) whether the act, declaration, or exclamation is so intimately interwoven or connected with the principal fact or event which it characterises, as to be regarded as a part of the transaction itself; and

(b) also whether it clearly negates any pretension or purpose to manufacture testimony.²⁰

Incidents that are thus immediately and undeliberately connected with an act, whether such incidents are doings or sayings, constitute in this way evidence of the character of the act.

7. Conditions for admissibility. Where the transaction consists of different acts, in order that the chain of facts may constitute one transaction, they must be connected together by—

(a) proximity of time,

(b) proximity or unity of place,

18. Phipson, 11th Ed., 71.

19. Yusualli Esmail v. State of Maharashtra, (1967) 3 S.C.R. 720; 1968 S.C.D. 347; (1968) 1 S.C.J. 511; (1967) 2 S.C.W.R. 934; 1968 A.W.R. (H.C.) 268; 70 Bom.

L.R. 76, 1968 M.L.J. (Cr.) 247; 1968 Mah. L.J. 179; 1968 Cr. L.J. 103; A.I.R. 1968 S.C. 147, at pp. 118, 149.
20. Corps Juris Secundum, Vol. XXXII, s. 403, p. 21.

(c) continuity of action, and

(d) community purpose or design.²¹

Where the relevant facts consist of declarations accompanying an act, they are subject to three important qualifications:

(1) They must not be made at such an interval as to allow of fabrication or to reduce them to the mere narrative of a past event;

(2) They must relate to, and can only be used to explain, the act they accompany. They are recent facts prior or subsequent thereto, evidence as to which the declarant would be relevant and admissible, if there is a nexus between the act and the facts with the other offences of the two acts forming part of the same transaction, so as to fall within this section.²²

(3) If they are admissible to explain, they are not always taken as proof of the truth of the matter stated, that is, as hearsay.²³

If a statement is to be admissible as substantive evidence of the truth of a matter, it must be a statement 'part of the transaction' and not merely a statement in the course of the transaction. Where the transaction is a single incident, a statement by a person who was perceiving the incident, made contemporaneously with the occurrence of the incident, may, with justification, be taken to be part of the transaction inasmuch as it is the result of a spontaneous perception of a fact. While no doubt the spontaneity of the statement is a guarantee of its truth, the reason for its admissibility under this section is that it is part of the transaction and not merely because it is spontaneous.²⁴

Declarations as to *res gestae* should be contemporaneous with the transaction, that is, the interval should not be such as to give time and opportunity for fabrication, and they should not amount to a mere narrative of a past event. They are admitted when they appear to have been made under the influence of some principal transaction relevant to the issue to be proved, with a view to characterize or explain it. A bare statement made by a third person after the complaint to the police is not admissible.²⁵ It is the power of perception, unmodified by recollection, that is appealed to; not of recollection modifying perception. When recollection comes in, whenever there is opportunity for fabrication and explanations, then statements cease to be part of the *res gestae*.

Unsworn declarations which are received as part of the *res gestae* do not affect the effect on the credit or credibility of the declarant, but

21. *Anurita Lal v. Emperor*, 29 I. C. 1076; 42 C. 957; 16 Cr. L. J. 497; *Ara Muhammad Khan v. The Crown*, 1950 Lah. 199 (F.B.); *Hadu v. The State*, 1951 Orissa 53; I. L. R. (1950) Cut. 509.

22. *Wasu Pollai v. State*, A. I. R. 1961 Bom. 114; 1961 Cr. L. J. 466.

23. Halsbury's Laws of England, 3rd Ed., Vol. 15, para. 509. see also

Phipson, Ev., 11th Ed., 81; *Llyod v. Edwards* (1854) 10 C. 735; *R. v. Christie*, 1914 A. C. 545, 553.

24. *Hadu v. The State*, 1951 Orissa 53; I. L. R. (1950) Cut. 509.

25. *Noor Mohanmad v. Imtiaz Ahmad*, 1942 Oudh 180; 197 I. C. 839; 43 Cr. L. J. 280; 1941 O. W. N. 1290.

derive their probative force from their close connection with the occurrence which they accompany and tend to explain, and are admissible as original evidence, although it is frequently stated that they are received under an exception to the hearsay rule. Declaration to be admissible must be made during the transaction. If made after its completion, they are too late² but it is no objection that they are self-serving. The minor married girl, who was abducted by the accused, after her recovery stated to her uncle that the accused had run away with her ornaments. This statement of the girl immediately after the occurrence was admissible as *res gestae* under Section 6 of the Evidence Act and provided the necessary corroboration so as to lend assurance about the trustworthiness of the witness's testimony on the question of exercise of dishonest inducement by the accused.⁴

The circumstances, facts and declarations which grew out of the main fact, are contemporaneous with and serve to illustrate its character, as part of the *res gestae*. Thus, the contemporaneous dialogue between the complainant and the accused in the case of an offence under Section 165 A, I. P. C., forms part of the *res gestae*.⁵ Whenever a fact is a link in a chain of facts necessary to establish another fact, it is, of course, admissible. In some cases an offence consists of a series of transactions; in such cases, evidence is admissible of any act which goes to make up the offence.⁶

Where the only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of the prisoner by the person injured to a third person immediately after the commission of the offence and the prisoner did not, when the statement was made, deny that she had done the act complained of, it was held that the evidence was admissible under this section and Section 8, illustration (g) of this Act.⁷ But where it did not appear how long an interval had elapsed between a murder and the statement of an alleged bystander, whose condition of mind did not seem to have been such as to exclude the supposition that this evidence was fabricated, it was held that his statement was inadmissible under this section.⁸ The doctrine of election (in Criminal trials) is closely connected with that about the admissibility of collateral facts which, though not in issue, may be relevant under this section if they form part of the same transaction. The cases cited below may be further consulted in connection with this section.⁹ Certain per-

1. Corpus Juris Secundum, Vol. XXII, s. 403, p. 21.

2. Chain Mahito v. R., (1907) 11 C. W. N. 266.

3. Wharton, Ev., ss. 258-262. See definition of *Statement* given in Georgia cited in Rice, Ev., 375.

4. Ram Das v. State, 1972 Cr. L. J. 57 at 58 (All.).

5. Yusufalli Ismail Nagree v. State of Maharashtra, (1967) 3 S. C. R. 720; 1968 S. C. D. 347; (1968) 1 S. C. L. J. 944; 1968 A. W. R. (H.C.) 268; 70 Bom. L. R. 76; 1968 Cr. L. J. 103; 1968 M. P. L. J. 114; 1968 M. L. J. (Cr.) 247; 1968 M. L. W. (Cr.) 12; 1968 Mah. L. J. 179; A. I. R. 1968 S. C. 147, 148.

6. Roxcoe Cr. Ev., 18th Ed., 77, 78; Norton; Ev., 102.

7. In re. Surat Dhobni, (1884) 10 C.

302.

8. Chain Mahito v. R., (1907) 11 C. W. N. 266.

9. R. v. Fakirapa, 15 B. 491, 496, 502; see also Ss. 220, 223 Cr. Pr. Code, 1908; Taylor, Ev., s. 329.

10. R. v. Birdseye, (1830) 4 C. & P. 386; R. v. Rearden, (1864) 4 Fost. & Fin. 76; R. v. Ellis, (1826) 6 B. & C. 145; R. v. Cobden, (1862) 3 Fost. & Fin. 833; R. v. Young, R. & R., C. C. R. 280, note; R. v. Westwood, 2 Dew. N. S. 361; R. v. Cobden, 4 C. & P. 547; R. v. Willis, (1845) 1 Den G. C. 80; R. v. Rooney, (1836) 7 C. & P. 517; R. v. Wilely, (1804) 2 Lca. 983; R. v. Long, (1833) 6 C. & P. 179; R. v. Firth, 1869 L. R. 1 C. C. R. 172; R. v. Salisbury, (1833) 5 C. & P. 155, 157; see cases cited in Steph. Dig. Art. 3; 2 East P. C. 934.

sons were convicted of robbery and murder, and on its appearing that the two offences constituted part of the same transaction, it was held that recent and unexplained possession of the stolen property, which would be presumptive evidence of their possession on the charge of robbery, was sufficient evidence against them on the charge of murder.¹¹

8. Statement of ravished woman. In certain cases, e.g., in cases of sexual offences against women, statements made to third parties are in certain circumstances admissible. But the careful limits placed upon the admissibility of such statements is evidence of the jealousy with which their admission is regarded. They must be complaints, made voluntarily and at the earliest convenient moment, and even then they are received not as evidence or corroboration of the facts complained of, but as evidence of the credibility of the complainant's testimony as to the facts alleged, and as evidence of her intention, to negative consent. They are admissible in any other class of case.¹² The particulars of the complaint made by the victim of a crime may so far as they relate to the charge against the accused be given in evidence, not as being evidence of the facts complained of but as evidence of consistency of the conduct of the prosecutrix with the story told by her in the witness-box and as negating consent on her part.¹³ They are admissible as evidence of conduct under Section 84 but the complaint made by the woman does not form part of the evidence and is not admissible under this section.¹⁴

9. First Information Report. The first information report of a crime is not a substantive piece of evidence, but can be used only for corroborative purposes. Ordinarily, it is proved by the prosecution for the purpose of corroborating the first informant and cannot be treated as substantive evidence. It may be used by the defence under Section 145, *post*. It may, however, be considered as substantive evidence under Section 82, *post*, if the informant had died as a result of an attack on him.¹⁵

10. Illustrations, of Illustration (a) of By-standers. The word "by-standers" in illustration (a) means the persons who are present at the time of occurrence and not the persons who gather on the spot after it. The remarks made by persons other than the eyewitnesses could only be hearsay, because they must have picked up the news from others.¹⁶ Hearsay evidence of a complaint by a bystander as to an occurrence would be admissible in evi-

11. *R. v. Sami*, (1890) 13 M. 426.
12. *Richard Gilbe v. Posho, Ltd.*, 1939 P. C. 146; 182 I. C. 27; 50 L. W. 81.
13. *R. v. Lillyman*, (1896) 2 Q. B. 167; 18 Cox C. C. 346; 65 L. J. M. C. 195; 74 L. J. 730; 44 W. R. 634.
14. See Illustration (g) to that section.
15. *Kappiniah v. Emperor*, A. I. R. 1931 Mad. 233 (2); 131 I. C. 456; 1930 M. W. N. 702. See also *Sree Hari Swarnakar v. Emperor*, A. I. R. 1930 Cal. 132; 124 I. C. 175; *Nga San Pu v. Emperor*, 19 Cr. L. J. 155; 43 I. C. 443; A. I. R. 1918 I. B. 81; *Ghulam Hussain v. Emperor*, 1930 Tan. 337; 127 I. C. 2; *Raman v. Emperor*, 1921 Lah. 258; *Emperor v. Phagunia*, 1926

- Pat. 58; 26 Cr. L. J. 1475; 89 I. C. 1043; *In re Surat Dhoobi*, (1884) 10 Cal. 302.
16. *Waris Khan v. Emperor*, 1940 Oudh 209; I. L. R. 15 Luck. 429; *Mahadeo v. Ram Kuber*, 1943 Oudh 451; 200 I. C. 114.
- Inchan v. Emperor*, 1943 Cal. 647; 210 I. C. 322; 45 Cr. L. J. 210.
- Naur Din v. Emperor*, 1943 Lah. 16; I. L. R. (1944) Lah. 461; 218 I. C. 242; See also *Pakhar Singh v. Emperor*, 1925 Lah. 578; 91 I. C. 812; 27 Cr. L. J. 140; *Hadu v. The State*, 1951 Orissa 53; I. L. R. (1950) Cut. 509; *Mahendra v. State of M. P.*, 1973 Cr. L. J. 110; 1974 M. P. L. J. 357; 1974 Jab. L. J. 234.

dence as a part of the transaction only if it was made at the time the transaction was taking place or so soon afterwards that it is in fact part of the transaction. If the transaction has terminated when the statement was made it would be irrelevant.¹⁹

In the undernoted case the place where a murder was committed was occupied by a number of persons besides the deceased and the eye witnesses. The evidence showed that these persons came up immediately after the murder and it was alleged that they were informed by the eye witnesses as to who the culprits were. It was held, that though these persons did not actually see the culprits, their evidence was material, not with a view to prove the actual fact of murder, which was in issue, but to prove the relevant fact that just after the event, the eye witnesses disclosed the names of the culprits to those who came there—this relevant fact being so connected with the fact in issue as to have necessitated the giving of evidence on that relevant fact itself.²⁰ Where the cries of the child of a murdered woman attracted the passers-by, it was held that witnesses could speak not only of the child's cries but even as to what the child said, so far as it explained their conduct.²¹ There was credible and credible evidence of five witnesses who heard or watched from outside from varying distances, of what was going on in the Veranda, but no eye witness was produced who could prove what actually took place inside the room where the murder was committed.²² The only evidence as to what could have taken place inside the room was the evidence of 'Baboo' who was present, though there was some understanding between him and the account of witnesses as to whether the murdered woman was actually saying more words showing that she was being actively killed. The evidence of witnesses about what the children said or did at the time of murder of their mother was held admissible under Section 6 of the Evidence Act. As the children had been questioned by the police and not against their father when they were questioned by relatives or by the Police, it could be said that there was no point in producing the children. The Court could also have relied upon the deposition of witnesses not to examine the children under Section 311 Criminal Procedure Code, 1908. But one went to produce the maid-servant who was also in the Veranda at the time of the murder. Though her statement was recorded under Section 161 Criminal Procedure Code and was brought on the record. The statement could only be used as evidence to corroborate or impeach testimony of the deceased and if she had appeared as a witness in court. The Court could therefore quite reasonably ask the Court to take in the bench that the deposition on under Section 161 of the Criminal Procedure Code was taken from her that if she had been produced in court, it would have formed the prosecution case against the appellant.²³

The word 'transaction' is used in this illustration in the limited sense of the particular incident which it is used in the more general sense in the remaining illustrations.²³

19. *Chain Mahto v. Emperor*, 11 C. W. N. 266.

20. *Malendia Pal v. State*, 1955 All. 828. ●

21. *Raban Lal v. Emperor*, 1938 Sind 97; 175 I. C. 324; 39 Cr. L. J. 618.

22. *Sawal Das v. State of Bihar*, 1974 Cr. L. J. 664 at 668; 1974

Cri. App. R. 71; 1974 S. C. D. 220; 1974 Chand L. R. (Cri.) 391. (1974) 3 S. C. R. 74; 1974 Cri. L. J. 664; 1974 S. C. C. (Cri.) 362; 1974 Cri. L. R. (S.C.) 186; (1974) 4 S. C. G. 193; A. I. R. 1974 S. C. 778.

23. *Queen-Empress v. Fakirappa*, 15 B. 491 at 496.

(b) *Illustration (b)*. Section 10 *post*. That war was waged is one of the facts in issue. The occurrences are part of that fact.

(c) *Illustration (c)*. Compare *R v Preece*²⁴ and *R v Board*²⁵. Even other letters written by B to third persons are admissible as proof of handwriting and thus of authorship.¹

(d) *Illustration (d)*. The deliveries are relevant as being part of the fact in issue, did the goods pass to A?

7. *Facts which are the occasion, cause or effect of facts in issue.* Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts, in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations

(a) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a bar with money in his possession, and that he showed it or mentioned the fact that he had it to third persons, are relevant.

(b) The question is, whether A murdered B.

Marks on the ground produced by a struggle take place near the place where the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms, social relations and habits of B known to A, which afforded an opportunity for the administration of poison, are relevant facts.

s. 3 ("Fact").

s. 3 ("Facts in issue").

s. 3 ("Relevant").

Steph. Dig. Art. 9, and note; Steph. Introd., Ch. III; Plonson Ev., 11th Ed., 169, 170, 217; Norton Ev., 103; Cunningham Ev., 90. *See* note, Ev., Sections 131–134, Best Ev., Section 453. Will's Circ. Ev. *passim*.

SYNOPSIS

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|---|--|
| 1. Principle. | (b) Exceptions to the rule |
| 2. Causation. | (c) Halsbury on similar facts |
| 3. Opportunity. | 6. Dissimilar facts |
| 4. Report of Court of Enquiry under section 7 of the Aircraft Act, 1934, read with Rule 75 of Aircraft Rules. | 7. Proof of similar acts (criminal and civil). |
| 5. Similar unconnected facts: | 8. Contemporaneous record of conversation |
| (a) Principle of exclusion | |

1. Principle. The reason for the admission of facts of this nature is that, it is easier to decide whether a fact occurred or not, against the first natural step is to ascertain whether there were facts at all and admitted to produce or afford opportunity for its occurrence, or facts which its occurrence

²⁴ 150 R. 75; 1 T. L. R. 100.

²⁵ 19 How St. Tr. at 825-826.

¹ 190 R. 100; 1 T. L. R. 100; 150 R. 75; 1 T. L. R. 100; 150 R. 75; 1 T. L. R. 100.

was calculated to produce. Further, in order to the proper appreciation of a fact, it is necessary to know the state of things under which it occurred.

2. Causation. Leaving the transaction itself, the present section embraces a larger area and provides for the admission of several classes of facts, which, though not possibly forming part of the transaction, are connected with it in particular modes (viz., as occasion, cause, or opportunity for its occurrence or as constituting the state of things under which it happened) and so are relevant when the transaction itself is under enquiry. These modes—occasion, cause, effect, opportunity—are really different aspects of causation. When an act is done and a particular person is alleged to have done it (not through an agent but personally), it is obvious that his physical presence within a proper range of time and place forms one step on the way to the belief that he did it. It may be asked whether the mere possibility, even of an opportunity, is not too slender and whether something more than mere opportunity, for example, exclusive opportunity, should not further delay the process, that by the very showing of an opportunity, a number of persons are involved, and the person charged, who might otherwise have been one of them, and other persons at the time, is shown to have been one of the many other persons who were in a position to do the particular act. In short, exclusive, that is, and not exclusive opportunity, is a sufficient excuse for the accused. On the other hand, no objection can be made to the admission of evidence that the accused had no opportunity of committing the crime. On the strength of this rests the force of a defence founded on proof that the accused was taken against a hasty inference from opportunity for the commission of a crime. There can be no crime without the opportunity, but there is a wide gulf to be bridged over by a difference between a mere opportunity and an opportunity.

When the fact in issue is whether he would have been able to do the act of the deceased, the facts that the accused had taken money and valuables from the deceased and that the deceased had in the act of resistance caused the accused to demand the money and ornaments are relevant as being the occasion, cause or effect of the fact in issue.⁶

Evidence that there were footprints in a room, the door of which was closed under enquiry, and that the footprints were found in a room closed up in a particular place is relevant evidence under the section.

3. Opportunity. Facts which afford an opportunity for the occurrence of a transaction are relevant. If there are any particular circumstances affording an opportunity for the commission of a crime, it is not possible. No offence can be committed without opportunity, and it is not possible to commit it. Physical presence of the time and place of the crime is a part of the evidence. The inference is that the accused was present at the time and place, and it prevents the accused from doing so. But the inference is that the accused was present at the time and place of the crime.

2. Cunningham, Ev., 90, 91. Steph. Introd., Ch. III: knowledge of circumstances enabling a person to do the act is thus also relevant, *ibid.*, (c).
3. Wigmore, Ev., s. 131.
4. See S. 11, post.
5. Norton, Ev., 104; Best Ev., s. 453;

see cases cited in Statkie, Ev., 4th Ed., 864, note; Wills' Circ. Ev., 6th Ed., 82, 356.

6. Dr. Jainand v. Rex, 1910 All. 291; 50 Cr. L. J. 498; 1919 A. L. J. 60.
7. Sidik Sumar v. Emperor, 1912 Sind 11; I. L. R. 1941 Kar. 325; 198 I. C. 110; 43 Cr. L. J. 308.

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

In 1934, this principle was said by Lord Sankey, then Lord Chancellor, with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted that jealously guarded principles of our criminal law and to be fundamental in the law of evidence as conceived in this country."¹³

The meaning of the rule, excluding transactions similar to, but unconnected with, the facts in issue, is, that inferences are not to be drawn from one transaction to another which is not specifically connected with it, merely because the two resemble one another. They must be linked together by the chain of cause and effect in some assignable way before an inference may be drawn.¹⁴ They are not facts in issue and are, therefore, excluded by the fifth section. They are not parts of the same transaction so as to be admissible under the sixth section, and there is no principle of causation which would render them relevant under this section. The maxim *res inter alios acta* is frequently supposed to express the principle of exclusion in such cases; but, this is incorrect, for similar transactions *inter partes* would be equally inadmissible in this relation. The maxim has its principal utility in the domain of substantive law.¹⁵ And so when, as in a well-known case, the question was whether A, brewer, sold good beer to B, publican, the fact that A sold good beer to C, D and E, other publicans, was held to be irrelevant.¹⁶ Nor, when an act has been proved to show that a given party did the act, evidence may be tendered of similar acts done either by himself, with the object of showing a disposition, habit or propensity to commit, and a consequent probability of his having committed, the act in question, or by others, though similarly circumstanced to himself, to show that he would be likely to act as they.¹⁷ And so, when the question is, whether A committed a crime, the fact that he formerly committed another crime of the same sort, and has tendency to commit such crimes is irrelevant.¹⁸

13. *Maxwell v. The Director of Public Prosecutions*, [1934] A.C. 300 at pp. 317, 320, 100 L.J.K.B. 501.

14. *Steph. Dig.*, p. 163.

15. *Phipson, Ev.*, 11th Ed., 215; *Steph. Dig.*, Art. 19, and *supra*, p. 163. *Best, Ev.*, ss. 112, 116, 117, 118, 119, 317, 326. *Brown's Legal Maxims*, 949-958.

16. *Holcombe v. Hewson*, 2 Camp. 391; if it had been shown that the beer sold to all was of the same brewing, *Steph. Dig.* Art. 19, 11st, 16th, so, unless a general custom be proved, the terms on which A let land to B are no evidence of the terms on which A let lands to other tenants. *Carter v. Pyke*, (1791) *Peake*, 130; see *Hollingham v.*

Heat, 180, 10 C.P. N.S. 368, *South v. O'Connell*, (1899) 1 F. & S. 180, 183 (1899) 6 C. & P. 180; *Taylor, Ev.*, ss. 317-326.

17. *Phipson, Ev.*, 11th Ed. 213, and *text-book and cases and notes to Steph. Dig.*, *converse cases of character and course of business v. post*, ss. 52-55, 16.

18. *Steph. Dig.* Art. 19, *post*, ss. R. v. *Colt*, 1825, 10 C.P. & Aron, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

... If, however, the similar facts are so related to the crime as to show the party's identity, irrespective of any general propensity, they will be admissible notwithstanding that they may also tend to show a criminal propensity. So to show that A was a writer of a rebellious letter other letters written by A to third persons are admissible as proof of handwriting and this of course, whether it would be immaterial for this purpose whether the other letters were rebellious or not.²¹ Similar facts are also admissible to corroborate a confession, though they might not be receivable as substantive evidence thereof.²²

Similar facts cannot be proved true or inadmissible whether proved by the defence or by the party himself, or by independent witnesses.

The second principle stated in Makin's case²³ was that:

"... the evidence of a previous offence is not to be received to show the commission of a later offence unless it renders it more probable if it be relevant to an issue relevant to the case, and it may be so relevant if it bears upon the question whether the accused is to be constituted the crime charged in the indictment was committed or accidental or to rebut a defence which would otherwise be open to the accused."

This statement of principle has given rise to some discussion. A plea of not guilty put in issue an issue which is a necessary ingredient of the offence charged, and in such a case it were permitted, ostensibly in order to strengthen the evidence of a fact which was not denied and perhaps could not be the subject of a defence, to adduce evidence of a previous crime, it is manifest that the protection offered by the "jealously guarded" principle enunciated in *Makin* is thereby gravely impaired. This aspect of the matter was considered by the House of Lords in *Dunlop v. R.*²⁴ in which Lord Sumner dealt particularly with the principle referred to and stated his conclusion as follows:

"But even if it were held to be correct which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been held in substance if not in so many words, and the issue so framed must be one to which the prejudicial evidence is relevant. The mere opportunity of putting on one's party everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Referring to the above passage with the spirit and intention of Lord Sumner, words of Lord Phillips of the Privy Council in *Noor Mohammed v. The King*²⁵ observed as follows:

19. Phipson, *Ev.*, 11th Ed. pp. 169-170. See also *R. v. Hall*, (1952) 1 K. 1; *R. v. Straffen*, (1952) 2 All E. R. 657; *R. v. Robinson*, 1953 Q. B. D. 911; 36 Cr. App. R. 132; (1953) 1 Cr. App. R. 132; 2 All E. R. 384.
20. *Jones v. Richards*, (1885) 15 Q. B. D. 439; see illust. (c) to S. 6 ante.
21. *R. v. Pearce*, (1791), Peak 106, per Lord Kenyon; see also *R. v. Barnard*, 19 How. St. Tr. 825-6

threatening letter.
22. *ib.*, *R. v. Burlison*, (1914) 11 Cr. App. R. 30; *R. v. Clayton*, (1909) 2 K. B. 945; *Perkins v. Jefferey*, (1915) 2 K. B. 702.
23. *Makin v. Attorney-General*, N. 1 W. 224; 1 A. C. 61; 63 L. J. P. C. 41.
24. (1918) A. C. 221; 87 L. J. K. B. 478.
25. 1949 P. C. 161; 53 C. W. N. 736; 1949 M. W. N. 437; 62 L. W. 530.

"On principle, however, and with due regard to subsequent authority,¹ their Lordships think that one qualification of the rule laid down by Lord Sumner must be admitted. An accused person need set up no defence other than a general denial of the crime alleged. 'The plea of not guilty may be equivalent to saying, let the prosecution prove its case, if it can,' and having said so much, the accused may take refuge in silence. In such a case it may appear, for instance, that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence. In all such cases the Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is proposed to direct, to make it desirable in the interest of justice that it should be admitted. In so far as that purpose is concerned it can in the circumstances of the case have only trifling weight the Judge will be left to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it will be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the Judge."

The existence of this discretionary discretion has been openly recognised and its importance has been emphasised by the House of Lords in *Harris v. D. P. P.*² in which Lord Simon observed that this rule:

"flows from the duty of the Judge when trying a charge of crime to set the essentials of justice above the technical rule, if the strict application of the latter would operate unfairly against the accused."

The law on the subject of the admissibility of similar facts has, after thorough examination of the caselaw been summarised in a publication as follows:

Rule 1. Evidence of similar facts which is relevant primarily, via propensity, that is, such evidence where the tendency of the similar fact evidences

1. The accused is entitled to say R. v. Smith, [1957] 1 K. B. 311, 146 T. All E. R. 697 at 701 in which at paragraph 100 Lord T. C. J. said: "it is consistent with the assumption that all evidence tending to show a propensity to commit the crime is admissible, and if the evidence is justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence of this kind is probative is admissible unless excluded, then evidence of this kind

does not have to seek a justification, but is admissible irrespective of the issues raised by the defence, and this we think is the correct view". Approving this Lordship of the Privy Council were not prepared to accept the method of approach thus stated.

2. (1952) A. C. 694; 36 Cr. App. R. 299, 144 T. All E. R. 1044. See also R. v. Straffen, (1952) 112 B. 911; 36 Cr. App. R. 132; (1952) 2 All E. R. 657; R. v. Robinson, [1953] 1 Cr. App. R. 95 (1953) 2 All E. R. 334.

to establish a propensity in the accused, is a link in the process of tending to show that the accused did in fact behave on the instant occasion in the way in which the prosecution alleges, such evidence may be relevant in addition, otherwise than via propensity, is inadmissible unless it is exceptional.

Rule 2. Such evidence is exceptional and therefore admissible provided :

- (i) it has very great real probative value upon any issue upon which the jury is likely to use it ; and
- (ii) its admission is not unnecessary (i.e., the issue upon which it is tendered can reasonably be regarded as a real one in the circumstances of the case).

Rule 3. Evidence of similar facts which has substantial relevance otherwise than via propensity (even if as well as via propensity) is admissible, provided it is sufficiently relevant.

Rule 4. In criminal cases the Judge has a discretion to exclude evidence admissible under any of the foregoing rules if their strict application would operate unfairly against the accused.

N. B. It should be remembered that—

- (a) Evidence which is relevant via propensity is of a much wider category than has often been supposed.
- (b) Rule 2 means (obviously) that not all evidence the primary relevance of which is via propensity is excluded.
- (c) The nature of issue to which the evidence is relevant (e.g., that it is to show system, to prove intent, etc.) does not control its admissibility. The nature of the issue may, however, affect the strength of the probative value of the similar fact in evidence and thus indirectly influence its admissibility.³

The so-called exceptions (though they are not strictly speaking, such) to this rule consist in the admissibility of evidence of facts showing intention, good faith, and the like⁴ and of facts showing accident or system.⁵

Judgments also in Courts of Justice on other occasions have been said to form an exception to the exclusion of evidence of transactions not specifically

3 Essays on the Law of Evidence by Zelman Cowen and P. B. Carter, 1956, pp. 160-161.

4 See S. 14 post, cf. Steph. Dig. Art. 11 and pp. 162-164 ibi; Pearson, 25th Ed. 181. As to evidence of intention. See *Narsing v. Ram* (1903) 30 C. 888, 886 R. v. Bond (1900) 21 Cox p. 242, 2 K. B. 389.

5 See S. 15 post, cf. Steph. Dig. Art. 12, Lawson's Presumptive Evidence, 182; Steph. Dig., 162-164; see also Taylor Ev., § 327-318; R. v. Cr. Ex., 18th Ed., 79, et seq. Best Ev., p. 408, Roscoe, N. P. Ev. 85 R. v. Wyatt (1904) 1 K. B. 188, Hales v. Kerr, (1908) 2 K. B. 601; James L. R. v. 24, p. 779.

connected with facts in issue.⁶ On the other hand, and on the same principle, in cases where causation is well known and regular, as in the case of physical and mechanical agencies, the conditions of mental disease, the propensities of animals, and the like evidence of similar but unconnected acts is often admissible.⁷ Where, in an action brought in respect of a nuisance alleged to be caused by the construction and maintenance of a hospital for infectious diseases, the plaintiff proposed to call evidence as to the effect of other similar hospitals on the surrounding neighbourhood, it was held that evidence of facts by which the effect (or absence of effect) of such hospitals could be either positively or approximately ascertained was admissible and material.⁸ Where the discharge of gaseous matter from the chimney of a chemical work was complained of as a nuisance by the proprietor of land in its vicinity, it was held that the effect of the discharge upon other properties in the neighbourhood was legitimate matter of enquiry;⁹ on the same principle, evidence of the effect of similar discharges from other chimneys would have been admissible.¹⁰ When the doings of animals are in question, it is admissible to prove the general character of the species, or of the particular animals, as well as the doings of the same or similar animals on other occasions.¹¹ Further, similar facts may become admissible in confirmation of testimony as to the main fact which would be inadmissible as direct proof. So, an admission of liability on one bill accepted by the same agent is no evidence of a general authority to accept, though it is admissible to confirm independent

6. Steph. Introd. 164; see Ss. 40-44 post.

7. Phipson, Ev. 11th Ed. 217; Best, Ev. pp. 463, 464; 1 Exch. Ev. 229; so that, in *Atwood v. Sells*, it being in dispute whether a horse was or was not frightened by a certain piece of machinery, evidence that other horses were frightened by the same piece under a variety of circumstances was admissible. Best, Ev., p. 464; for a similar case, see *Brown v. E. & M. Ry.* (1889) 22 Q.B.D. 391; "so where the question was whether A's dog killed a sheep belonging to B; the fact that the same dog had killed other sheep was admissible." So also, in *Atwood v. Sells*, it being in dispute whether A's premises were ignited by sparks escaped from a steam engine, (1) other engines of the same Company, and (2) other engines of similar construction belonging to the same Company had previously caused fires at the same time, was admissible. *Aldridge v. G. W. R. Co.* (1844) 3 M. & G. 522; *Piggot v. F. C. Ry. Co.* (1846) 3 C.B. 229, the question being whether A was insane at a certain time, evidence that he exhibited symptoms of insanity prior and subsequent to

such time, and that his ancestors and collaterals had been insane, is admissible. *Pope on Lunacy*, 392; Phipson, Ev. 11th Ed. 149-150; as to the presumption of regularity in the case of scientific instruments, see *Taylor, Ev.*, s. 183. As to *Maori and Trade Customs*, see *Taylor, Ev.* Ss. 320-322; *Roscoe, N.P.* Ev. ss. 86; Phipson, Ev. 11th Ed. 216; s. 13, post; acts showing title; see S. 11, post.

8. *Metropolitan Asylum District Managers v. Hill*, (1882) 47 L.T. (H.L.) 29; per Lord Selborne, L.C., "Evidence relating to collateral facts is only admissible where such facts will, if established, establish a reasonable presumption as to the matter in dispute, and when such evidence is reasonably conclusive." per Lord Watson; see also *Foulks v. Chadd*, 3 Dong. 157.

9. *Townsend v. Hamilton* (1839) 1 Rob. 51; 7 C.L. & F. 122; *R. v. Neville* (1791) 1 H.L. Perke, N.P.C. 91; but see as to this last case *R. v. Fairie*, (1857) 8 E. & B. 886.

10. *Metropolitan Asylum District Managers v. Hill*, supra, per Lord Watson.

11. Phipson, Ev. 11th Ed. 217; *Osborne v. ChocVeel*, (1896) 2 Q.B. 109; *Williams v. Richards*, (1907) 2 K.B. 88.

proof of such authority.¹² And proof of particular instances are admissible to confirm a general course of business. And under this Act (though not¹³ generally speaking, in England) even previous similar statements made by a witness are admissible to corroborate him by showing that he is consistent with himself.¹⁴ Similar facts may be admissible in proof of agency. Where the question is whether one person acted as agent for another on a particular occasion, the fact that he so acted on other occasions is relevant.¹⁵ In a suit for dissolution of marriage, evidence of acts of adultery, subsequent to the date of the latest act charged in the petition, are admissible for the purpose of showing the character of previous acts of improper familiarity.¹⁶

Facts similar to a fact in issue are not, in general, admissible to prove either the occurrence of the fact in issue or the identity of its author. The rule is, however, subject to various exceptions. This rule of exclusion is not based, as it is sometimes said, on the ground that the evidence of similar facts may be *res inter alios acta*, for such evidence might be inadmissible if it were *inter partes*; nor is it based primarily on the inconvenience and delay which the admission of such evidence might occasion. The rule is based on the ground that evidence of similar facts may be irrelevant. In criminal cases to which this rule is most frequently applied, there is a further ground for exclusion even though the facts may fall within exception to the rule: this ground is that the judge has a discretion to exclude evidence of similar facts when to admit the evidence would operate unfairly against the accused.

The rule in civil proceedings may be illustrated by a case in which the question was whether a brewer supplied good beer to a publican. The brewer sought to establish this by proving *inter alia*, that during the material period he supplied good beer to other publicans. The evidence was rejected, the court remarking that a man might deal well with one and not with others. So where the question was whether a surgeon had been negligent or skilful in performing similar operations on other patients, was rejected. In an action against the acceptor of a bill of exchange, who defends on the ground that his acceptance is a forgery by a particular person, evidence that he has forged other bills is not admissible.

When evidence of similar facts is relevant, that is, when there is a nexus between the similar fact and the fact in issue, such evidence may be received

12. *Llewellyn v. Winckwarth*, (1945) 13 M. & W. 598; *Hollingham v. Head*, (1859) 4 C. B. (N.S.) 388; *Morris v. Bethel*, (1869) L. R., 4 C. P. 765; *Phipson, Ev.*, 11th Ed., 112, 113.

13. *Bourne v. Gatliff*, (1944) 11 Cl. & F. 45; see as to similar facts admissible in corroboration of the main facts: *R. v. Pearce*, (1791) 1 Peake 106; *R. v. Egerton*, (1819) R. & B. 375, cited in *R. v. Ellis*, (1872) 2 R. & C. 145; *Cole v. Manning*, (1872) 2 Q. B. D. 611 and cases in preceding note.

14. S. 157, post.

15. *Steph. Dig. Art. 19*; *Blake v. Albion Life Assurance Society*, (1878) 4 C.P.D. 94; see also *Courteen v. Touse*, (1807) 1 Camp. 42; *Neal v. Erving*, (1793) 1 Ep., 61; *Watkins v. Vince*, (1818) 2 Stark 368.

16. *Boddy v. Boddy*, (1860) 30 L. J. P. & M. 23; *Taylor, Ev.*, 340; see remarks on this case in *Phipson, Ev.* 80, 1st Ed., omitted in 2nd Ed. It has been held that ante-nuptial incontinence is relevant to prove post-nuptial misconduct charged between the parties. *Cantello v. Cantello*, *Times*, Feb. 1, 1896, cited in *Phipson, Ev.* 11th Ed., 220.

to prove either the occurrence of the fact in issue or the identity of its author. When a practice to do or omit an act is in issue, evidence of similar acts or other occasions by the persons concerned is admissible.

Evidence of similar facts may be resorted to on questions of title to land and its value.....¹⁷

6. **Dissimilar facts.** Similar facts under the present rule are inadmissible, whether proved by the direct admissions of the party himself or by independent witnesses. So, dissimilar facts are admissible to disprove the main fact, e.g., skill on other occasions to disprove negligence,¹⁸ honest act to disprove fraudulent one¹⁹ or specific acts of bravery to disprove specific acts of cowardice.²⁰

Illustration (a). The facts mentioned in this illustration are relevant as giving occasion or opportunity or being the cause.²¹

Illustration (b). The facts mentioned in this illustration are relevant as effects of the fact in issue. This is an instance of real evidence.²²

Illustration (c). The facts mentioned in this illustration are relevant as constituting the state of things under which the alleged fact in issue happened, and as affording opportunity.

7. **Proof of similar acts (criminal and civil).** Again, as a general rule, upon a trial of a criminal case, evidence of the commission of other independent and unrelated crimes by the accused is inadmissible to show either his guilt or that the accused is likely to commit the crime with which he is charged. There are two major exceptions, viz., (a) proof of commission of another crime is proper whenever a statute provides for the enhancement of the accused's punishment, if he is a previous offender, and (b) proof of the independent crime is admissible, if it is relevant to the proof of the guilt of the accused for the crime with which he is charged.

The relevant similar acts can be grouped under the following heads:

- (a) when the nature of the case requires cumulative instances of similar facts to prove the main fact, e.g., gang cases under Section 101 and cases in civil matters like custom, assessment of market value of similar properties (Section 9);
- (b) when similar facts are admissible as part of the transaction closely connected with and explanatory of the main fact or form part of a series of continuous facts causally connected (Section 10);
- (c) if the question involved is the state of mind in which the act was done, e.g., intention, knowledge, etc. (Section 14);

¹⁷ *See* *Simmons v. L.L.*, Vol. 15, para. 527 pp. 291, 292.

¹⁸ *R. v. Widdell*, 1849, 3 C. & K. 202.

¹⁹ *R. v. Bowen* (1877) 34 T. T. M. C. 57, 67; *R. v. Mortimer*, (1896) 31 T. T. 180; *Holcombe v. Hewson*, (1810) 2 Camp. 301.

²⁰ *Edwards v. Amer. Ind. Ins. Co.*, January 26, 1911.

²¹ *See* *Norton v. L.*, 103 C. & G. 111; *Ev.*, 90; *Whitely Stokes*, 855.

²² *See* *Norton v. L.*, 103 C. & G. 111, S. 92.

As to proof of a foot mark, *see* *Circ. Ev.*, 96, 214-21, 436.

- (d) to resolve whether an act was accidental or intentional (Section 15) ;
- (e) experiments made by experts showing similar facts (Section 45) ; and
- (f) where the habits or the habits of the animals are in question, e.g., Police dogs, evidence of similar acts is admissible (Section 52)

Thus evidence of an independent and separate crime is admissible, when such evidence tends to aid in identifying the accused as a person who committed the particular crime under investigation. So, when a crime is committed by novel means or in a particular manner, the proof of other distinct crimes may be admitted for the purpose of identifying the accused as the perpetrator thereof, e.g. *modus operandi*. Evidence of similar offences may be relevant to prove *scienter* or guilty knowledge or intent of the accused, and negative mistake, accident, lawful purpose or innocent intent or the existence of malice or the motive which suggests the doing of the act, plan, scheme or system.

8 Contemporaneous record of conversation. Like a photograph of a relevant incident, a contemporaneous record of a relevant conversation is a relevant fact and is admissible under this section²³. The time, place and accuracy of the tape-recording must be proved by competent witnesses and the voices must be properly identified²⁴. A tape-recording may be used for the purpose of confronting a witness with his earlier tape-recorded statements. Where the voice is denied by the alleged maker thereof, a comparison of the same with a later tape-record is inevitable and such a comparison is not prohibited under any statute²⁵. The use of tape-record is not confined to purposes of corroboration and contradiction only, but when duly proved by satisfactory evidence of what is found recorded and there is absence of tampering, it could, subject to the provisions of Evidence Act, be used as substantive evidence.¹

8 Motive, preparation, and previous or subsequent conduct. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceedings, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct

23. *Yusufalli Esmail Nagree v. State of Maharashtra*, (1967) 3 S. C. R. 720; 1968 S. C. D. 347; (1968) 1 S. C. J. 511; (1967) 2 S. C. W. R. 934; 1968 A. W. R. (H.C.) 268; 70 Bom. L. R. 76; 1968 M. L. J. (Cr.) 247; 1968 M. L. W. (Cr.) 12; 1968 Mah. L. J. 179; 1968 S.C. 147, 149; *R. M. Malkani v. State of Maharashtra*, A. I. R. 1973 S.C. 157; *Z. B. Bukhari v. B. R. Mehra*;

A. I. R. 1975 S.C. 1788. (A contemporaneous tape record would be part of *res gestae*).

24. *Ibid.*

25. *Dial Singh Narain Singh v. Rajpal Jagan Nath*, 1969 Cur. L. J. 325 71 Punj. L. R. 519; 1969 Cr. L. J. 1422; A. I. R. 9169 Punj. 350.

1. *Z. B. Bukhari v. B. R. Mehra* A. I. R. 1975 S. C. 1788 at 1795.

of any person an offence against whom is the subject of any proceeding is relevant if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1 The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2 When the conduct of any person is relevant, any statement made to him or in his presence and hearing which affects such conduct, is relevant.

Illustrations

(a) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money, B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose is relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will A made inquiry into matters to which the provisions of the alleged will relate; that he consulted Vakils in reference to making a will, and that he caused drafts of other wills to be prepared, or which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—"the police are coming to look for the man who robbed B", and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B Rs. 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing, "I advise you not to trust A, for he owes B 10,000 rupees", and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that he was being made for the criminal, and the contents of the letter, relevant.

(i) A is accused of a crime.

The facts that after the commission of the alleged crime, he absconded, was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is whether A was ravished.

The facts that shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which the complaint was made, are relevant.

The fact that without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

(k) The question is, whether A was robbed.

The fact that soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

S. 3 ("Fact in issue").

S. 3 ("Relevant").

S. 3 ("Fact").

Ss. 10, 14, 17-39, 155, 157 (Statements relevant under other sections)

Ss. 17-31 (Oral and Documentary admission).

S. 50 (Opinion on relationship expressed by conduct).

Motive, Preparation and Concert: Steph. Dig., Art. 7. Wills, on Circumstantial Evidence passim; Best, Ev., ss. 90, 92, 462, 467; Russell on Circumstantial Evidence; James Wills on Circumstantial Evidence; Phillips' Famous Cases on Circumstantial Evidence passim; Phipson, Ev., 5th Ed., 28; Norton, Ev., 11; Charnagham, Ev., 11; Taylor, Ev., ss. 104, 1204, 1215; Roscoe, N.P., Ev., 28, 67; Roscoe Cr. Ev., 18th Ed., 7, 11; Ss. Wills, Ev., 2nd Ed., 68; Wigmore, Ev., ss. 17, 23, et seq.; Statements affecting fact: Steph. Dig., Art. 7, 8, 10; Note v. Best, Ev., ss. 46, 47; Green, ed. Ev., ss. 108; Wharton, Ev., ss. 528, 207; Phipson, Ev., 5th Ed., 47; Steele, Ev., 51-53, 87-89, 166-171; Taylor, Ev., ss. 258, 289; Roscoe, N.P., Ev., 51-53; Powell, Ev., 9th Ed., 187-9; Roscoe Cr. Ev., 19th Ed., 23; Statements affecting conduct: Steph. Dig., Art. 8; Taylor, Ev., ss. 808-810; Best, Ev., ss. 7, 4, 575; Phipson, Ev., 11th Ed., 183, 313; Norton, Ev., 106; Roscoe, N.P., Ev., 64-66; Powell, Ev., 9th Ed., 430-439; Wharton, Ev., ss. 1136-1155.

Section 27, which deals with statements made to police officers a highly artificial reservation of the law of evidence peculiar to India, controls and circumscribes the provisions of this section which deals with the proof of conduct.⁶ See Introduction, ante, and Notes, post.

2. Five allied concepts. Knowledge, motive, intention, preparation and attempt are the five allied concepts.

Knowledge means a state of mind, entertained by a person, with regard to existing facts, which he has himself observed or the existence of which has been communicated to him by another person.⁷ In the American Cyclopaedia (1928), page 169 knowledge is, defined as: 'The certain percepts of truth, belief which amounts to or results in moral certainty; indubitable apprehension; information, intelligence, implying truth, proof and conviction, the act of state of knowledge, clear perception of fact; that which is or may be known; acquaintance with things ascertainable; specific information; settled belief; reasonable conviction, anything which may be the subject of human instructions.'⁸

Knowledge and actual knowledge have sometimes been held to be synonymous.⁹

Knowledge is nothing more than men's firm belief and is distinguished from belief in that the latter includes things which do not make a very deep impression on the memory. Belief is defined by the Century Dictionary as: to be persuaded upon events, arguments and deductions or by other circumstances other than personal knowledge. The difference is ordinarily merely in degree.

Then the different stages in the development of the mental phenomenon may be represented as follows:

Motive Wish for the end Choice of means or deliberation Desire to do the act Determination or will Intention to do the act (The doing of the act).

Motive is the longing for the satisfaction of desire which includes the mind to wish and then to intend doing something which would bring about the realisation aimed at. Primal motive is always the outcome of an impulse which the mind receives from outside, and which, owing to the peculiar state in which it happens to be, is susceptible of being affected thereby. That impulse calls forth a response in the nature of a wish and an intention. An example perhaps would best illustrate it. The desire for the preservation of life is a primitive desire embedded in the nature of man. This gives birth to a desire for the satisfaction of hunger. The sight of a loaf of bread is an impulse which the mind receives from the outside world, but which, however, would not have been effective had not mind been in the particular state in

6. Kalamban Bhattacharjee v. Emperor, 1936 Cal. 316; I. L. R. 63 C. 1053; 163 I. C. 41.

7. Emperor v. Zamin, A. I. R. 1932

Oudh 28 136 I. C. 213.

8. See Ramasatha Iyer's The Law Lexicon, (M. L. J.), p. 688.

9. Ibid, 688.

which it is placed owing to hunger. This impulse creates the motive for intending to steal the bread. The most ulterior 'Motive' can always be traced back to the satisfaction of one or other of the primitive human desires, which form as it were the primary bedrocks at which we must finally arrive. Every 'Motive', however, is not necessarily the direct outcome of an external impulse. For, as will soon appear, there may be a long unbroken chain of motives linked with each other. From the above definition of the 'Motive' it is evident that there must be a motive for every act (except those that are unconscious, for which no responsibility can arise). The Motive produces in the mind a Wish for the end in view. Had this Wish not been generated, the Motive would have failed in its effect altogether, it would then not have been a true Motive at all. As has been noticed before, this Wish can only arise when the mind, owing to its peculiar condition, is susceptible of receiving and responding to the external impulse. The sight of bread supplies the Motive for the satisfaction of hunger, the peculiar circumstances of hunger create the Wish for its satisfaction. The initial Motive and Wish are not one and the same thing, the latter represents the second stage in the operation of the mind.

Now the Wish for the end is, in its turn, succeeded by another phase in the development of the mind. The Wish for the end produces a certain Deliberation or Choice of means to achieve the end wished for. There is an idealisation of some movement which seems likely to procure the realisation. There is within the mind a balance of judgment which carefully measures the practicability and cautiously weighs the probability of its being carried out. The Wish is of a quasi-spontaneous growth, but the Deliberation has an atmosphere of artificiality about it. It manifests the effort of the intellect to co-operate with the mind. It is this state of the mind consulting the intellect and profiting by its advice that constitutes the third stage.

After the Choice of Means has been fixed upon, there follows a Desire to do the act. The Desire to do the act must not be confused with the Wish for the end aimed at. The one leads the Deliberation while the other follows in its trail. The former is a Wish to attain the ultimate consummation whereas the latter is a mere Desire to do the act which the Deliberation considers would lead to the ideal. The bare Desire to do the act itself is oblivious, for **the time being, of the ultimate end aimed at.**

Next comes a still further successor—a Determination or will to do the act. Determination must be distinguished from Deliberation which enjoys precedence. Deliberation concerns itself mainly with the balancing of probabilities whereas Determination is the permanent judgment of the reason that some particular course is desirable. Deliberation indicates the process of the activity of the intellect, whereas Determination is the fruition of that activity. 'We have resolved' or determined on an act' only means that we have examined the objects of the desire, have considered the means of attaining it and that since we think the object worthy of pursuit, we believe we shall resort to the means which will give us a chance of getting it'. The present Determination is nothing but a present belief that we shall do the act in the future. There is a recognition of the relation which the means adopted bears to the

Lastly, and just preceding the act proper, is the intention, or, as it is often called, "Intending the act". This intention is the highest culmination of the mental phenomenon and serves as a point for the summation of the act itself. Intention is stretching to your mind the mind upon, the act". It is the contemplation by the mind of the object to which many combined movements are directed. Many movements, in fact, are the setting or aiming of oneself and one's powers to bring about a certain result.

This is what is known as *intention* in the law. It is distinguished from intent. Intention is the result of the act, while intent is defined as: "intention is the purpose or design with which an act is done. It is the foreknowledge of the act and of the results of it, such knowledge, and there being the cause of it in so far as it moves through the operation of the will. An act is intentional so far as it exists in idea hence if it exists in fact, the idea resembles it as if it were fact because of the desire by which it is accompanied". The word 'intent' by its etymology seems to have a metaphorical origin, to intend and implies aim and thus connotes not a desire or a merely possible desire, perhaps as not improbable, more it is a desire, but not a desire for the one object with which the effort is made and thus has a *dominant motive* which has been called a dominant motive without which the action would not be done.

[illegible]

13. In re Kuttayan, A. I. R. 1960 Mad

13. И. Г. Куклава, А. П. К. 19

therefore not intending the consequences¹⁴ The distinction between intention and knowledge is brought out in (a) *Faqir v. State*¹⁵ and (b) *Emperor v. Dhirajia*.¹⁶

(a) Knowledge as contrasted with intention would more properly signify a state of mental realisation in which the mind is a passive recipient of certain ideas and impressions arising in it and passing before it. It would refer to a bare state of conscious awareness of certain facts in which human mind might itself remain supine or inactive. On the other hand, intention connotes a conscious state in which mental faculties are roused to activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. Mental faculties which might be dispersed in the case of knowledge are in the case of intention, concentrated and converged on a particular point and projected in a set direction.

(b) In order to possess and to form an intention there must be capacity for reason. And, when, by some extraneous force the capacity for reason has been ousted, the capacity to form an intention must have been unseated too. But knowledge stands upon a different footing. Some degree of knowledge must be attributed to every sane person. Obviously, the degree of knowledge which any person can be assumed to possess must vary. For instance, one cannot attribute the same degree of knowledge to an uneducated as to an educated person. But to some extent knowledge must be attributed to every one who is sane.

While one way to prove intention is by showing statements of such intention, yet such declarations are not necessarily the equivalent of the intention itself. As Burrill says:¹⁷

"It does not necessarily follow, because a man has avowed an intention to commit a crime, that such intention really existed in the mind. The words may have been spoken in mere bravado or with the view of alarming or annoying the object of them, or, like expression of ill-will may have been uttered in a moment of passion or state of intoxication without any settled evil purpose."

It is proper for a witness to tell what his intention was as to a material fact in issue. But a witness may not state the intention of another person. Such direct testimony is, of course, hard to disprove, and because of the interest of the witness does not carry the weight that is accorded to evidence of surrounding circumstances which show the character of the transaction. Facts and circumstances accompanying the act are generally considered the most reliable evidence to prove the intent with which the act was done. Conduct, as evidenced by acts, course of dealing or other like transactions or declarations is always admissible to show intent.

But the common law has always confined itself to tangible evidence of intention. It has avoided secret intention of the mind because this is too

14. *Mansuri v. State*, A. I. R. 1955 Pat. 330.

15. A. I. R. 1955 All. 321.

16. A. I. R. 1940 All. 486; I. L. R. 1940 A. 647; 191 I. C. 328.

17. *Treatise on Circumstantial Evidence*, p. 545.

subtle for the practical methods of legal proof. The medieval jurist well put it by saying that the devil himself did not know the thoughts of man. Therefore, Pollock has remarked: "As the acts of the mind which are not directly manifested in outward performance the law will not generally take account of them, both because they cannot be certainly known and because no certain result can be assigned to them."¹⁸

In order to avoid some of these difficulties of proving intention in the traditional manner and yet to secure the evidence of necessary intent, the law has resorted to expediency in place of the usual logic. Sir Frederick Pollock puts this plainly. He says:

"The wrongdoer cannot call on us to perform a nice discrimination of that which is wicked by him from that which is only consequent on the strictly within wrong. We say that intention is presumed, meaning that it does not matter whether intention can be proved or not; nay, more, it would, in the majority of cases, make no difference, if the wrongdoer could disprove it. Such an explanation as this, 'I did mean to knock you down, but I meant you not to fall into the ditch' would, even if believed, be the finest of apologies, and would no less be a vain excuse in law."

The same author makes the same application in another tale when he says:

"It was once even supposed, that parties could not make time of the essence of the contract by express agreement; but it is now perfectly settled that they can, the question being always what was their true intention, or rather what must be judicially assumed to have been their intention."¹⁹

The result of this attitude has been that when the evidence fails to show what the intention was, then presumptions are used to get the desired result. An ironclad rule becomes the index of the mental operations. No latitude is given for individual differences. If a person does a certain thing, then, by the rule, he has thought a certain thing. For instance, a person is presumed to intend the natural and probable consequences of his acts.

There are, however, limits to such a broad presumption. Otherwise, no latitude will be given for individual differences and ironclad rule would become the index of mental operations. Section 106, Evidence Act, has been enacted with this difficulty in view. Presumptions are rebuttable. Thus, when a person does an act with some intention other than that which the character and circumstances of the case suggest, it is not for the prosecution to eliminate all the other possible intentions. If the accused had a different intention that is a fact which is peculiarly within his knowledge and which he may prove.²⁰

In law, a man's motives are not unoften irrelevant. As a general rule, no act, otherwise lawful, becomes unlawful because done with a bad motive; and

¹⁸ The Elements of Jurisprudence, 2d ed., 1890, p. 34.

¹⁹ The Elements of Jurisprudence, 3d ed., Principles of Contract, p. 505.

²⁰ See Prof. Glanville Williams, Proof of Guilt, Chap. 7, p. 127, and Kenyon's Outlines of Criminal Law 17th Ed., p. 438 and following.

contra, no act otherwise unlawful, is excused or justified because of the motives or the doer, however good. The law will judge a man by what he does, **not by the reason for which he does it.**

To this rule, as to irrelevance of motive, there is a very important exception in criminal law, viz., criminal attempts. An attempt to commit an offence is itself a crime. The existence of a motive is of the essence of the attempt. The attempted act in itself may be perfectly innocent but is deemed criminal by reason of the purpose for which it is done. To mix arsenic in food is in itself a perfectly lawful act for it may be that the mixture is designed for the purpose of poisoning the rats. But, if the purpose is to kill a human being the act becomes by reason of this purpose the crime of attempted murder.

What is an attempt? In order to understand this term we must examine the elements which go to constitute every intentional crime. There are four distinct stages in the commission of an intentional crime. First, I intend to commit the crime; secondly I get ready to commit the crime; thirdly, I try to commit it; and finally, I commit it. In other words, intention, preparation, attempt and completion. To give a concrete illustration of this, take the burning of a haystack. I intend to burn the haystack (intention); for that I buy matches and procure some kerosene and soaked rags (preparation); then I go to the stack and there light one of matches (attempt); and finally complete the act by setting fire to the stack (completion).

The only difficulty which arises is, where does preparation end and attempt begin? The answer to this question is, an attempt is an act of such a nature that it is in itself evidence of the criminal intent with which it is done. A criminal attempt bears criminal intent upon its face. The thing speaks for itself. If this formula is applied carefully, it would be easy to say where preparation ends and attempt begins. The ground of distinction will be merely **evidential.**

An attempt to do what is impossible may be indictable.²¹

The principle of those decisions is as follows: In the words of Butler, J., an American Judge, it would be a novel and startling proposition that a known pickpocket might pass around in a crowd in the view of policemen and even in the room of a police station and thrust his hands into the pockets of those present with intent to steal and yet be not liable to arrest or punishment until the policeman has first ascertained that there was in fact money or valuables in some of the pockets.²²

The vexed question as to where preparation ends and the attempt starts has been sought to be resolved by following four different approaches, viz. (a) proximity rule, (b) doctrine of *locus penitentiae*, (c) equivocality theory, and (d) **social danger test.**

21. R. v. Brown (1880) 24 Q. B. D. 357; Rex v. Burg, 1892 17 Cox 491; Queen v. M. Jivaji, 11 Bow. 376.

22. See H. H. H. The Principle of the Law of Crimes (Boston, U.S.A.) p. 55.

(a) The rule is that an act of attempt must be sufficiently proximate to the crime intended and that it should not be remotely leading towards the commission of an offence and that it must contribute an interpenultimate act and that the act done should place the accused into a relation with his intended victim.²³

(b) Abandonment is a defence, if the attempt to commit a crime is freely and voluntarily abandoned before the act is put in process of final execution.²⁴

(c) The act is criminal, if and only if it indicates beyond reasonable doubt what is the end towards which it is directed.²⁵

(d) The seriousness of the crime attempted has been one of the criteria in deciding the liability in case of attempt.¹

3. Motive, meaning of. Motive, according to Murray's Dictionary, is, "that which moves or induces, a person to act in a certain way; a desire, fear, or other emotion, or a consideration of reason which influences or tends to influence, a person's volition; also often applied to contemplated result or object, the desire of which tends to influence volition." This definition may be again abridged as "something so operating upon the mind as to induce or tend towards inducing a particular act or course of conduct."² Motive is an emotion, a state of mind, but it is often confused with events tending to excite the emotion, the outward facts which may be the stimulus and cause of the emotion. Motive, in the correct sense, is the emotion supposed to have led to the act. The external fact, which is sometimes styled the motive, is merely the possible exciting cause of this "motive" and not identical with the motive itself, and the evidentiary question is not whether that external fact is admissible as a motive, but whether it is admissible to show the probable existence of the emotion or motive.³

The emotion or state of mind which moves a man to act may be produced by a certain belief, but whether the belief which produces that state of mind is true or false, the motive remains the same.⁴

4. Motive and intention distinguished. Motive must not be confounded with intention. Intention is an act of the will directing an act or a deliberate omission. It shows the nature of the act which the man believes he is doing. If he fires at a tiger, and the ball glances off and kills a man, he intends to kill the tiger, he neither intends to kill the man nor to do any act which would have that result. Motive is the reason which prompts the intention. It is the reason which induces him to do the act which he intends to do and does. If his act is absolutely legal, the motive which leads him to do it cannot make it illegal.

23. Glanville Williams, *Criminal Law*, General Part, p. 477, etc.

24. Inbau and Sowle, *Cases and Comments on Criminal Justice*, (1960), p. 411.

25. Turner, *Modern Approach to Criminal Law*, p. 279.

1. Holmes, *The Common Law* (1881), p. 68.

2. Wills, *Circ. Ev.*, 5th Ed., p. 57.

3. Wigmore, *Ev.*, s. 117.

4. Crump, J., in *Ganga Ram v. Emperor*, 1920 B. 371; 62 I. C. 545; 22 Bom. L. R. 1274.

If a man sinks a well in his own land, his act does not become unlawful because his motive is to drain the current of water which supplies his neighbour's well. On the other hand, the presence of a good motive can never be an excuse for the exercise of the will to commit a criminal act. If the act intended is absolutely illegal, it cannot become lawful by being done for an excellent motive. A man who libels another from the loftiest motive, such as to promote the public welfare, is just as criminal as if he had done so for spite.

5. When motive is important. But motive is sometimes important as evidencing a state of mind which is a material element in the offence charged.⁵ If a person kills another under the pretext of self-defence, it is essential to consider whether his real motive was to save his own life or to take a cruel revenge upon a man whom he found in his power. If provocation is set up as extenuation of what would otherwise be murder, the motive under which the act was done is material, as bearing upon the question whether the provocation had deprived the prisoner of self-control.⁶ "In estimating probabilities motive cannot, in a general sense, be safely left out of the account. When the motive is a pecuniary one, the wealth of the offender is no unimportant consideration.⁷ Motive, though not a *sine qua non* for bringing the offence of murder home to the accused, is relevant and important on the question of intention.⁸ Generally, the voluntary acts of sane persons have an unpelling emotion or motive.⁹ It has, therefore, been observed that the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence.¹⁰

6. Relevancy of motive. Conceiving an emotion (or motive) as a circumstance showing the probability of appropriate ensuing actions, it is always relevant.¹¹

It is always a just argument on behalf of one accused that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive, on the other hand, proof of motive tends in some degree to render the act so far probable as to weaken presumptions of innocence and corroborate evidence of guilt.¹² The absence of all motive for a crime when corroborated by independent evidence of the prisoner's previous insanity, is not without weight.¹³ However improbable an alleged motive may be, the prosecution is entitled to call evidence in support of it, and none the less so because such evidence may suggest that the accused has committed some crime

5. Per Lord Watson, in *King v. Henderson*, (1898) A. C. 720.

6. *Mayne's Criminal Law of India*, s. 9 A. See also *Plipson* 11th Ed., p. 183.

7. Per Sir Lawrence Peel C. J., in *R. v. Hedger*, (1852) p. 131. *Starkie on Ev.*, 132.

8. Per Mukerji, J., in *Hazrat Gul Khan v. Emperor*, 1928 Cal. 430, 109 I. C. 482, 32 C. W. N. 345.

9. See *Wigmore, Ev.*, s. 118. *Norton Ev.*, 107. In *Palmer's case* (see *Steph. Introd.* 107-108) Rolfe, B. in addressing the jury, said: "Had the prisoner the opportunity of administering poison, that was one thing. Had he any motive to do

so, that is another." *Wills' Circ. Ev.*, 6th Ed., 356.

10. *Wills' Circumstantial Evidence*, 6th Ed., 260. *Burrill's Circ. Ev.*, 281, et seq.; *Best Ev.*, s. 453. See illustrations (a), (b).

11. *Wigmore*, s. 118.

12. *Woodroffe, J.* in *Kennedy v. People*, 39 N. Y. 245, 254.

13. *R. v. Mustafa*, (1864) 1 W. R. Cr. 19; *R. v. Sorab*, (1866) 5 W. R. Cr. 28, 31; *R. v. Bihar Ali*, (1871) 15 W. R. Cr. 56; *Dil v. R.*, (1907) 34 Cal. 686 (absence of motive); *R. v. Jarchand*, (1867) 7 W. R. Cr. 60 (proof of motive not necessary).

other than that with which he is charged.¹⁴

An emotion may impel against, as well as towards, an act. Thus, a defendant's strong feelings of affection for a deceased person would work against the doing of violence upon him and would thus be relevant to show the not doing. This is also the significance of evidence that there was "no apparent motive" for a murder; for a state of emotional indifference, i.e., the absence of any anger, jealousy, or the like—is almost equally powerful in its operation against a deed of violence.¹⁵ If the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive.¹⁶ The absence of motive is always a circumstance which is relevant for assessing the evidence.¹⁷ It is not necessary that motive must be proved by the prosecution in every criminal case. Of course if motive is sought to be established by evidence on record and the motive is found to be false on consideration of the evidence, then it may have some effect on the prosecution case sought to be made out; because no motive has been proved that will not by itself affect the prosecution case.¹⁸

7. Adequacy of motive. If there be any motive which can be assigned, the adequacy of that motive is not, in all cases, necessary. Atrocious crimes have been committed from very slight motives.¹⁹ Absence of motive, or the existence of an inadequate motive, is of comparative unimportance where there exists absolutely cogent evidence that a crime has, in fact, been committed by a certain person.²⁰ That is to say, when there is direct evidence of an eye-witness motive recedes to the background. The absence of motive involves only this that the other evidence has got to be very closely examined.²¹

14. *Natha Singh v. Emperor*, 1946 P.C. 187; 73 I. A. 195; 227 I. C. 1: 59 L. W. 650.

15. *Wigmore*, s. 118.

16. *State of U. P. v. Hari Prasad*, 1974 Cr. L. J. 1274 at 1276; 1974 S. C. Cri. R. 106; 1974 S. C. C. (Cri.) 203; (1974) 3 S. C. C. 673; 1974 B. B. C. J. 163; 1974 Cr. L. R. (S.C.) 68; (1974) 2 S. C. R. 588; A. I. R. 1974 S. C. 1740; *Mukhtiar Singh v. State of Punjab*, (1974) 1 Cr. L. T. 225; 1974 Punj. L. J. (Cri.) 538; 1975 Cr. L. J. 132.

17. *Prince Prosecutor v. A. Hari Babu*, (1975) 1 All. W. R. 304 at 308; (1975) Mad. L. J. (Cri.) 283; *Rajendra Kumar v. State of Punjab*, 1963 M. L. J. (Cr.) 506.

18. *State of Assam v. Upendra Nath*, 1975 Cr. L. J. 354 at 400 (Gau.).

19. Per Lord Campbell, C. J., in *R. v. Palmer* cited in *Wills' Circ. Ev.*, 6th Ed., 63; *R. v. Hedger*, (1840) 12 Ad. & El. 139.

20. *Mata Din v. Emperor*, 1937 Oudh 236; 167 I. C. 579; *Manbodh v. State*, 1955 Nag. 97; I. L. R. 1955 Nag. 23.

21. *Atley v. State of U. P.*, A. I. R. 1955 S. C. 80; 56 Cr. L. J. 1653; 1956 All W. R. 483; 1956 S. C. C. 159, see also *Prem Narain v. The State*, A. I. R. 1957 All. 177; *Hari v. State*, A. I. R. 1958 Cal. 118;

1958 Cr. L. J. 362; *Gurcharan Singh v. State of Punjab*, A. I. R. 1956 S. C. 460; 1956 Cr. L. J. 827; *Sita Ram Pandey v. State of Bihar*, I. L. R. (1975) 54 Pat. 5; 1976 Cr. L. J. 800 Pat. N. N. Nair v. State of Maharashtra, (1970) 2 S. C. C. 101; 1970 S. C. D. 697; 1970 S.C. (Cri.) R. 516; (1971) 1 S. C. J. 72; 1971 M. L. J. (Cri.) 43; 1971 All W. R. (H.C.) 160; 1971 All Cri. R. 156; 1971 M. L. W. (Cri.) 71 (2); (1971) 1 S. C. R. 133; A. I. R. 1971 S.C. 1656 (If court is satisfied about accused being guilty of crime, court need not consider question of motive); *Paras Ram v. State of U. P.*, 1973 Cr. L. J. 428 (H.P.); (1972) 1 Cut. L. R. (Cri.) 285; 38 Cut. L. T. 734; 1974 Punj. L. J. (Cri.) 271; 1975 W. L. N. 373 (Raj.); *Radha Kishan v. State*, 1973 Cr. L. J. 481; *State of Assam v. U. S. Rajkhowa*, 1975 Cr. L. J. 374 (Gau.); *P. Narain v. State of A. P.*, 1975 Cr. L. J. 1062; A. I. R. 1975 S.C. 1252; *Nachhettar Singh v. State of Punjab*, 1974 Cri. App. R. (S.C.) 307; 1974 Cr. L. R. (S.C.) 634; 1975 Cr. L. J. 66; 1974 S. C. C. (Cri.) 874; 1974 B. B. C. J. 919; (1975) 3 S. C. C. 266; (1975) 1 S. C. W. R. 645; 1975 S. C. Cri. R. 306; A. I. R. 1975 S. C. 118.

Where there is a positive proof that a person committed a crime, no motive or ill-will is required for sustaining a conviction.²² Lust of land is a very sensitive matter. A very large number of cases have occurred resulting in serious disputes culminating in murders over small land disputes. Various persons react differently in similar circumstances and where the accused was held to have reacted very sharply against what he considered to be an inequitable distribution of the property, this could undoubtedly provide an adequate motive for the murder.²³

The possibility of accused having asked the deceased to settle the land held by her upon his sons, or in the alternative to adopt any one of them. Either of these two courses would have ensured the land coming to his family and not being disposed of in favour of any outsider. The refusal by the deceased to comply with the request persistently made and the possibility of the land going out of the reach of the accused could not also be regarded as an inadequate motive.²⁴

It is not possible to enter into any meticulous calculations of proportion between motive and offence, because it is all a matter which can have reference to the degree of mental depravity or discipline of the individual concerned.²⁵

8. Value of motive. Whether the motive of an accused is sufficient, or whether the absence of motive is crucial is to be judged in the whole context of the facts of the case. Motive is of great importance where conclusion rests on circumstantial evidence. But where the circumstances can lead but to one conclusion of guilt, remoteness of motive is not crucial. The law on the point is clear enough. The question of motive is of great importance in circumstantial evidence and where there is absence of such motive, the Court should carefully examine the absence of motive as a circumstance in favour of the accused. But nevertheless, having made proper allowance for it in giving due weight to it, if the Court is satisfied that the circumstances are such that they can lead but to one conclusion which makes the accused guilty, then absence of motive cannot vitiate the conviction.¹ In *Atley v. State of U. P.*² it was said that where the evidence, led on behalf of the prosecution, did not clearly establish the motive for crime, the other evidence bearing on the guilt of the accused has to be very closely examined, though where there is clear proof of motive for the crime that lends additional support to the finding that the accused was guilty. But the absence of clear proof of motive does not necessarily lead to the contrary conclusion.

Motive assumes importance only where direct and credible evidence is not

22. *Atley v. State of U. P.*, M. L. W. (Cr.) 239; A. I. R. 1971 Mad. 194, 197.

23. *Mat. Dalbir Kaur v. State of Punjab*, A. I. R. 1977 S.C. 472 at 484; (1977) 1 S. C. J. 54; (1977) M. L. W. (Cr.) 158; (1976) S. C. C. (Cri.) 527.

24. *Shivji Genu Mohite v. State of Maharashtra*, 1973 Cri. L. J. 159 at 163; 1973 S. C. C. (Cri.) 214; 1972 Cri. App. R. 432 (S.C.); 1973 U. J. (S.C.) 163; (1973) 3 S. C. C. 219; 1973 Mad. L. J. (Cri.) 462; (1973)

S. C. J. 133; 1973 Cri. L. R. (S.C.) 288; A. I. R. 1973 S.C. 55.

25. *M. S. Srinivasulu v. State of A. P.*, (1975) 2 A. P. L. J. 146.

1. *Arun Kumar v. The State*, A. I. R. 1967 C. 204. See also *Lopendra Nath v. Emperor*, A. I. R. 1940 C. 561; *Radha Kishan v. State*, 1973 Cri. L. J. 481.

2. A. I. R. 1955 S. C. 807; 1955 Cri. L. J. 1653; 1956 All W. R. 483; 1956 S. C. 159.

available and the case rests upon circumstantial evidence.³ Motive for a crime, while it is always a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of an accused person, can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged.⁴

Facts showing motive are not entirely valueless but are relevant to prove the crime. Thus, where the accused has murdered her brother-in-law by poisoning, evidence that the deceased had threatened to expose the accused and his being beaten by her paramour, would be relevant to prove the previous enmity which led to the murder.⁵ Motive is not an indispensable link in the chain of circumstantial evidence, nevertheless it is a strand that runs through all the links and helps to forge a complete chain.⁶

Where the direct evidence as to the commission of the crime breaks down, it is unnecessary for the Court to discuss the evidence for the motive of the crime.⁷

Mere motive cannot be considered as sufficient evidence of the commission of a crime by a particular person.⁸ The mere fact, however, of a party being so situated that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it.⁹ A letter written by the Solicitor of a company of the plaintiff stating that the company declined to continue the negotiations for a contract because of the defendant's threats, was held admissible (though not necessarily conclusive) evidence that the negotiations were in fact discontinued because of the defendant's threats.¹⁰ Further, the existence of motives invisible to all except the person who is influenced by them must not be overlooked.¹¹

3. *Bhagat v. Hyderabad Government*, 1954 Hyd. 146; *Udaipal Singh v. State of U. P.*, 1971 Cri. A. P. R. 427 (S.C.); 1972 U. J. (S.C.) 38; 1972 M. L. J. (Cri.) 259 (1972) 1 S. C. J. 408 (1972) 1 M. L. J. (S.C.) 64; (1972) 1 An. W. R. (S.C.) 61; 1972 All. Cri. R. 226; 1972 Cri. L. J. 7; A. I. R. 1972 S. C. 54; *Ab. Monidin Ginnu v. State*, 1972 Cri. L. J. 173 (Goa); *Shahabuddin v. State of Rajasthan*, 1972 W. L. N. 648; 1972 Raj. L. W. 629; 1973 Cri. L. J. 723 (absence of motive is a strong circumstance in favour of the accused); *Ram Gopal v. State of Maharashtra*, 1972 S.C. Cri. R. 169; 1972 U. J. (S.C.) 304; (1972) 2 S. C. W. R. 250; 1972 Cri. L. J. 473; A. I. R. 1972 S.C. 656 (If motive as a circumstance is put forward it must be fully established like any other incriminating circumstance); *Dasa alias Dasamant Majhi v. State*, (1975) 41 Cut. L. J. 636; *Radha Kishan v. State*, 1973 Cri. L. J. 48; I. L. R. (1971) 21 Raj. 419; *Shivji Genu Mohite v. State of Maharashtra*, 1973 Cri. L. J. 159; 1973 S. C. C. (Cri.) 214; 1972 Cri. App. R. 432 (S.C.); 1973 U. J. (S.C.) 163; (1973) 3 S. C. C. 219; 1973 Mad.

I. J. (Cri.) 462; (1973) 2 S. C. J. 303; 1973 Cri. L. R. (S.C.) 268; A. I. R. 1973 S.C. 55.

4. *Rannun v. King Emperor*, A. I. R. 1926 Lah. 88; I. L. R. 7 Lah. 84; 94 I. C. 901; 27 Cr. L. J. 709; *Pratap Singh v. State of Madhya Pradesh*, 1970 Lab. I. J. 797; 1970 M. P. L. J. 478; 1971 Cri. L. J. 172; *State of Rajasthan v. Manga*, 1973 Raj. L. W. 52; 1973 Cri. L. J. 1075 (Raj.).

5. *Himachal Pradesh Administration v. Mr. Shiv Devi*, A. I. R. 1959 H. P. 3.

6. *Sivaraman v. State*, I. L. R. 1959 Kerala 319; 1959 Ker. L. T. 167; 1959 Ker. L. J. 221.

7. *Ghorrao v. Emperor*, 1983 Oudh 265; 145 I. C. 470; 10 O. W. N. 1108.

8. *Dita Ram v. Emperor*, A. I. R. 1932 Lah. 195; 137 I. C. 681; 33 Cr. L. J. 501.

9. *Best v. Fox*, 5 L. J. 153.

10. *Skinner & Co. v. Shaw & Co.*, I. R. 2 (1894) Ch. D. 581.

11. As to acts apparently motiveless see *R. v. Haynes*, (1859) 1 F. & F. 666, 667; *R. v. Michael Stokes*, (1848) 3 C. & K. 185, 188 and next note.

Motive or malice in prosecution may, if established, affect the appreciation of the prosecution evidence but it cannot affect the validity of the investigation and the prosecution if it is otherwise regular.¹² The court need not consider the question of motive for the offence of murder if it is satisfied that the evidence that the accused was the assistant of the deceased victim, was acceptable.¹³

9. Motive not essential. "It is sometimes", Professor Wigmore points out, popularly supposed that in order to establish a charge of crime, the prosecution must show a possible motive. But this notion is without foundation." Assuming for purposes of argument that "every act must have a motive, i.e., a prior cause as compelling emotion" (which is not strictly correct), yet it is always possible that this necessary emotion may be undiscoverable, and therefore the failure to discover it does not signify its non-existence."

"The kinds of evidence to prove an act vary in probative strength and the absence of one kind may be more significant than the absence of another, but the mere absence of any one kind cannot be fatal. There must have been a plan to do the act, we may assume, the accused must have been present (assuming it was done) by mental act, but there may be no evidence of preparation, or there may be no evidence of presence, yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate motive may be a great weakness in the whole body of proof, but it is not a fatal one as a matter of law. In other words, there is no more necessity in the law of evidence to discover and establish the particular existing emotion or some possible one, than to use any other particular kind of evidential fact."¹⁴ When facts are clear it is immaterial that no motive has been proved.¹⁵

Motive is not an element essential to prove the guilt in a criminal trial. It is a factor to be taken into account along with other circumstances.¹⁶ If there are circumstances in a case which prove the guilt of the accused, they are not weakened because the motive has not been established. It often happens that only the culprit himself knows what moved him to a certain course

12. *P. S. Sengupta v. Government of Madras*, 1 L. L. R. (1967) 3 Mad. 697 (1968) 1 M. L. J. 480; 1968 M. L. W. (Cr.) 223; 1968 Cr. L. J. 100; AIR 1968 Mad. 117, 125.

13. *Narayan Nathu Naik v. State of Maharashtra*, 1970 S. C. D. 697; (1971) 1 S. C. J. 72; 1971 A. W. R. (H.C.) 160; 1971 M. L. J. (Cr.) 45; 1971 M. L. W. (Cr.) 71 (2); AIR 1971 S. C. 1656, 1657.

14. Wigmore, Ev., s. 118, citing *Poinster v. U.S.*, 151 U.S. 396 (Amer.), of motive is never indispensable to conviction; *State v. Rathbun*, 74 Conn. 524 (Amer.) (the other evidence may be such as to justify

a conviction without any motive being shown); *Emperor v. Ram Dat*, 1933 Oudh 340; 143 I. C. 129; 10 O. W. N. 585.

15. *Hazrat Gul Khan v. Emperor*, 1928 Cal. 430; 109 I. C. 482; 32 C. W. N. 345; *Kazi Badrul Rahman v. Emperor*, 1929 Cal. 1; 115 I. C. 561; 33 C. W. N. 136; *Mohna v. Crown*, 1925 Lah. 328; 86 I. C. 406; 26 Cr. L. J. 774; *Mathura v. Emperor*, 1937 Oudh 354; 155 I. C. 527; 1937 O. W. N. 561; *Chet Ram v. The State of U.P.*, 1958 A. L. J. 82; *State v. Hadibandhu Mati*, (1973) 39 Cut. L. T. 619; 1973 Cut. L. R. (Cri.) 241; 1 L. R. (1973) Cut. 601.

16. *State v. Ganesh Sahi*, 1952 Pat. 1; 1953 Cr. L. J. 145.

of action.¹⁷ Where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance.¹⁸ Even if the genesis or the motive of the occurrence was not proved the ocular testimony of the witnesses as to the occurrence could not be discarded only on that account if otherwise it was reliable.¹⁹

The effect of motive between the deceased and the wife of the accused's brother, who, after the murder, kept up of the house of that brother was a provocation which would also be a motive for the accused murdering her husband.²⁰

10. Motive as a fact in issue. 'Motive may be a fact in issue in some cases. Thus it may be in issue—

- (1) in the sense of good or bad faith; as where the motive of a transfer is charged to have been in fraud of creditors;
- (2) in the sense of reason or ground for conduct, as where the motive of a wife for leaving her husband is disputed, or of employees for leaving their employer; and
- (3) in the sense of malice or criminal intent.²¹

11. Proof of motive. The motives of parties can only be ascertained by inference from the facts.²² But the motive should not be inferred from any other than the positive evidence of the strictest character.²³ Motive can never be proved by circumstantial evidence. The Evidence Act, however, is silent under Section 32.²⁴

It is a settled rule of law that the Court is to consider the evidence adduced before it and to draw such inferences as to the commission of the crime as the suggestion of crime is consistent with the whole of the evidence before the Court.

12. Preparation. The act of preparation is not an offence, nor is it necessary for the commission of a crime. An intention to commit a crime towards the commission after preparations are made.

17. *Rajinder Kumar v. State of Punjab*, (1963) 3 S.C.R. 281; 1963 S.C.D. 43; (1963) 2 S.C.J. 418; 1963 M.L.J. (Cr.) 506; A.I.R. 1966 S.C. 1322, 1324; *Rajendra v. State*, 1968 Cr. L.J. 811 (All.); *Atundhan Kuntani v. The State*, 1968 Cr. L.J. 848, 850 (Orissa); *Ramesh Chandra v. State*, 1969 Cr. L.J. 1549; A.I.R. 1969 Tripura 53.

18. *Gurcharan Singh v. State of Punjab*, 1956 S.C. 460; *Rajendra v. The State*, 1968 Cr. L.J. 811 (All.), at p. 818; *State v. Bhola Singh*, I.L.R. 1962 Pat. 1002; A.I.R. 1969 Raj. 219; *Vinayaka Datta v. State*, 1970 Cr. L.J. 1081; A.I.R. 1970 Goa 96, 101 (threats by accused to deceased constitute motive and explain antecedent conduct); *Surjan Singh v. State*, 1971 W. L. N. 360; *Sita Ram v. State of Bihar*, 1976 Cr.

L. J. 800; *Dasa Kandha v. State*, 1976 Cr. L. J. 2010; (1976) 42 C. L. T. 599.

19. *Bahal Singh v. State of Haryana*, 1976 Cr. L. J. 1568 at 1572; (1976) 3 S.C.C. 564; (1976) S.C.C. (Cr.) 461; A.I.R. 1976 S.C. 2032.

20. *Krishna Wanti v. The State*, 71 P.L.R. 280.

21. *Wignmore*, s. 119.

22. *Taylor v. Willans*, (1860) 2 B. &

23. *R. v. Zuhir*, (1868) 10 W.R. (Cr.) 11.

24. *ib.*, *Venkatasubba Reddi v. Emperor*, Mad. 951; 134 I.C. 1145; 34 L.W. 128.

25. *Dwarka v. Emperor*, 1951 Oudh 119; I.L.R. 6 Luck. 475; 131 I.C. 439.

1. *Jain Lal v. Emperor*, 1943 Pat. 82 at p. 87; I.L.R. 21 Pat. 667; 205 I.C. 69.

The reasons which exist for the relevancy of evidence of preparation or design have been already given. Design may be proved by an utterance in which it is avowed, by conduct, indicating the inward existence of design; by evidence of prior or subsequent existence of the design as indicating its existence at the time in question^{1, 2, 4}. Previous attempts to commit an offence are closely connected to preparations for the commission of it, and only differ in being one or more steps rather and nearer to the criminal act, of which, however, like the former, they fall short.²⁵

Under Section 14, both of preparation for and previous attempts to commit an offence rests on the presumption that an intention to commit the offence was formed in the mind of the accused which persisted until power and opportunity were found to carry it into execution. Such evidence is admissible both under this section as showing preparation for the commission of the offence and under Section 14 as exposing the state of mind and intention on the part of the accused to commit the offence.³

In the under noted case, the accused was charged with cheating for importing goods in port Karachi without payment of the proper customs duty by deceiving the Customs authority. Evidence was adduced of a previous visit of the accused to the port of Okla where, it was said, he tried to make some arrangement with the Customs, whereby he could import other goods without payment of the proper Customs duty. It was held, the evidence was admissible under this section as constituting the motive or preparation for the commission of the offence at Karachi and previous conduct.

13. **Conduct.** Preparation and previous attempts are instances of previous conduct of the party influencing the fact in issue or relevant fact; but other conduct also, whether of party or of an agent to a party, whether previous⁴ or subsequent⁵ and whether influencing or influenced by a fact in issue or relevant fact, is also made admissible under this section. A man's conduct is not only what he does, but also what he refrains from doing, and the latter is often the more significant.⁶ 'Conduct' has, in certain circumstances, include statements as well as acts as Explanation 1 to this section shows.⁷

When the witness was the first to reach the scene and he found the accused lying on the verandah of his house with a steel dagger in the heart. The accused told him that he had "finished his case" (died). Another witness who arrived three hours later, was told by the accused that his wife was

1-24. *Jainlal v. Emperor*, 1943 Pat. 82, 28 et seq. e.g. possession of tools, materials, preparations, journeys, experiments, enquiries, and the like.

25. Best's Ev., 455; S. 14 post, illustr., and informative circumstances connected with preparation and previous attempt, see Best, Ev., ss. 456, 457.

1. *Abhu v. State*, 1970 M.L.W. (Cr.) 239; A.I.R., 1971 Mad. 194, 197.

2. *Mohan Lal v. Emperor*, 1937 Sind L.C. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

3. See illustrations (c), (d) and S. 14 illustrations (i), (j) and (o).

4. See illustration (d), (e); as to conduct, see Best, Ev., s. 452; *Mohan Lal v. Emperor*, 1937 Sind 293; 172 I.C. 374; 39 Cr. L.J. 123.

5. See illustrations (e), (i). But see *Pat.* 235; 54 I.C. 775; 21 Cr. L.J. 167.

6. *Ram Narain v. Chota Nagpur Banking Association*, 1917 Cal. 746; 43 Cal. 332; 36 I.C. 321, also *Watson v. Mohesh*, (1875) M.W. R. 176.

7. See *Shankar v. Nand Lal*, 1941 All. 145; 1 I.L.R. 1941 All. 280; 193 I.C. 873.

in the habit of abusing his children when she served meals to them and that despite his persuading her not to do so, she had continued abusing them and, therefore, he had decided to put an end to the entire family. He was further told by the accused that after he murdered his wife and children, he had decided to commit suicide by jumping from a tree, but as his courage failed him, he came down. After that, he climbed an electric pole near his house with the same object, but came down from that also. It was argued that the accused intended the members of his family to be suffering from unsoundness of mind, so that he was incapable of knowing the nature of his acts, or that he was ignorant what was either wrong or contrary to law. Held it was not because of unsoundness of mind that the accused did away with the members of his family. The accused had been acting for a considerable time, and that he was so even during the time when the offence took place. The burden of his illness and the constant domestic bickering and unhappiness at home took the accused to the point of ultimate despair when he decided that he could take no more. That culminated in the decision to put an end to himself and his family. The circumstances in which the accused was found in his verandah in the morning still wearing the bloodstained clothes, making no attempt to remove the clothes or other incriminating evidence or to run away did not necessarily lead to the conclusion that he was of unsound mind. On the contrary, it was wholly consistent with the case that the accused had decided to put an end to his life also. There was no evidence to show that the cognitive faculties of the accused had been impaired so that he could not judge the consequences of what he was doing. The trial Judge erred in applying Section 84, Indian Penal Code. The accused caused the death of his wife and children with the intention of causing their death and he was liable to be punished under Section 302, Indian Penal Code.⁸

"It is not competent for the prosecution to adduce evidence leading to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crime does not render it irrelevant if it be relevant to an issue before the jury."⁹ Under this section, conduct is a material perspective of the fact whether the conduct was or was not the result of inducement offered by the police.¹⁰

Whether in a particular case, the conduct of the accused is a relevant factor or it is not depends for decision on the facts and circumstances of each particular case. In the *above* noted case, at the time when the accused was called upon to produce the money which had been received as bribe from a person, the accused hesitated and he was trembling and perspiring, it was held that the conduct of the accused was a relevant factor which could be taken into consideration.¹¹ But where the accused, while going out, after

8. *The State v. Lal Din*, 1973 Cr. L.J. 877 (S.C.).

9. *Makin v. Attorney-General of New South Wales*, (1894) A.C. 57; 58 J.P. 48; 63 L.J.P.C. 411; 17 Cox C.C. 704; see also *Emperor v. Stewart*, 1927 Smd 28; 97 I.C. 1041.

10. *Jagadamba Prasad v. State*, A.I.R. 1957 Madhya Bharat 33; 1957 Cr. L.J. 179.

11. *M.M. Gandhi v. State of Mysore*, A.I.R. 1960 Mys 131; 1960 Cr. L.J. 934; *Shiv Bahadur Singh v. State of Vindhya Pradesh*, A.I.R. 1954 S.C. 322; 1954 Cr. L.J. 910; 1954 S.C.J. 362; 1954 S.C.A. 1316; 1954 S.C.R. 1098 and *State of Madras v. Vaidyanatha Iyer*, A.I.R. 1958 S.C. 61; 1958 Cr. L.J. 232; 1958 Mad. L.J. Cr. 299; 1958 S.C.R. 580 followed.

taking the alleged bribe, was halted and made a statement, that statement was held not admissible under this section¹². The conduct of the accused would be relevant under Section 8 of the Evidence Act if his immediate reactions to the illegal overture of the complainant or his action in inserting unwanted something in his pocket were revealed in the form of acts accompanied then and there or immediately thereafter by words or gestures reliably established. There was no evidence to support an innocent piece of conduct.¹³

14. Person whose conduct is relevant. The second clause applies to the party's agents as well as the party himself. 'Party' includes not only the plaintiff and defendant in a civil suit, but parties in a criminal prosecution, that is the complainant and the accused. The section provides that the term 'party' is to include any one against whom an offence is the subject of any proceeding, and the reason why the Legislature said this was, probably, the fact that, by a pure legal technicality, the State occupies, in criminal matters, a position analogous to that of plaintiff in a civil suit^{14 15}.

In a murder case, a complaint made by the deceased to the Sub-Divisional Officer about a week before the alleged murder stating that he seriously apprehended danger to his life at the hands of certain persons was held to be admissible under this section as evidence of the conduct of the deceased, an offence against whom was the subject of trial, such conduct being influenced by his fear of injury¹⁶. Where a letter written by a relation of the accused referring to an attempt to raise money to buy off the prosecution was tendered in evidence, it was held, that it could not be received in evidence, as an admission of the accused without proof that it was written with the knowledge and direct authority of the accused.¹⁷

Documents filed in maintenance proceedings are relevant and admissible in proceedings under Section 10, Hindu Marriage Act, 1955, as evidence of conduct of the husband towards the wife.¹⁸

Letters written by a married sister to her brother complaining of maltreatment by her husband in so far as they point to her conduct are admissible in evidence for the conduct of a party levelling complaints and seeking protection from maltreatment is evidence of *res gestae*¹⁹.

The conduct of an accused is relevant against him but not against his co-accused²⁰. This is on the principle that the evidence of conduct admissible under this section is of the conduct of a person who is a party to the action. It is thus reasonably clear that evidence of acts, statements or writings of a co-

12. *Zwringlee Ariel v. State of M.P.*, A.I.R. 1964 S.C. 1030 C.L.J. 230.

13. *Maha Singh v. Delhi Administration*, 1966 C.L.J. 336 at 343. A.I.R. 1976 S.C. 449. 1976) 1 S.C.C. 647. 1976 S.C.C. (Ch.) 1. : 1976 Cr. A. R. (S.C.) 94; 1976 S.C. C.R. 128. 1976 3 S.C.R. 119.

14 15. *R. v. Abdullah* (1885) 7 A. 385, 990 490. 7 A.W.N. 8. F.B.; see *R. v. Arnali*, (1861) 8 Cox.

C.C. 439 : 3 Russ. Cr. 489.

16. *Coloke Behari Lalal v. Emperor*, 1938 Cal. 51 at p. 58. 11 R. 238. 1 Cal. 290. 173 I.C. 65.

17. *Lojan Singh v. Emperor* 1925 All. 405. 86 I.C. 817. 26 C.L.J. 881.

18. *Shyam Chand v. Janki*, 1966 Cr. L.J. 1438 : A.I.R. 1966 Him. Pra. 70-73.

19. *Smt. Chander Kanta v. Dhal Chand*, 70 P.L.R. 691.

20. *Des Raj v. The State*, 1951 Simla 14.

conspirator either under trial or not on trial but outside the period of conspiracy would not be admissible in proof of the specific issue of the conspiracy.²¹

The explanation of any admission or conduct on the part of a party must if the party is alive and capable of giving evidence come from him and the court will not imagine an explanation which the party himself has not chosen to give. If the party, the main defendant in the instant case, abstains from entering into the witness box, it would give rise to an inference adverse to him (alleged adoption).²² The defendants in a conspiracy case were found swindling funds of society. They agreed before the members who were arbitrating in the affairs to make good the loss and signed the agreement. It was held that though the agreement may not be used as extra judicial confession, the same could be used as evidence of conduct of the defendants.²³

15. Conditions of admissibility. The conduct of a party or his agent must be in reference to the suit or proceeding, or in reference to any fact in issue therein or relevant thereto. Again conduct is admissible under this section only if it influences or is influenced by any fact in issue or relevant fact.²⁴ The conduct of the accused is relevant only for the purpose of proving his guilt. That piece of conduct can be held to be incriminatory, which has no reasonable explanation except on the hypothesis that he is guilty. That is to say, conduct which destroys the presumption of innocence can alone be considered as material.²⁵

When there was not an iota of evidence as to any reason for the appellant to do away with deceased, it was not possible to affirm his conviction under Section 364 of the Indian Penal Code on such evidence adduced by the prosecution. The fact that he had escaped from custody was not sufficient for coming to the conclusion that he was guilty of the charge of abduction of the deceased resulting in his murder.¹⁻²

16. "Influences or is influenced." In the Full Bench case of *R. v. Abdullah* the accused was charged with murder, and it appeared that, shortly before her death the deceased was questioned by various persons as to the circumstances in which the injuries had been inflicted on her and in reply she made certain signs in answer to the questions as she was unable to speak. On a question being raised as to the admissibility in evidence of the questions put to the deceased and the signs made by her in answer to them Mahmood, J. was, in view of illustration (d) to this section, of opinion that the word "conduct" in this section does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact and that the signs

1. See *State v. Singh*, 1957 S.C. 747; 1957 S.C.J. 780; 1958 All. W.R. (Sup.) 1; 1957 Cr. L.J. 1325; (1957) 1 M. L.J. Cr. 739.
22. *Arjun Singh v. Virendra Nath*, A.I.R. 1971 All. 29, 35.
23. *Arjuna Panigrahi v. State*, 1974 Cut. L. R. (Cri.) 203.
24. See *Hadu v. State*, 1951 Orissa 53; I L.R. (1950) Cut. 509.
25. *Anant Lagu v. State of Bombay*, A.I.R. 1960 S.C. 500; 1960 Cr.

1. (1960) M.L.J. (Cr.) 493; *State v. Lavinder Singh*, (1972) 2 Sim. L.J. 349; 1973 Cr. L.J. 1023; *Narsingha Karwa v. State*, (1974) 40 Cut. L.T. 491; *Dattar Singh v. State of Punjab*, 1974 Cr. L.J. 908; A.I.R. 1974 S.C. 1193.
1-2. *Narain Mahton v. State*, 1974 B. L. J. R. 642 at 644.
3. (1885) 7 All. 385; 5 A.W.N. 78 (F.B.).

made by the deceased were relevant under this section as conduct of a "person an offence against whom is the subject of any proceeding" and that the questions put to her were admissible in evidence, either under Explanation II of this section or under Section 9 by way of explanation of the meaning of the signs. Petherick, C. J. was of a contrary opinion, and held, that the conduct made relevant by this section is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons. The ruling of the Full Bench, however, was that the questions and signs taken together were admissible under Section 32, as "verbal statements" made by a person as to the cause of her death. This ruling was followed without dissent by the Calcutta⁴, Lahore⁵, Patna⁶ and Bombay⁷ High Courts. But the question of the admissibility of the signs under this section has been left unanswered, although in the Bombay case⁸ Broomfield, J. observed :

"I should never have thought that her gestures as explained by the question put to her would be relevant as conduct under Section 8, although I must admit that Section 8 is a little difficult to understand, in particular its phrase 'conduct of the extension of which or is influenced' by any fact in issue or relevant fact."⁹

Provisions of Sections 3, 4 and 5 of the Minimum Wages Act are contained within the scope of the Labour Welfare Officer, the confusion created by the phrase "conduct of the extension of which or is influenced" considered from the point of view of evidence for conviction under Section 20 (c) or for the purposes of prosecution under Section 22 of that Act.¹⁰

17. **Need not be contemporaneous.** As the section itself shows, conduct is relevant whether it is previous or subsequent to the fact in issue or relevant fact. Hence, contemporaneity is not necessary as it was at one time thought necessary in England, and even now considered necessary in America. The rule in England, however, although contemporaneity of time must always be considered a matter as to relevancy, it is by no means essential. Contemporaneity of time may, however, be important in estimating the weight to be given to the evidence when admitted.¹¹

4. Emperor v. Sadhu Charan Das, 1923 Cal. 409; 1 L. R. 49 Cal. 600; 77 L.C. 993; 25 Cr. L.J. 529.

5. Ranga v. Emperor, 1924 Lah. 581; 1 L. R. 5 Lah. 305; 84 I.C. 552.

6. Chanduka v. Emperor, 1922 Pat. 5; 1 L. R. 1 Pat. 101; 71 I.C. 355; 24 Cr. L.J. 129; 3 P.L.T. 771.

7. Emperor v. Moti Ram, 1936 Bom. 372; 165 I.C. 422; 38 Bom. L.R. 818.

8. Emperor v. Motiram, supra.

9. See also Balmakand v. Ghansam, (1894) 22 C. 391, 404, 406; R. v. Ishri, (1906) 29 A. 46; Dalip v. Nawal, (1908) 30 A. 258 (P.C.) (intention inferred from subsequent conduct of accused); R. v. Heeramun, (1866) 5 W. R. Cr. 5;

R. v. Mulla (1915) 37 A. 395 (presumption of guilty intent); Karali v. R. (1917) 44 C. 358; 35 I.C. 984; A.I.R. 1917 C. 824; see as to conduct R. v. Jora Hasji, (1874) 11 B.H.C.R. 245, and Wigmore, Ev., sub. voc.

10. G.S. Dugal and Co. (Pvt.) Ltd., v. Labour Inspector, 1968 Lab. I.C. 538; A.I.R. 1963 Pat. 90, 91.

11. 58 Whitley v. Taylor, Ev., ss. 588, 589; Rouch v. G.W.R. (1841) 1 Q.B. 51; but see also R. v. Beddingfield; (1879) 14 Cox, 341, Agassiz v. London Train Co. (1873) 21 W.R. (Eng.) 199; R. v. Goddard, (1882) 15 Cox, 7; Lees v. Marton (1832) 1 M. & R. 210; Thompson v. Trevanion, (1963) Skin, 402 v. post.

18. Contemporaneous tape-record of conversation. If a statement is relevant, an accurate tape record of the statement is also relevant and admissible, the contemporaneous dialogue between the complainant and the accused forms part of the *res gestae* and is relevant and admissible, under this section. The time, place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. Like a photograph of a relevant incident, a contemporaneous record of a relevant conversation is a relevant fact and is admissible under Section 7. The fact that the tape-recording was done without the knowledge of the person concerned is not an objection to its admissibility in evidence¹². A tape recorded statement could be tampered with. If the tape recorded statement is played and it is re-recorded on another machine then at the will of the party taking the second tape, the portions which it wants to eliminate, could easily be eliminated by stopping the second machine at convenient points and allowing the original to play out at those points. Thereafter the second tape record could yet be edited once again by a similar device. Then in exercising its inherent power the Court may keep in view such other considerations as would have bearing on the administration of justice. Though the application for taking on record the additional evidence was made, the transcripts of the conversation on the tape were not placed on record. If the additional evidence on this ground was desired to be produced then it was the clear duty of the party to place this evidence with the Court to ensure that it would be beyond his reach for the purpose of subsequent trimming or tampering. Therefore, if transcript of tape-recorded conversation is not put on record at the earliest opportunity, it is not admissible¹³. Once a tape-recording is admissible, it can be used for confronting a witness with his earlier tape-recorded statements. It can also be used for shaking the credit of a witness¹⁴. It can also be used as substantive evidence.¹⁵

19. Presumptions from conduct. The illustrations given are so many instances of natural presumptions which the Court or jury may draw. From preparations prior, or flight subsequent to, a crime may be inferred or presumed the guilt of the party against whom such conduct is proved¹⁶.

Other presumptions from conduct arise in the case of flight,¹⁷ silence,¹⁸

12. *Yusufalli Esmail v. State of Maharashtra*, (1967) 3 S. C. R. 720; 1968 S. C. D. 317; (1968) 1 S. C. J. 511; (1967) 2 S. C. W. R. 934; 1968 A. W. R. (H.C.) 268; 70 Bom. L. R. 76; 1968 M. L. J. (Cr.) 247; 1968 M. L. W. (Cr.) 12; 1968 Mah. L. J. 179; 1968 Cr. L. J. 103; A. I. R. 1968 S. C. 147, at pp. 148, 149. *R. M. Mehra v. State of Maharashtra*, (1967) 2 S. C. W. R. 779; (1967) Cr. L. J. 28; 1968 Mah. L. J. 92; 1973 Cri. Ap. R. 81; S. C. (1973) M. P. L. J. 224; 1973 Cr. L. J. 471; 1974 Mad. L. W. (Cri.) 121; A. I. R. 1973 S. C. 177. There was no violation of Article 20(3) or 21 of the Constitution, and further the conversation was not within the vice of section

162 Cr. P. C.); *Z. B. Bukhari v. B. R. Mehra*, A. I. R. 1973 S. C. 1788.

13. *Lachhamandas v. Deep Chand*, A. I. R. 1974 Raj. 79 at 82, 83; 1973 W. L. N. 281; 1973 Raj. L. W. 409.

14. *Rup Chand v. Mahabir Prasad*, A. I. R. 1956 Punj. 173; the reasoning of which was approved by the Supreme Court in *Yusufalli Esmail v. State of Maharashtra*, *supra*. *Deep Singh v. State of Punjab*, *supra*. *Rajpal Jagan Nath*, 71 Punj. L. R. 519; 1969 Cr. L. J. 825; A. I. R. 1969 Punj. 350.

15. *Z. B. Bukhari v. B. R. Mehra*, A. I. R. 1973 S. C. 1788 at 1790.

16. *Norton v. Ex*, 107.

17. Illustration (i), ante.

18. *v. post*.

evasive or false response¹⁹ possession of documents or property connected with the offence²⁰ Letters, etc., found in a man's house after his arrest are admissible in evidence if their previous existence has been shown.²¹ Change of demeanour in or in the circumstances of, the accused, as his becoming suddenly rich, his squandering unusual sums of money, and the like attempts to stifle or evade justice or mislead enquiry (as flight, keeping concealed, concealing things, obliteration of marks, subordination of evidence, bribery, collusion with officers and the like) and fear indicated by passive deportment²² as by trembling, stammering, staring, etc. or by a desire for secrecy²³ e.g., as by disguising the person, or choosing a spot supposed to be out of the view of others.

20. Subsequent conduct. Subsequent conduct may also be exculpatory conduct of the accused person which is equally admissible because an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.²⁴ These verdicts are subject to Sections 24, 25 and 26 of the Evidence Act and Section 162, Cr. P. C. One of the important pieces of subsequent conduct of an accused person in property offences is his change of life or circumstances not easily accounted for, excepting on the hypothesis of the possession of the thing in question. For instance, where shortly after a burglary or dishonesty, the accused person is found to be in possession of considerable sums of money, the inference may be drawn that he was found after having been the possessor of the property. In *The State v. A. V. The State*²⁵ it was held that after the murder of a woman, A. V. a woman who had a large sum of money, was found to be in possession of the same, and the missing after her murder was discovered, the possession of the money by the accused who was a poor man was found to be a strong piece of evidence against him, indicating large sums of money. This change of circumstances, without any other explanation except on the hypothesis of the acquisition of the fruits of crime was held to be strong piece of evidence against the accused.

19. Norton, Ev., 106, 107 and post, Best, Ev., 574; see *Moriarty v. I. C. & D. Ry.* ante; for an example of inferences from conduct of the character above mentioned, see *R. v. Sami*, (1890) 13 M., 426, 432 (v. post).
20. Illustration (i), ante; see *R. v. Couroisier*, Norton, Ev., 111; *Taylor, Ev.*, s. 595; *R. v. Cooper*, (1875) 1 Q.B.D., 19.
21. *R. v. Ameer Khan*, (1871) 9 B.L.R. 36; 17 W.R. (Cr. 15; *Bharat Chandra Das v. State*, 1950 Assam 193 (purchasing and concealing stolen property).
22. Best, Ev., s. 459.
23. Arthur P. Wills' Circ. Ev., 138; Best, Ev., s. 460; Norton, Ev., 110, 111. Illustrations (c), (i), ante. *R. v. Donellin Gurney's S.H.R.*, (1781) in Steph. Introd. 75-81 and Wills' Circ. Ev., 6th Ed., 376, 380; destruction of marks, see *R. v. Cook Leicester Sum Ass* (1834) and *R. v. Green-*

acre, C.C.C. Sess Pat. April 1837; 8 C. & P. 35 cited in Wills' Circ. Ev., 6th Ed., 144-16 and Norton, Ev., 111.

24. Best, Ev., s. 466, Trial of Eugene Aram cited in Wills' Circ. Ev., 6th Ed., 121, 122, and Norton, Ev., 111, 112; *R. v. Peter*, (1865) 3 W.R. Cr. 11 (conduct of accused before and after crime); *R. v. Beharee*, (1865) 3 W.R. Cr. 23, 24 (conduct of the prisoner since arrest; feigning insanity; general demeanour).
25. Best, Ev., s. 467; Norton, Ev., 113. Section 24 (3); illustrations (d) and (e) are in point. See *Aghnoo Nagasia v. State*, A.I.R., 1966 S.C. 119; 1966 Cr. L.J. 100; 1967 Mod. W.N. 20; 1967 All. W.R. H.C. 618; 1967 B.L.J.R. 865; 1966 M.P.L.J. 19; 1966 Mod. L.J. 113; 1966 M.L.J. 131; 1966 J. Andh. L. 131; 1967 M.W.N. 111; 1967 C.C.C. 111; 1967 A.I.R. 1991 Lah. 406; 1991 I.C. 639.

Evidence of contemporaneous conduct is always admissible as a surrounding circumstance, but evidence as to subsequent conduct of the parties is inadmissible.⁴

The fact that the accused was seen holding a pistol in his hand by the victim immediately after being shot at goes to show that it was the accused who had fired the shot at the victim. The accused was also identified by the witness when the victim raised an alarm. The conduct of accused in then running away from the spot lends further assurance to the inference of his complicity.⁵⁻⁶

21. Absconding or flight. See Illustration (i) to the section. Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. The act is a relevant piece of evidence to be considered along with other evidence but its value would depend upon the circumstances of each case. Normally, evidence for sustaining a conviction can scarcely be held as a determining link in completing the chain of circumstantial evidence which must amount to a stronger hypothesis than that of the guilt of the accused. Though the conduct of accused in absconding immediately after the occurrence is relevant evidence to show to some extent his guilty mind, it is not conclusive of guilt for there are sometimes even innocent persons when suspected may abscond to avoid arrest. The disappearance of the accused after the commission of the offence is a circumstance which, in the absence of any plausible explanation, may be taken against them.⁷ But absconding is usually but a corroborative evidence at best.⁸ Mere absconding should not form the basis of a conviction. It comes in as a very useful piece of corroborative evidence, if there is other evidence to connect the accused with the crime, but *per se* absconding is not enough to bring home the charge to the person who has absconded. A person charged with an offence might be nervous, and under the impulse of the moment might consider it desirable that he should leave the country rather than face a trial. Later, in safer moments he might decide that he should come back and have himself cleared.⁹ Facts tending to ex-

4. *Bhaskar Waman v. Shrinarayan*, (1960) 2 S.C.R. 117; (1960) 2 S.C.A. 189; 1960 S.C.J. 327; A.I.R., 1960 S.C. 301; 1960 M.P. L.J. 409; (1960) 1 Mad. L.J. (S.C.) 87; 1960 Andh. W.R. S.C. 1787; (1960) S.C.L.R. 117. Evidence of subsequent conduct of the transactors, as indicative of the character of the transaction as a sale, held not admissible; *Sita Ram v. Bashesher Daval*, A.I.R., 1964 Punj. 81; 65 P.L.R. 1064.

5-6. *Malkhan Singh v. State of U.P.*, 1975 Cri. L.J. 32 at 33; 1974 S.C. Cri. R. 177; 1974 B.B. C.J. 270; 1974 S.C.C. (Cri.) 919; (1975) 3 S.C.C. 311; 1975 Cri. App. R. 56 (S.C.); (1975) 2 Cri. L.J. 117; (1975) 2 S.C.J. 149; 1975 Mad. L.J. 450; 1975 Cri. L.J. 52; A.I.R., 1975 S.C. 12.

7. *Mairu v. State of U.P.*, 1971 S.C. C. (Cr.) 391; (1971) 1 S.C.W.R.

465; A.I.R., 1971 S.C. 1050, 1058 (absconding not inconsistent with innocence).

8. *Thimma v. State of Mysore*, (1971) 1 S.C.J. 726; 1971 M.L.J. (Cr.) 336; A.I.R., 1971 S.C. 1871, 1877.

9. *Parashram Dutt v. Emperor*, 1941 Oudh. 517 at p. 519; 195 I.C. 630; 1941 O.W.N. 981.

10. *R. v. Sorab*, (1866) 5 W.R. Cr. 28; *R. v. Gohardhan*, (1887) 9 All. 528 at p. 568.

11. *Jan Khan v. Emperor*, 1936 Peth. 169; 164 I.C. 630; 37 Cr. L.J. 988; see also *Chandrika Prasad v. Emperor*, 1930 Oudh. 324; 126 I.C. 684; *Rakhal Nikari v. Queen-Empress*, 2 C.W.N. 181; *Param-hansa v. The State*, A.I.R., 1964 Orissa 144; (1963) 5 O.J.D. 372; *Krishna Murthy v. Abdul Subban*, A.I.R., 1965 Mys. 128; *Banwari v. State*, A.I.R., 1962 S.C. 1198; 1962 All. L.J. 469; 1962 All. W.R. (H.C.) 345; 1962

plain the fact of absconding would be relevant under Section 9 post 14.

The fact of absconding is relevant as explaining subsequent conduct. But absence of access to his house for a couple of days does not prove that the accused absconded.¹²

To show that the accused absconded ever since the time of the incident the bald statements of the Police Sub-Inspector are wholly insufficient. In order to lead to the inference that the accused was so absconding, the investigating Police Officer must lay before the court that during the relevant period continuous watch was kept on the accused at his house, the place of work and places he frequented.¹⁴

The statement of a person recorded under Section 164 Cr. P. C. after being kept in police custody, is not reliable evidence of subsequent conduct under this section.¹⁵

Production of articles used by an accused in an assault is relevant as evidence of subsequent conduct under this section and statements accompanying such conduct are also admissible as evidence of *res gestae*.

Where the accused gives information to the police head constable and panchas that he would show the stolen goods and he goes to a cowdung hill and takes out the stolen goods from that hill the next day after the commission of the offence it is evidence of the conduct of the accused under this section. Such evidence can also be said to be evidence under Section 27, post 17-18. The Supreme Court has pointed out in *H. P. Administration v. Om Prakash*,¹⁶ that normally Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden, sold or kept and which is unknown to the police can be said to be discovered as a consequence of the information

(2) Cr. L.J. 278; 1962 All. Cr. R. 197; In *Gangadharan v. State of Kerala*, 1970 Ker. L.J. 146; 1970 Cr. L.J. 1701. As to the obsolete maxim "*Fatetur facinus qui fugit iudicium*" (he who flees judgment confesses his guilt); see *Best, Ev.*, ss. 460-65; *Norton, Ev.*, 110.

12. See Illustration (c) to S. 9.

13. *Rama v. State*, 1969 Cr. L.J. 1393; A.I.R. 1969 Goa 116, 121.

14. *Dinkar Bandhu Deshmukh v. State*, 72 Bom. L.R. 405; 1970 Mah. L.J. 634; A.I.R. 1970 Bom. 438, 447.

15. *State Government of Manipur v. K. G. Sharma*, 1968 Cr. L.J. 1390, 1394; *Gopisetti Chinna Venkata Subbiah In re*, A.I.R. 1955 Andhra 61 (statement of person,

eye-witness, in police custody for 5 days); see also *Emperor v. Manchik*, A.I.R. 1938 Pat. 290 (voluntary nature of statement under S. 164 raises suspicion).

16. *Rama v. State*, 1969 Cr. L.J. 1393; A.I.R. 1969 Goa 116, 121.

17-18. *Kachaji Mariji v. State of Gujarat*, 1969 Cr. L.J. 471; A.I.R. 1969 Guj. 100 at pp. 101, 102.

19. 1972 Cr. L.J. 606 at 616; (1972) 1 S.C.C. 249; 1972 S.C.D. 128; (1972) 1 S.C.J. 691; (1971) 1 S.C.W.R. 819; (1972) 2 M.L.J. (S.C.) 16; 1972 Cur. L.J. 654; (1972) 2 An.W.R. (S.C.) 16; (1972) 2 Um.N.P. 105; 1972 S.C.C. (Cri.) 88; (1972) 2 S.C.C. 765; 1973 M.L.J. (Cri.) 161; 1 L.R. (1974) 2 Delhi 73; A.I.R. 1972 S.C. 975 at 985.

information is admissible. These examples, however, are only by way of illustration. What makes the information leading to the discovery of the thing sold to the accused admissible is the discovery from him of the thing sold to the accused, which was a fact which the police did not know until the substantial information was furnished to them by the accused. A witness cannot be said to be his own evidence, as to be found or recovered from him as a consequence of the information furnished by the accused, and the information which discloses the fact that the witness will not be admissible. But even apart from the admissibility of the information under Section 27, the evidence of the Investigating Officer and the panchas that the accused had taken them to P.W. 11 and produced him out and as corroborated by P.W. 11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused.

Even if the statement of the accused for some reason is not admissible under Section 27, the fact discovered can be proved under Section 8 and if it is relevant, it can be used against the accused.²⁰

22. **Pointing out places and producing property connected with crime.** The facts as stated in the statements of the accused in pointing out places where the crime was committed or property connected with the crime was committed, and producing such property, is admissible under this section as evidence of the crime. Although it is not safe to act upon a confession of the accused, made extra-judicially, unless it is corroborated by other circumstances, it is not safe to act upon a confession, made where the extra-judicial confession, made by the accused, is made almost immediately after the occurrence, is in the nature of a confession, and the statement in evidence is such, and if the truth of that confession is corroborated by the conduct of the accused himself in preparing the confession, and proceeding to the Police Station and depositing the property with the police to take necessary action, it would be safe to act upon the confession, although it has been retracted by him before the Sessions Court.²²

20. *Paras Ram v. State*, 1970 A.L.J. 149, 158; 1969 A.W.R. (H.C.) 865; 1969 A.L.J. 592; 6 A.L.J. 839 (F.B.); *Ganu Chandra Kashid v. Emperor*, A.I.R. 1952 Bom. 280; *Emperor v. Nanna*, A.I.R. 1911 All. 145; *Ram Kishan v. State of Bombay*, 1955 S.C.R. 903; 1955 S.C.A. 410; 1955 S.C.J. 129; 1955 A.W.R. (Sup.) 41; 57 Bom. L.R. 600; 1955 Cr. L.J. 196; (1955) 1 M.L.J. (S.C.) 66; 1955 M.W.N. 146; A.I.R. 1955 S.C. 104; *Karan Singh v. State of U.P.*, 1972 All. Cr. R. 25; I.I.R. 1971 Cut. 466; (1971) Cr. W. R. 351.

21. *Emperor v. Mimi*, (1909) 1 I.L.R. 31 All. 592; 6 A.L.J. 839 (F.B.); *Emperor v. Nanna*, 1911 All. 145; I.L.R. 1911 All. 280; 193 I.C. 837; *Rahique-uddin Ahmad v. Emperor*, 1935 Cal. 184; I.L.R. 62 Cal. 572; 157 I.C. 687 (F.B.); *Kalijiban Bhattacharjee v. Emperor*, 1936 Cal. 316; I.L.R. 63 Cal. 1053; 163 I.C. 117; 1936 Cal. 316; 1935 Mad. 574 (2); 86 I.C. 664; 21

I.L.W. 199; *Babulal Beharilal v. Emperor*, 1946 Nag. 120; I.L.R. 1946 Nag. 97; 121 I.C. 485; but see *Hira Gobar v. Emperor*, 1919 Bom. 162; 52 I.C. 604; *Turab v. Emperor*, 1935 Oudh 1; I.L.R. 10 Luck. 281; 152 I.C. 473; *Birja v. Emperor*, 1941 Oudh 563; 195 I.C. 493; *Narasingha Karwa v. The State*, 40 Cut. L.T. 491; (1974) 1 Cut. W.R. 428; 1975 Cri. L.J. 1560 (Conduct of accused in leading the search party to the place of recovery and bringing out the article from the bush is relevant under section 8); 1973 Cut. L.R. (Cri.) 413 (accused in police custody led the party to open place and recovery was made from place of concealment as a result of conduct of accused. Conduct was held admissible under section 8); *Radha Kishan v. State*, 1973 Cri. L.J. 481 (But want of recovery would not materially affect the account of the incident when there is other substantial evidence).
22. *Nar Bahadur v. The State*, A.I.R. 1965 Assam 89

Where the accused after stabbing the deceased took to the Police Station and makes a confession and before doing makes a statement that he would show the place where the deceased fell and the tree where the dagger and the stick were kept, the statement is a misstatement under Section 2. Even otherwise, as the conduct of the accused, immediately after the death of the deceased, is relevant under this section, that conduct is admissible. What is admissible under this section is the conduct of the accused and the statement which affects or influences that conduct. The admission of the portion of the statement is merely the statement that he would show the place where the deceased fell and the tree where the dagger and the stick were kept.²³

The fact that the accused gave some information about the crime is his conduct and is admissible under this section.²⁴

But where the statement made by the accused leading to the discovery of stolen articles, their recovery, even though it raises a grave suspicion against the accused, will not be sufficient to support conviction.²⁵

Where joint acts of several persons are sought to be proved in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concerned in the act.²⁶ Otherwise the evidence cannot be used against any one of the persons. The conduct of an accused person is relevant against him but not against his co-accused.²⁷ For admissibility of joint statement, also see the following case.²⁸

Where a woman accused of a murder led the Police to a place where she produced ornaments which were the victim's and worn at the time of the murder, this was held to be conduct admissible in evidence against her.²⁹ The conduct or demeanour of a prisoner on being charged with the crime, or upon allusions being made to it is frequently given in evidence against him.³⁰ But evidence of this description ought to be regarded with caution.³¹

To judge the state of mind of an accused, his behaviour immediately after the crime would be relevant.³² In all cases, where legal insanity is set up, it

23. *In re Murugulu*, 1 I.L.R. (1961) 1 A.P. 123; A.I.R. 1961 A.P. 87.

24. *Bhuta v. The State of Rajasthan*, 1975 W.L.N. 682 (Raj.).

25. *Rangappa Goundan v. Emperor*, 1936 Mad. 426; 1 I.L.R. 59 Mad. 349; 161 I.C. 663; *Emperor v. Chokhey*, 1937 All. 497; 1 I.L.R. 1973 All. 710; *Chavadappa v. Emperor*, 1915 Bom. 292; 221 I.C. 86; 47 Bom. L.R. 63; but see *Emperor v. ...*, 1936 Nag. ...; 1 I.L.R. ... Nag. 78; 161 I.C. 964.

1. *R. v. Babulal*, (1881) 6 All. 509; 1884 A.W.N. 229 (F.B.); *Durlav Namasudra v. Emperor*, 1932 Cal. 297; 1 I.L.R. 59 Cal. 1010; 138 I.C. 116; *Rafiqueuddin Ahmad v. Emperor*, 1935 Cal. 184 (F.B.).

2. *Faqira v. Emperor*, 1929 Lah. 665; 116 I.C. 619.

3. *Des Raj Sharma v. The State*, 1951

4. *Simla* 14; 1951 A.W.R. (Sup.) 33.
5. *Babu v. State*, 1972 Cri. L.J. 815.
6. *Emperor v. Misri*, (1909) 31 A. 592; See also *Jamunia v. Emperor*, 1 I.L.R. 1936 Nag. 78; 37 Cr. L.J. 1047; A.I.R. 1936 Nag. 200; *Kaliphan v. Emperor*, 1 I.L.R. 63 Cal. 1033; 37 Cr. L.J. 775; 63 C.L.J. 232; A.I.R. 1936 Cal. 316; *Nehaloo v. Emperor*, 1 I.L.R. 1937 Nag. 268; 38 Cri. L.J. 642; 1937 Nag. 220.

R. v. Smiths, (1832) 5 C. & P. 332; *R. v. Bartlett*, (1837) 7 C. & P. 832; *R. v. Mallory*, (1884) 13 Q.B.D. 33; *R. v. Tatterall*, (1801) 2 Leach 984; *R.U.S.S.Q.R. v. Phillips*, (1829) 1 Lew C.C. 105; *R. v. Tate*, (1908) 2 K.B. 680; *R. v. Cramp*, (1880) 14 Cox. 390. 1 Phillips and Arnold, 10th Ed., 405; Roscoe, Cr. Ev., 53, 11th Ed.

8. *Hemu v. State*, 1951 Sau. 19.

is most material to consider the circumstances which have preceded, attended, and followed the crime: Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire for concealment; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detection; whether, after his arrest he offered false excuses, and made false statements.⁹

Again, in order to ascertain the real intention of parties to an instrument, evidence is admissible to explain it, since its execution is relevant. The principle of extrinsic evidence is admitted, is contained in the maxim *optimus interpret rerum usus*.¹⁰ And so, in the case of the *Attorney-General v. Drummond*¹¹ Lord Chancellor Sugden said: "Tell me what you have done under such a deed, and I will tell you what that deed means."

But if there is a deed which is ambiguous in its construction, one thing, you cannot say that it means something else merely because the parties have acted on it for a long time so understanding it.¹² The conduct of the parties to a contract reduced into writing may not vary or alter it, but **their conduct may help to explain or elucidate a contract open to different meanings.**¹³ Subsequently conduct is only admissible, for the purposes of construing a deed, when it is impossible to arrive at a clear finding as to the meaning of the deed from its own terms and from understanding circumstances.¹⁴ Such evidence is admissible not only in the case of ancient, but of modern documents, and whether the ambiguity be patent or latent.¹⁵

Where the meaning of a document is doubtful¹⁶ but not when it is clear¹⁷

9. *Deorao v. Emperor*, 1946 Nag. 321; 11 F.R. 196 Nag. 948; 25 I.C. 377; *Hemu v. State*, 1951 Sau. 19.

10. *Robert Watson & Co. v. Mohesh Narain*, (1875) 24 W.R. 176 in which the question was whether a pattah conveyed an estate for life only or an estate of inheritance, their Lordships of the Privy Council said: "In order to determine this question their Lordships must arrive as well as they can at the real intention of the parties, to be collected chiefly, no doubt, from the terms of the instrument itself, but to a certain extent also from the circumstances existing at the time of its execution, and further by the conduct of the parties since its execution." *Hulada v. Kalidas*, (1915) 42 C. 536; 1914 Cal. 813; 24 I.C. 899; 20 C.L.J. 312; 19 C.W.N. 542. See generally as to the admissibility of extrinsic evidence to affect documents the introduction to Chapter VI post.

11. *Dru. & War.* 368.

12. Per Lord Crainworth, *I.C.* in *Nashier v. Biggs*, 1883 4 H.L.C. 135; 94 R. & R. 172; 10 F.R. 531, cited in *Hulada v. Kalidas* A.I.R. 1914 Cal. 813; I.L.R. (1915) 42 Cal. 536; 24 I.C. 899.

13. *Ma Thaung v. Ma Than*, 1924 P.C. 88; 59 I.A. 1; I.L.R. 51

Cal. 374; see also *Secretary of State v. Raja Jyoti Prasad Singh*, 1926 P.C. 41; 53 I.A. 100; I.L.R. 53 Cal. 533; for conduct showing intention not to be bound by contract, see *Mathura Mohan v. Ram Kumar*, 1916 Cal. 136; I.L.R. 43 Cal. 700; 35 I.C. 505.

14. Per Ashworth, J., in *Badri Singh v. Sadaphal Singh*, 1928 All. 31; 111 I.C. 701; 25 A.L.J. 849.

15. *Van Diemen's Land Co. v. Table Cape Board*, (1906) A.C. 92; *Waichman v. Attorney-General*, 1919 A.C. 533; *Robert Watson & Co. v. Mohesh Narain*, (1875) 24 W.R. 176, see also *Taylor v. Evans*, 1204-1205; *Roscoe v. N.P. Evans*, 281; see also *Girdhar v. Ganpat*, (1874) 11 Bom. H.C.R. 129; *Nidhee Kristo v. Nistarinee* (1874) 21 W.R. 386; *Cheetun Lall v. Chutterdhari*, (1873) 19 W.R. 432; see *Rance Radha v. Gireedharee Sahoo*, 20 W.R. 243 (1873) in a boundary dispute; *Narsingh v. Ram Narain*, (1903) 30 Cal. 883, 896.

16. *Bourne v. Gailiffe*, (1844) 11 Cl. & F. 45; *Forbes v. Watt*, (1866-75) L.R. 2 S.C. & D. 214; *Harri-son v. Barton*, (1860) 30 L.J. Ch. 213; *Royal Exchange Assurance v. Todd*, (1892) 8 T.L.R. 669.

17. *N. E. Ry. v. Hastings*, (1900) A.C. 260; *Marshall v. Berridge*, (1882) 19 Ch. D. 233.

the sense in which both but not one only, of the parties have acted on it, is admissible in explanation¹⁸. Evidence of previous dealing is admissible only for the purpose of explaining the terms used in a contract and not to impose on a party an obligation as to which the contract is silent¹⁹.

As to the admissibility of judgments under this section, see the case noted below²⁰ and as the admissibility of opinion on relationship, expressed by conduct, see Section 50, post.

23. Admission by conduct. Instances of admission by the conduct or acts of a party to civil suits are of frequent occurrence. A party's admission by conduct as to the existence or non-existence of any material fact may always be proved against him²¹ and evidence on his part to explain or rebut such admissions is also receivable²². Thus evidence of conversion of a Hindu to Buddhism may be corroborated by evidence of his conduct subsequent to conversion. Such member may sign a declaration to the effect that he had embraced Buddhism or issue a wedding invitation on which the picture of Lord Buddha is inscribed or instal the image of Buddha; all these would be strong pieces of corroborative evidence of the fact that he ceased to be a Hindu and was converted to Buddhism.²³

The plaintiff's title to sue or the character in which the plaintiff sues or in which the defendant is sued, is frequently admitted by the acts and conduct of the opposite party, and in some cases the admission though not strictly an estoppel is practically conclusive. Thus if B has dealt with A as farmer of the post horse, that is evidence in an action by A against B to prove that he is such farmer, and payment of money is an admission against the payee that the receiver is the proper person to receive it²⁴. So also, suppression of documents is an admission that their contents are unfavourable to the party suppressing them (v. ante).

When A brings an action against B to recover possession of land, he thereby admits B's possession of the land²⁵. Mere subscription of a paper, as

18. Phipson, Ev., 11th Ed., 892.

19. *Hill v. Minter*, 10 C. Spencer's Co., 24 B. 510; 2 Bom. L. R. 691; *Hulada v. Kalidas*, 12 Cal. 536; A.I.R. 1914 C. 813; 14 I. C. 899; as to usage affecting contracts, see Sec. 92, prov. 5, post and note.

20. *The Collector v. Palakdhari*, (1887) 12 A. L. J. 45 and notes to S. 13, post.

21. *Taylor*; Ev., 54, 804, 806 and cases there cited. The original draft of the Evidence Act contained the following section: "A conduct of any party to any proceeding upon the occasion of anything being done or said in his presence in relation to matters in question, and the things so said or done are relevant facts when they render probable or improbable any relevant fact alleged or denied in respect of the person so conducting himself." The provisions of this proposed section are, however, incorporated in other parts of the

present Act: see present sections Sec. 11 and Sec. 114, Illustrations (g), (h) post; *Field*, Ev., 6th Ed., 120; as to conduct of family showing recognition of family arrangement, see *Bhubaneshwari v. Harisaran*, (1881) 6 C. 720 at p. 724.

22. *Melhuish v. Collier*, (1850) 15 Q. B. 878; and Sec. 9, post; *Powell*, Ev., 9th Ed., 430, 439.

23. *Punjab Rao v. D. P. Meshram*, A. I. R. 1965 S. C. 1179; 1965 M. P. L. J. 257; 1965 Mah. L. J. 162; 67 Bom. L. R. 812.

24. *Roxoe*, N. P. Ev., 67 *Radford v. Mc. Intosh* (1710) 5 T. R. 632; *Pracock v. Harris*, (1808) 10 East. 104; *James v. Biou*, 2 Sin. & St. 606; *Taylor*, Ev., p. 567 note; *Norton*, Ev., p. 114; as to estoppel arising from the acts of a party see Sec. 115, post.

25. *Stanford v. Hurlstone*, (1873) 9 Ch. App. 116.

Here what the person says and what he does may be taken together and proved as a whole."⁹

Where on information contained in the confession of an accused, a visit was made by that accused, together with certain witnesses and police officers, to a spot where arms were concealed, and during the time that the arms were dug up on the information of the accused person in custody various conversations between the accused and the police officers to the detriment of the accused and actually adding to the confession already made by him took place, it was held that not only the conduct but also conversations were admissible.¹⁰

A statement by an accused leading to the discovery of articles connected with a crime is admissible not only under Section 27 but also under this section.¹¹ But a statement made by an accused person while pointing out buried property that he concealed the property is not admissible under this section.¹² As to the admissibility of statements preceding and subsequent to the pointing out of places and production of property connected with a crime, see Section 27 and notes thereto, post.

A statement may be admissible not as standing alone, but as explaining conduct in reference to relevant facts. So it was held that the answers to his superior officer given by an accused person in explanation of an official irregularity could be proved against him, if subsequently ascertained to be false.¹³ The evidence of false explanation is not only relevant under this section but it is of considerable importance when it was given soon after the alleged occurrence and it was apparently designed to give to the facts an appearance favourable to the accused.¹⁴ Conduct may be equivocal without statements explanatory and elucidatory of it. Statements accompanying acts are in fact part of the *res gestae* just as much as the acts themselves. They are often absolutely necessary to show the *animus* of the actor. They have been styled verbal acts.¹⁵ Thus, a payment by a debtor may be explained by his request to apply it to a certain debt. If a debtor leaves home, his intent to avoid his creditors may be shown by what he said when leaving.¹⁶ The declarations are not admissible simply because they accompany an act; the latter itself must be in issue or relevant, the admissibility of such a statement depends

9. *R. v. Abdullah*, (1885) 7 A. 385, 396, per Petheram, C. J.: "But the case would be very different if the person stopped him and suggested, some name, or asked some question regarding the transaction. If a person were found making such statements without any question first being asked, then his statements might be regarded as a part of his conduct. But when the statement is made merely in response to some question or objection it shows a state of things introduced not by the fact in issue, but by the interposition of something else" *ib.*, 400, per Mahmood, J.

10. *Kalijiban Bhattacharjee v. Emperor*, 1936 Cal. 316; I. L. R. 63 Cal.

1053; 163 I. C. 41.

11. *Sadashiva Daulat v. State*, 1950 M. B. 104.

12. *Overstreet v. Emperor*, 1945 Bom. 292; 221 I. C. 86; 47 Bom. L. R. 63.

13. *R. v. Ganesh*, (1902) 4 Bom. L. R. 284.

14. *Gulam Mojibuddin v. State of W. B.*, 1972 Cri. Ap. R. (S.C.) 47; 1971 U. J. (S.C.) 885; 1972 Cri. L. J. 1542 at 1545 (S.C.).

15. *Norton, Ev.*, 106; *Bateman v. Bailey* (1794) 5 T.R. 512; *Hyde v. Palmer*, (1863) 3 B. & S. 657; 23 L. J. Q. B. 126; *Bennison v. Cartwright* (1864) 5 B. & S. 1.

16. *Bateman v. Bailey*, *supra*; *Roscoe*, N.P. Ev., 52.

upon the light it throws upon an act which is itself relevant.¹⁷ The Evidence Act makes those statements admissible and those only, which are the essential complements of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial.¹⁸ Failure of an eye-witness to mention the names of accused to the neighbours who came to the scene soon after the occurrence will by itself not render the prosecution story untrue, when the prosecution case does not rest on the statement of that witness alone.¹⁹

25. Statements must explain facts accompanied. (a) *General.* What is relevant is the particular act upon the statement and the statement and the act must be so blended together as to form part of a thing observed by the witnesses and sought to be proved.²⁰ A statement is not admissible if there is no conduct to be explained.²¹ A bare statement unaccompanied by any act and not explaining any act is not admissible.²²

It is not every declaration that accompanies and purports to explain a fact that will be received, e.g., a declaration that is equivocal²³ or is a mere expression of opinion²⁴ or is obviously concocted to serve a purpose.²⁵ In other words, the statements must really explain the acts and the declaration must relate to and can only be used to explain the fact it accompanies and not previous or subsequent facts²⁶ unless the transaction be of a continuous nature.²⁷ But hearsay evidence relating to statement of admission by one of conspirators could not be admissible even under Section 8 if it did not explain any accompanying conduct of that conspirator.²⁸

17. Wright v. Latham, (1888) 5 Cl. & Fin. 600; R. v. Bliss (1857) 7 Ad. & El. 1, 550; Hyde v. Palmer, *supra*; Roscoe, N.P. Ev., 53; "When a statement is proper evidence upon an issue all oral or written declarations which can explain such facts may be received in evidence," per Baron Park, See Steph. Dig. p. 161.

18. R. v. Rama, (1878) 3 B. 12, 17, per West, J.

19. Harbajan Singh v. State of J. & K. 1973 Cr. App. R. 298 (S.C.); 1973 S.C. Cri. R. 390; 1973 Cri. L.R. (S.C.) 465; 1975 S.C.C. (Cri.) 515; 1975 U.J. (S.C.) 100; 1975 L.J. 175; 1975 4 S.C.C. 480; (1975) 2 S.C.W.R. 213; A.I.R. 1975 S.C. 1814.

20. Mrs. Ram v. K. 1963 Nag. 136; 143 I.C. 17; 34 Cr. L.J. 505; Chaitan Lal Sharma v. State, 1970 All. Cr. R. 243; 1970 All. W.R. (H.C.) 381; 1970 Cri. L.J. 94 (Statement in first information report received was not admissible in lodging such report can be proved).

21. Zwingloe Ariel v. State, 1954 S. C. 100; 1954 Cr. L.J. 100; N.S. P. v. State of H.P., 1972 Cri. L.J. 701; 1972 S.C. 100; 1972 All. Cr. R. 332; 1972 All. L.J.

744; 1972 All. W.R. 310; 1972 Cr. L.J. 521.

22. Venkata Subba Reddy v. Emperor, 193 Mad. 689; 11 I.R. 24 Mad. 931; 134 I.C. 1143; Nika Ram v. State, 1972 Cri. L.J. 204 (S.C.).

23. R. v. Bliss, (1857) 7 Ad. & El. 1, 550; R. v. Wainwright, (1876) 13 Cox. 111; Roscoe, N.P. Ev., 53.

24. Wright v. Latham, (1888) 5 Cl. & Fin. 600.

25. Thompson v. Trevenion (1693) Hol. K.B. 286; R. v. Abrahams, (1840) 2 C. & K. 550; Brodie v. Brodie, (1861) 4 I.L. 307; Starkie, Ev. 89; and see American Cases, and Authorities in Phipson, Ev., 9th Ed., 85.

1. See remarks in R. v. Rama, (1878) 3 B. 12, 17.

2. Hyde v. Palmer, (1863) 3 B. & S. 607.

3. Bennison v. Cartwright, (1864) 5 B. & S. 1; Roscoe v. Harg (1824) 2 Bing. 99.

4. Bhagwan Das Keshwani v. State of Rajasthan, A. I. R. 1954 S. C. 100; 1954 Cr. L.J. 100; 1974 S.C. D. 759; (1974) 4 S.C.C. 611; 1974 Pun. L.J. (Cri.) 266; 1974 Cri. L.R. (S.C.) 402; 1974 S.C. Cr. R. 156; 1974 S.W. L.R. 419; 1974 W.L.N. 532; 1974 S.C. (Cri.) 647; 1974 Cri. App. R. (S.C.) 188; 1974 Cri. L.J. 751.

(b) *Declarations and acts need not be by same person.* It is sometimes said that the declaration and act must be by the same person.⁵ But though such declarations are often the only material, the rule is by no means so strictly confined. It is in everyday practice in criminal cases to receive the declarations of the victim, as well as those of the assailant. So, in cases of conspiracy, not and the like the declarations of all concerned in the common object, although not defendants, are admissible.⁶ It has indeed, been held that unless some such common object be proved, the declarations of parties, if neither parties nor agents are inadmissible,⁷ but this limitation can not be taken as invariable for the exclamations of mere bystanders may sometimes be both material and admissible evidence.⁸

(c) *Declarations no proof of fact they accompany.* The declarations are no proof of the fact they accompany; the existence of the latter must be established independently.⁹ As to the admissibility of declaration as evidence of mental and physical conditions, see the fourteenth section, post.

26. Complaints, relevancy of. Illustrations (j) and (k) are illustrations of statements accompanying and explaining the conduct of a person an offence against whom is being enquired into. Under these illustrations the terms in which the complaint was made are relevant.¹⁰

The making of a complaint to the police that the complainant apprehended trouble from the accused does not, by itself, constitute motive for the murder of the complainant within the terms of the section, especially when it is not the prosecution case that the murder was committed because of the complaint to the police.¹¹ As to the admissibility of such complaint, see the following case.¹²

27. First Information Reports. The first information report is the statement of the maker of the report, at a Police Station before a Police Officer, recorded in the manner provided by the Code of Criminal Procedure. The first information report is admissible under this section as evidence of part of the conduct of the person making it.¹³ When the accused himself makes the first information report and it is in the nature of a confession, it is inadmissible

5. *Howe v. Malkin*, (1878) 27 W.R. (Eng.) 340; 40 L.T. 196.

6. *R. v. Gordon*, (1781) 21 How St. Tr. 535; *R. v. Hunt*, (1820) 3 B. & Ald. 566; *R. v. O'Connell* (1844) Arm. & Tr. R. 281; the present section deals only with statements by parties; the declarations mentioned in the text would be admissible under S. 10, post.

7. *R. v. Petcherini*, (1856) 7 Cox 79; *Bruce v. Nockipolo* (1887) 11 Ex. 129.

8. *R. v. Fowkes*, (1856) *Times*, March 8, *Milne v. Lesier* (1862) 7 H. & N. 786; and see generally *Benjamin v. Crowther* (1864) 5 B. & S. 1; 33 L.J.Q.B. 137; 10 L.T. 266; 12 W.R. 425; such evidence may be admissible under S. 6, ante; see S. 6, illustration

(a) and note ante.

9. *Phipson, Ev.*, 11th Ed., 82.

10. As to the English rule on this point, see Steph. Dig. p. 162; *Taylor Ev.*, s. 581; *Roscoe, Cr. Ev.*, 25; *Norton, Ev.*, 114; *Whitley v. State*, 38 Cal. 2d 808; *R. v. Elyman*, (1896) 2 Q.B. 167; *R. v. Osborne*, (1905) 1 K.B. 551.

11. *Dinkar Bandhu Deshmukh v. State*, 72 Bom. L.R. 405; 1970 Mah. L.J. 101; 1970 C.L.J. 101; AIR 1970 Bom. 438 (the previous litigation between the deceased complainant and the accused was held to be motive for the murder).

12. *Mohammed Saigal v. State of Punjab*, 1971 Cr. L.J. 1764 (Punj.).

13. See *Vallan Kothol v. State*, AIR 1956 T.C. 207.

But, if it is not a confession but contains admissions made by the accused, the first information report is admissible under Section 21 of this Act. If the first information report contains several other matters, which are relevant to the trial, besides the confession, the statement about the other relevant matters is admissible. Thus, where an accused states about his preparation for the offence but disowns that he had committed the offence, his statement is exculpatory and is admissible in evidence though it also contains certain self-harming statements. But, if there is a confession, then the statement of confession is inadmissible, including that portion which relates to the preparation for the commission of the offence.¹⁴ If the first information report is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under this section.¹⁵

The first information report is not a substantive piece of evidence. It can be used either for corroboration or for contradiction of the maker of the statement, but not, if the maker is, dead.¹⁶ A statement containing self-exculpatory matter cannot amount to a confession, if it would negative the offence alleged to be confessed. If the admission is both exculpatory and inculpatory in its parts, the prosecution cannot use in evidence the inculpatory part only.¹⁷

A first information report is, ordinarily, not substantive evidence but it can be used for corroborative purpose¹⁸ or to remove a doubt, e.g., as to the name of an eye witness. The report is admissible under this section.¹⁹

28. Complaint and statement, distinction between. A distinction is to be marked between a bare statement of the act of rape or robbery and a complaint. The latter evidences conduct; the former has no such tendency. There may be sometimes a difficulty in discriminating between a statement and a complaint. It is conceived that the essential difference between the two is that the latter is made with a view to redress or punishment, and must be made to someone in authority—the police for instance, or a parent, or some other person to whom the complainant was justly entitled to look for assistance and protection. For instance, a petition impugning the conduct of a police officer and begging that he may be put on trial is a complaint within the meaning of the Criminal Procedure Code.²⁰ The fact that after the occurrence was all over, the woman said that the accused had tried to rape her cannot be taken to be proof that he tried to rape her. Nor is there any force in saying that

14. *State of Karnataka v. Shiv Singh*, 1 I.R. 1961 Raj. 294; A.I.R. 1962 Raj. 301; *Pravraj Singh v. State of Rajasthan*, 1975 Cr. L.J. 1013 (1975) 1975 Raj. L.W. 542; 1975 W.L.N. 625. (The I.R. must be considered as a whole and not in part if it is to be used as an admission of accused.)

15. *Aghnoo Nagaria v. State of Bihar*, 1966 1 S.C.R. 154; 1966 2 S.C.A. 367; 1966 S.C.D. 243; 1966 1 S.C.J. 193; (1965) 2 S.C.W.R. 750; 1965 A.W.R. (H.C.) 648; 1965 B.L.J.R. 865; 1966 M.P.L.J. 49; 1966 M.L.J. 113; 1966 M.L.J. (Cr.) 4; 1966 1 Andh. L.T. 430; 1966 Cr. L.J. 100; A.I.R. 1966 S.C. 119, 123.

16. *State of Orissa v. Chakradhar*, A.I.R. 1961 Orissa 232. See *Aghnoo Nagaria v. State of Bihar*, supra.

17. *Aghnoo Nagaria v. State of Bihar*, *Supra*.

18. *Empor v. Mohammad Sheikh*, 1 I.R. 1942 2 C. 213; 2 I.C. 92; A.I.R. 1943 C. 74; *Waris Khan v. Emperor* 1 I.R. 15; *Dark* 428; A.I.R. 1949 Cr. 299; *Uma Rao Singh v. State of M.P.* A.I.R. 1961 M.P. 45; 1961 Jab. L.J. 321.

19. *Umrao Singh v. State of M.P.*, *supra*.

20. *Gangadhar v. R.* 1915 43 C. 17; A.I.R. 1915 C. 897 (but see *R. v. Phulci*, (1915) 35 A. 102 (accusation not made as a complaint)).

the accused kept silent when she was making those accusations.²¹ The distinction is of importance; because while a complaint is always relevant, a statement not amounting to a complaint will only be relevant under particular circumstances, e.g. if it amounts to a dying declaration, or can be used as corroborative evidence,²² or otherwise. In *State v. Hiranman*²³ the raped girl, aged four years, cried and disclosed the name of the accused. Her private parts were swollen and did show that she had been raped, and, further, the stains of blood and semen on the clothing of the accused strongly suggested that he could be the offender. It was held, that all the circumstances put together necessarily led to the only conclusion that it was the accused who committed the crime and that the girl's and her mother's conduct was relevant under this Section.

The previous statement of the complainant at about the time of occurrence is admissible and relevant as evidence of conduct under this Section. It is also admissible as corroboration of the evidence of the complainant in Court under Section 157. What weight is to be attached to such statement is a different matter. In some cases, its weight may be nil, but in other cases, where corroboration is not essential to conviction, conduct of this kind may be sufficient to justify acceptance of the complainant's story.²⁴

The section so far as it admits a statement as included in the word "conduct" must be read in connection with Sections 25 and 26 post, and cannot admit a statement as evidence which would be shut out by those sections.²⁵ This section covers the relevancy of conduct. If the conduct of a woman who has been ravished is such that she lodges a complaint, then that conduct is relevant, and the terms in which the complaint was made are relevant as conduct, but they are not relevant as direct proof of the act. There is no reason to suppose that there the statutory law of India departs from the common law of England.¹

In England it is now held that in prosecutions for rape, indecent assault and offences of similar character, a statement in the nature of a complaint made by the prosecutrix to a third person, not in the presence of the accused, may be given in evidence provided such statement is shown to have been made at the first opportunity which reasonably offered itself after the commission of the offence.²

Illustration (d) to this section shows that, in India, the rule is not confined to cases of rape and kindred offences. It was formerly doubted whether the particulars of the complaint could be disclosed by the witnesses for the Crown, either as original or as confirmatory evidence; but it is now settled, that

²¹ *N. v. M. G. v. King*, 1938 Rang. 127; 175 I.C. 222.

²² *N. v. M. G. v. King*, 1938 Rang. 127; 175 I.C. 222. See *White v. White*, 1938 Rang. 127; 175 I.C. 222. *Apurba v. R.*, (1907) 35 C. 141; *R. v. Shamlal*, (1887) 14 C. 707 (P.R.).

²³ A.I.R. 1963 B. 141 (Bom. H.R. 16).

²⁴ *State of Orissa v. Puvassani, A.I.R.*, 1963 Orissa 58; 29 Cut. L.T.

²⁵ See *Rameshwar v. State of Rajasthan*, A.I.R. 1952 S.C. 54; 1952 M.W.N. 170; 1952 Cr.L.J. 707; 1952 (1) M.L.J. 440; 65 M.L.W. 871; 1952 S.C.R. 377; 1952 S.C.A. 40.

²⁶ *R. v. Nana*, (1889) 14 B. 260. *Kappinaiah v. Emperor*, 1931 Mad. 223; 131 I.C. 155; 1930 M.W.N. 702.

²⁷ *R. v. Osborne*, (1905) 1 K.B. 551.

they may be so given in evidence in this class of cases, but only in this class, not as being evidence of the truth of the charge against the accused, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and as negating consent on her part.

It is now established that such evidence is also admissible in cases of indecency upon boys, and of sodomy and therefore it seems of sodomy or gross indecency with males of any age.⁴ In *Jones v. S. E. Chatham Ry. Co's Managing Committee*⁵ an attempt was made to enlarge the classes of cases in which such evidence is admissible, but it was not countenanced by the Court of Appeal.⁶ It is not admissible in civil cases, though consent be in issue, as it is in an action for performing a surgical operation without the consent of a female patient.⁷

It was at one time thought that this evidence was only admissible in cases where non-consent was a material element.⁸ This, however, is not now the law.⁹ A statement by a girl alleging that she was raped made immediately after the rape is admissible as an explanation of her act of crying under this section as also under Section 157 by way of corroboration.¹⁰

Where a child of 3½ years of age is raped and she complains to her mother, sister and father, but she is not examined as she is not a competent witness, the evidence of the statements made by the child, to her mother, sister and father, or of her conduct amounting to a complaint is admissible, but in the undernoted case, it was said that it was not admissible against the accused, as it was hearsay evidence.¹¹ The mere fact that the statement is made in answer to a question is not of itself sufficient to make it inadmissible as a complaint.¹² But it cannot found a conviction under Section 376, I P. C. It can be used as evidence of the credibility of the girl.¹³

The evidence of the prosecution does not require corroboration in all cases.¹⁴ In assessing the value of her evidence, the conduct of the complainant, immediately after the offence is committed, is of great value. Not only the fact that the complaint was made by the prosecution shortly after the alleged occurrence, but also the particulars of such a complaint may be given in evidence, not as being evidence of the fact complained of, but as evidence of the

3. *R. v. Osborne*, (1905) 1 K.B. 551; *R. v. Lillyman*, (1896) 2 Q.B. 107; *R. v. Rowland*, (1898) 62 J.P. 109. See also *Richard Gillie v. Posho Ltd.*, 1939 P.C. 146; 186 I.C. 227; 50 L.W. 81; 41 P.L.R. 622.
4. *R. v. Wannell*, (1922) 17 Cr. App. R. 53.
5. (1908) 87 L.J.K.B. 775, 118 L.T. 802.
6. See *Richard Gillie v. Posho Ltd.*, 1939 P.C. 146 at p. 149.
7. *Phipson Ev.*, 11th Ed., 158, citing *Beatty v. Cullingworth*, *Times*, January 14, (1897) C.A.
8. *R. v. Kingham*, (1902) 66 J.P. 393.
9. *Taylor*, 581.
10. *Seksalal v. R.*, 1924 25 Cr. I.J. 124; 82 I.C. 142; *R. v. Phagania*, 1926 Pat. 58; 89 I.C. 1043. See

- however *Sreehari v. Emperor*, 1930 Cal. 132; 124 I.C. 175, (a statement of the girl to her mother did not form part of the transaction).
11. *Kashi Nath Pandey v. Emperor*, 1942 Cal. 214; 1 L.L.R. (1941) 2 Cal. 180; 199 I.C. 311; see also *R. v. Soopi*, 1930 Lah. 84; 120 I.C. 539; 31 Cr. L.J. 149.
12. *Rex v. Osborne*, (1907) 1 K.B. 551; *Raman v. King-Emperor*, 1921 Lah. 258; 4 L.L.J. 491.
13. *State v. Banamali*, 25 Cut. L.J. 435.
14. *Rameshwar v. State*, 1952 S.C. 100; 1952 S.C.J. 40; (1952) 1 M.L.J. 440; 1952 M.W.N. 150; In re *Boya Chinnappa*, 1951 Mad. 760; 1 L.R. 1951 Mad. 973; (1951) 1 M.L.J. 110. See also *Bechu v. King*, 1949 Cal. 815; 51 Cr. L.J. 153.

consistency of the conduct of the prosecution with the story told by her in the witness box.¹⁵

29. Explanation II—Statements affecting conduct. In the second Explanation "statements" includes documents addressed to a person and shown to have come to his actual knowledge.¹⁶ Statements to be relevant under this explanation must be made to the person whose conduct is relevant, or though not in his possession within his hearing. Again the statements, whether oral or written must justify the conduct, if they cannot be shown to have done so, they are inadmissible under this section.¹⁷ "Conduct" in this section, according to the Explanation, does not include statements unless those statements accompany and explain any other than statements. In *Arthur v. State*¹⁸ the wife was accused of murdering her husband. In the morning after the murder, she had stated to the brothers of the deceased, when questioned by them, that she did not know the whereabouts of her husband. In the committal Court, she stated that on the night in question she was sleeping with her husband and upon the other's coming knocking at the door, she opened it and they murdered her husband. It was held that her statement to the brothers of the deceased was not admissible in evidence as it did not accompany and explain an act other than the statement.

Statements made in the presence of a party are admissible as the groundwork of his conduct. Thus if a man accused of a crime is silent, or flies, or is guilty of false or evasive response, his conduct coupled with the statements, is in the nature of an admission and therefore, evidence against himself. His flight or false response would be equivocal proof, and might be unintelligible without the knowledge of what led to it. His act, upon the statement, and the statement are so blended together, that both form part of the *res gestæ*, and on this ground again, the statement is as receivable as the act. In point of fact, it is the conduct of the party upon the statement being made that is material; the statements themselves are only material as leading up to and explaining that.¹⁹ The mere fact, that statements have been made in a party's presence and documents found in his possession, though it may render them admissible against him as original evidence, e.g., as showing knowledge or complicity, will afford no proof *per se* of the truth of their contents; the ground of reception for the latter purpose is that the party has, by his conduct or silence, admitted the accuracy of the assertions made.²⁰

To render documents found in the possession of a prisoner admissible against him in proof of the contents, it must be shown that, by some act, speech or writing, he has manifested a knowledge of all or any of them; this would

15. In re Bova Chinamen, 1951. **Mad** 760. 1 L. R. 1951 224. 973 (1951) 1 M. L. J. 111.

16. See, on (b), 1. *Wheat v. The King*, (1838) 5 Cl. & Fin. 670.

17. As in the English rule *Neale v. The King*, (1849) 2 C. & K. 719. *Atkinson v. The King*, 1907. 1907. 1 L. R. 582.

19. Norton, *Ev.*, 106-107. "It is a general rule that a statement made in the presence of the prisoner, and which he might have contradicted

if untrue, is evidence against him" per Field, J. in *R. v. Mallory*, 1884. 14 Cox, 453. 13 Q. B. D.

20. See Phipson, *Ev.*, 11th Ed., 339 and authorities cited at head of commentary. A party may, on his own ground, be affected by the acquiescence of his agents or others for whose admissions he is responsible, *ib.*, *Haller v. Worman* (1860) 3 L.T.N.S., 741; *Price v. Woodhouse*, (1849) 3 Ex. 616.

apply more strongly when, of the documents in question, some had been received by him and others written by him.²¹ In the case of statements made to, or in a party's presence, he may either reply to them or keep silent;²² or his conduct may be otherwise affected by them.²³ When the statement in reply accompanies and explains an act other than the statement, it may be relevant under this section or the section relating to oral or documentary admissions when it is unaccompanied by any act, it may be relevant under the latter sections. Such statements made in a party's presence and replied to, will be evidence against him of the facts stated to the extent that his answer directly or indirectly admits their truth.²⁴

30. Silence. What is admissible under this section is conduct and statement which affected or influenced that conduct. Silence may, in certain circumstances, amount to conduct, but it must be a positive silence which may conceivably be taken to be conduct.²⁵ A party's silence will render statements made in his presence, evidence against him of their truth¹ only, when he is reasonably called on to reply to such statements. Care must be taken in the application of the maxim *qui tacet consentire videtur* (silence gives consent) for in many cases, but little reliance can be placed on the circumstances.² "So statements made in a party's presence during a trial are not generally receivable against him merely on the ground that he did not deny them, for the regularity of judicial proceedings prevents the free interposition allowed in ordinary conversation."³ Even here, however, cases may occur in which the refusal of a party to repel a charge made in a Court of Justice,⁴ or to cross-examine or contradict a witness,⁵ or to reply to an affidavit⁶ "may afford a strong presumption that the imputations made against him are correct; but this cannot be the case when the accused makes no statement, or no detailed reply in answer to the statutory question of the justice before committal,⁷ or when asked by the Police to make a statement after being cautioned.⁸ The caution tells him that he need not reply—not that if he does not reply or state his defence that fact will be used against him as proof of guilt⁹ and the mere omission to deny a formal charge made by the Police is not evidence from which an inference

21. *Lalit Chandra v. R.*, (1911) 39 C. 119; *Wright v. Tatham*, (1838) 5 Cl. & Fin., 670.

22. Illustration (g), ante; *Neile v. Jakle*, (1849) 2 C. & K. 709.

23. Illustrations (d) and (e), ante.

24. *Ex post* Sec. 11, *cf. seq.* *Phipson v. J. J. 11th Ed.*, 342; *Taylor, J. v. s.* 815; *Jones v. Morrell*, (1844) 1 C. & K. 266; *R. v. John*, 7 C. & P. 324; *Child v. Grace*, (1825) 2 C. & P. 193; *R. v. Welsh*, (1862) 9 F. & F. 275 and note to this case in 3 Russ. Cr. 488.

25. *Hind v. State*, 1951 Orissa 53; I.L.R. 1950 Cut. 509.

1. *Neile v. Jakle*, *supra*; *Hayden v. Gymer*, (1834) 1 A. & E. 162; *Price v. Burva*, (1858) 6 W.R. (Eng.) 40; *R. v. Cox*, (1859) 1 F. & F. 90; *R. v. Mallory*, (1886) 15 Cox, 458; 19 Q.B.D. 33.

2. See *Child v. Grace*, (1825) 2 C. & P. 193, per Taddy Serjit: "The not-making an answer may under some circumstances be quite as strong as the making-one;" per

Best, C.J. "Really it is most dangerous evidence. A man may say this is impertinent in you and I will not answer your question." See also *Mason v. Smith*, 14 Serg. & R. 398; *Dacy v. Manfield*, (1860) 5 H. & N. 229; *Woolman v. Wolpole*, (1891) 2 O.B. 534; *Notion. Ev.*, 113.

3. *Melen v. Andrews*, (1829) 1 M. & M. 836; *R. v. Appleby*, (1821) 2 Starkie N.P.C. 85; *R. v. Turner*, (1832) 1 Mood. C.C. 347; *Child v. Grace*, *supra*. See *Mash v. Darley*, (1911) 3 K.B. 1226, 1238 (C.A. per Kennedy, L.J.).

4. *Sutton v. Robinson*, (1838) 12 Q.B. 511.

5. *R. v. Coyle*, (1855) 7 Cox, 74; *Morgan v. Evans*, (1861) 1 Cl. & F. 156, 206; *Freeman v. Cox*, (1878) 8 Ch. D. 148; *Hampden v. Wallis*, (1884) 27 Ch. D. 251.

7. *R. v. Naylor*, (1933) 1 K.B. 685.

8. *R. v. Leckey*, 1944 K.B. 80.

9. *Ex R. v. Ture*, (1944) 29 Cr. App. R. 162.

can be drawn unfavourable to the accused.¹⁰ Where a Police Officer, who had a written statement in his possession made to the accused person, in several pieces of it and asked for an explanation and cautioned him, it was held that what the officer said was rightly excluded since the accused's statement after the caution was intelligible without it, but it would be admissible, if necessary, to make that statement intelligible.¹¹ In *Stockton v. Gregory*,¹² Phear, J., said: "It is true that silence on the part of defendant during the trial of a case, in regard to any matter brought against him in the course of the case, might possibly be of some value afterwards irrespective of the decree, as amounting to an admission on his part that that which was alleged and with regard to which he had kept silence was true."¹³ So when a Judge at a trial, made a proposal as to the course of proceedings in the presence of counsel who raised the objection, it was held not open to counsel subsequently to question the propriety of the course to which he had impliedly given his assent.¹⁴ "If a client be present in Court and stands by and sees his solicitor enter into terms of an agreement he is not at liberty afterwards to repudiate it."¹⁵ Admissions from silence or acquiescence frequently occur with reference to unanswered letters or failure to object to an account. Here the question will also be, whether there was any duty or necessity to answer or object. The rule has been stated by Bowen, L. J., to be that:

"Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not."¹⁶

The fact of silence may, with all the other circumstances of the case, be taken into account in a proper case; but it should be clearly borne in mind that an accused person always has a right to remain silent, if he wishes. The silence of the accused must never be allowed to any degree to become a substitute for proof by the prosecution of its case. No presumption arises *ipso facto* from the silence of an accused person.¹⁷ If, however, the silence of the accused is to be regarded as an important point for the prosecution then it is necessary for the trial court to put to the accused when he is examined under Section 342, Cr. P. C. as part of the case for the prosecution, the fact that,

10. *R. v. Whitehead* (1929) 1 K B. 99.

11. *R. v. Mills and Lemon*, (1947) 2 K B. 297.

12. (1873) 19 W R. 283-285.

13. See Phipson, *Fv.*, 11th Ed., 341 and Cunningham's *Ev.*, 95 and 96.

14. *Morrish v. Murry* (1844) 13 M. & W. 52.

15. *Swinfen v. Swinfen*, (1857) 24 Beav. 549, 559; *Asiatic Steam Navigation Co. v. Bengal Coal Co.*, (1908) 35 C. 751.

16. *Wiedemann v. Walpole*, (1891) 2 O. B. 534 at p. 539 and see per Willes, J., in *Richards v. Gellaily*, (1872) L. R. 7 C. P. 127 at p. 131 the relation between the parties must be such that a reply might be reasonably expected. *Norton, Fv.*, 113; *Edwards v. Towels*, (1843)

5 M. & G. 624. "The only fair way of stating the rule of law is, that in every case you must look at all the circumstances under which the letter was written and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission." Per Kay, L. J. in *Wiedemann v. Walpole*, (1891) 2 Q. B. D. 534 at 541; and see per Jenkins, C. J., in *R. v. Bal Ganga-dhar*, (1904) 28 B. at p. 491.

17. *Ghura v. Emperor*, 1942 All 47; L. L. R. 1911 All I. C. 452; see also *R. v. Pala*, 1937 Rang. 83; L. L. R. Rang. 666; 168 I. C. 193; 38 Cr. L. J. 524 (F B.) and cases cited therein.

remained silent, and to invite his explanation as to why he did so.¹⁸

A man is not bound to answer every officious letter written to him. Though unanswered, a letter may be evidence of a demand.¹⁹ The mere failure to answer or object will not generally imply an admission.²⁰ But it is otherwise if the writer is entitled to an answer, so, in the case of a letter written by A to B to which the position of the parties justified A in expecting an answer, as when the subject of it is a contract or negotiation pending between them, the silence of B may be important evidence against him.²¹ The point, in such cases, is, whether the party in respect of whom such statements are made acknowledges their truth either by words or by conduct.²² Such acknowledgment can be deduced from mere silence. But where a reply cannot reasonably be expected, silence will not justify an inference of assent, e.g., where the party was deaf, ignorant of the language, intoxicated, asleep, in extremis or where the statement was made in the course of judicial enquiries.²³ Among modern cases it has been held in certain old cases, that an account rendered by a debtor and allowed, if it is not objected to within a second or third post, or at least if it is kept for any length of time by the addressee without his making an objection, it then becomes a stated account. It is said, however, in *Taylor on Evidence* to be doubtful how far these cases would be followed at the present day, and whether apart from any special circumstances under which the account is shown to be valid. A distinction can be drawn between accounts rendered between merchants and those between other persons, and that with regard to the latter it now appears to be clear that the mere fact that an account has been kept by the addressee without remarks is no evidence of its truth. It has been quiesced in their contents.²⁴ The absence of an entry of payment in an account book is a relevant fact either under this or under Section 10 or Section 11.²⁵ Letters and other papers found in a party's possession will occasionally in a civil suit be evidence against him, as raising an inference that he knows their contents and has acted upon them, and they are frequently received in criminal prosecutions. So also, the opportunity of construction of documents may sometimes, by raising a presumption that their contents are known and of non-objection afford ground for affecting parties with an implied ad-

18. *Mg. Hman v. Emperor*, 1924 Rang. 172 (2); *I. L. R.* 1 Rang. 689; 77 *I. C.* 887; 25 *C. I. J.* 487; *R. v. U. Damapala*, 1937 Rang. 83.

19. *Norton Ev.*, 115; see also *Roscor. N. P. Ev.*, 53.

20. See *Fairlie v. Denton*, (1828) 3 *C. & P.* 103; "what is said to a man's face he is in some degree called on to answer; but it is too much to say that a man by omitting to answer a letter, admits the truth of the statements it contains," per Lord Tenterden; or "that every paper a man holds purporting to charge him with a crime is evidence against him". *Doe v. Frankis*, (1840) 11 *A. & E.* 792, per Lord Denman and see *Richards v. Gellatly*, (1872) *L. R.* 7 *C. P.* 127; *Wiedemann v. Walpole*, (1891) 2 *Q. B.* 534, 541.

21. *Lucy v. Moufit*, (1860) 5 *H. & N.* 229; *Edwards v. Towels*, (1845) 5

M. & G. 624; *Richardson v. Dunn*, (1841) 2 *Q. B.* 218; *Gaskill v. Skene*, (1837) 14 *Q. B.* 664; *Fairlie Denton*, *supra*; *Freeman v. Cox*, (1879) 8 *Ch. D.* 148; *Hampden v. Wallis*, (1884) 27 *Ch. D.* 251.

22. See *R. v. Christie*, (1914) *A. C.* 545 at p. 555; *Wiedemann v. Walpole*, (1891) 2 *Q. B.* 534, 539; *R. v. [unintelligible]*, [unintelligible] 1 *B. & C.* 100.

23. *Halsbury's Laws of England*, Simonds Ed., Vol. 15, para. 541, pp. 298, 299.

24. *Taylor, Ev.*, s. 810, and cases there.

25. *Kasen v. Firm of Haji Jamal*, 1921 *Nag. J.*, 1 *I. L. J.*, 107; *Sagarbhai v. Mairaj*, (1900) 4 *C. W. N.* 207 (notes); but see *R. v. Gies Chunder Banerji*, 10 *Cal.* 1021, *contra*.

1. *Lalit Chandra v. R.*, (1911) 39 *C.* 119.

mission of the truth or correctness of such contents.² Thus, the rules of a club or the proceedings of a society recorded by the proper officer and accessible to the members, or an account book kept openly in a club room,⁴ are evidence against the members. On similar grounds, books of account which have been kept between master and servant, tradesman and shopman, banker and customer or co-partners⁵ will occasionally be admitted as evidence even in favour of the party by whom they have been written, provided that the opposite party has had ample opportunities for testing from time to time the accuracy of the entries.⁶ In the case cited below, the accused was convicted of theft on the evidence of an accomplice which was needed as corroborated in material particulars by the depositions of a Police Officer and the commitment to the effect that the accused pointed out the house which he had entered on the night of the offence and the various places in the house connected with the offence. It was held, (1) that the evidence of the Police officer as to the accused pointing out the various places by the accused, was not evidence of the confession of his guilt made while he was in the custody of the Police Officer and was therefore inadmissible under Sections 25 and 26 of the Evidence Act of 1872; (2) that the evidence could not be treated as evidence of conduct apart from the accompanying statements under the section; and (3) that the statement made by the Police Officer to the committing magistrate in the presence of the accused that he (the accused) was going to show the various places connected with the theft was not admissible under Exception 2 to this section, because the conduct apart from the accompanying statements was not shown to be relevant and secondly, because, under the circumstances, such a statement could not be said to affect the conduct of the accused. Statements inadmissible under Section 8 may be admissible under Section 32.⁸

31. Illustrations to the section. Illustration (a). See also *R. v. Buckley*,⁹ *R. v. Shippey*,¹⁰ *R. v. Clewes*.¹¹

Illustration (c). See *R. v. Palmer*.¹²

Illustration (d). Where the factum of a will is in dispute the question whether the testator had made a will before is relevant to show that he had disposing mind.¹³

Illustration (e). "A party who gives or produces false evidence may by

aylor, Ev., s. 812. See notes to
Raggett v. Mugrave, (1827) C. &
K. 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

post.
1. (1873) 13 Cox, 293.
24; 32 L. C. 601; 20 Cr. L., 1. 681.
2. (1871) 12 Cox, 161.
3. (1830) 4 C. & P. 221; 5 Cox, C. C.
214; Best, Ev., s. 92.
4. (1873) 13 Cox, 293.
5. (1871) 12 Cox, 161.
6. (1830) 4 C. & P. 221; 5 Cox, C. C.
214; Best, Ev., s. 92.
7. (1873) 13 Cox, 293.
8. (1871) 12 Cox, 161.
9. (1830) 4 C. & P. 221; 5 Cox, C. C.
214; Best, Ev., s. 92.
10. (1873) 13 Cox, 293.
11. (1871) 12 Cox, 161.
12. (1830) 4 C. & P. 221; 5 Cox, C. C.
214; Best, Ev., s. 92.
13. In the goods of Bhuggobutty (de-
ceased). Cal. H. C. 9th Febru-
ary, 1900.

so doing give rise to a general presumption against the truth of his case."¹⁴ Where the question was whether A suffered damage in a railway accident, the fact that A conspired with B, C and D to suborn false witnesses in support of his case was held to be relevant, as conduct subsequent to a fact in issue tending to show that it had not happened.¹⁵ The conduct of a party to a cause may be of the highest importance in determining whether the cause of action, if he is plaintiff, or the ground of defence, if he is defendant, is honest and just as it is evidence against a prisoner that he has said one thing at one time and another thing at another time, as showing that the recourse to falsehood leads fairly to an inference of guilt. So, if it can be shown that a plaintiff has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well that his case was an unrighteous one. But it is not conclusive; it does not always follow, because a man, not sure that he shall be able to succeed by righteous means, has recourse to means of a different character, than that which he desires, namely, the gaining of the victory, has not good ground for believing that justice entitles him to it. It does not necessarily follow that he has not a good cause of action any more than that a prisoner making a false statement to increase his appearance of innocence is necessarily a proof of his guilt, but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts; and therefore, the evidence is admissible inasmuch as it goes to show that the plaintiff thought he had a bad case.¹⁶

Illustration (f). See *R. v. Abdu'lrah*¹⁷ and notes ante.

Illustration (g). See in the petition of *Surat*.¹⁸

Illustration (h). As to the inferences to be drawn from absconding, see *R. v. Sorob Roy*.¹⁹

Illustration (i). See Steph. Dig. Art. 7, Illust. (d), and Section 9, Illust. (c), post.

Where it is established that the gun belonging to the deceased had been taken away by the rascals in course of the commission of the crime, the concealment of such a gun is relevant under this Section in terms of illustration (i).²⁰

Illustration (j). The statement of a prosecutrix victim of rape, soon after the alleged rape, is legally admissible as evidence of conduct.²¹

Illustration (k). The absence of the accused at the time when a complaint

11. *Girish Chunder v. Iswar*, (1869) 3 B.L.R., 337; 12 W.R., 226. See also *R. v. Patch* in Steph. Introd., 99–106 and Wills Circ. Ev., 6th Ed., 445; *R. v. Palmer*, (1856) Steph. Cr. L.W., 111, 389; Steph. Dig. Art. 7, illust. (b). Steph. Dig. Art. 7, illustration (c); see S. 124, illustration (g), post.

15. *Mortuary v. L. C. & D. Ry. Co.*, (1870) L. R., 5 Q. B. 314.

16. *ib. Cockburn, C. J.*, see Taylor, Ev., s. 804; as to conduct of a party in a case of malicious prosecution, see *Taylor v. Williams*, (1832) 2 B. & Ad., 815; as to admission inferred from the conduct of parties, see S. 58, post; see also Taylor, Ev., S.

804; *Roscoe, N. P. Ev.*, 62; *Melluish v. Collier*, (1850) 15 Q. B. 878; *Rest, Ev.*, s. 524.

17. (1885) 7 All. 385.

18. (1884) 10 Cal. 302 and *Besela v. Stern*, (1877) 2 C. P. D. 265.

19. (1866) 5 W. R., Cr. 28, 30.

20. *State v. Ramchandia*, A. I. R. 1965 Orissa 175.

21. *Rameshwar Kalyan Singh v. State of Rajasthan*, 1952 S. C. R. 377; 1952 S. C. J. 46; (1952) 1 M. L. J. 440; 65 M.L.W. 351; 1952 M.W. N. 150; 1952 Cr. L. J. 547; A. I. R. 1952 S. C. 54, 58; *State of M.P. v. Surendra Prasad Dave*, 1969 M. P. W. R. 890; 1968 Jab. L. J. 992; 1970 M. P. L. J. 242.

is made against him in cases coming within this illustration, does not affect the relevancy of such complaint and therefore does not exclude it ²²

9. *Facts necessary to explain or introduce relevant facts.* Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or resist an inference suggested by a fact in issue or relevant fact or which establish the identity of anything or person whose identity is relevant or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted are relevant in so far as they are necessary for that purpose.

Illustrations

(a) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under Section 8, as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A: "I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A is accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it: "A says you are to hide this." B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cry of the mob are relevant as explanatory of the nature of the transaction.

²² R. v. Macdonald, (1872) 10 B. L. R. App. 2.

s. 3 ("Fact").
s. 3 ("Fact in issue.")

s. 11 (Rebuttal of inference." etc.)
s. 3 ("Relevant.").

Steph. Dig. Art. 9, Steph. Introd. Pleasur. Ev., 5th Ed., 77. Cunningham, Ev., 98. Norton, Ev., 115. Wills Ev. 2nd Ed., 65. Wigmore, Ev., ss. 110-116.

SYNOPSIS

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 - (1) General.
 - (2) Power to identify.
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 - (5) Procedure and precautions.
 - (6) Who can hold a test identification.
 - (7) Legal effect of identification memo.
 - (8) Precautions to be taken by Magistrate and Police to ensure that the test was a fair one.
 - (9) Inference that accused was shown to identifying witnesses should not be based on surmises.
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 - (11) What was the condition of the eyesight of the identifier?
 - (12) What was the state of his mind?
 - (13) What opportunity did he have of seeing the offender?
 - (14) What were the errors committed by him?
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 - (16) How did the identifier fare at other test identifications held in respect of the same offence?
 - (17) Was the quantum of identification evidence sufficient?
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 - (19) Non-identification by other witnesses.
 - (20) Identification by single witness.
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 - (26) Test identification of an accused on bail.
 - (27) Identification parade and Article 20(3) of the Constitution of India.
 - (28) Memo of identification not a record of evidence.
 - (29) Delay, omission, etc., in identification, effect of.
 - (30) Identification parades with long or short intervals.
 - (31) Joint identification parades.
 - (32) Accused not put up for identification, effect of.
 - (33) Identification evidence, doubtful or worthless.
 - (34) Evidence based on personal impressions.
6. Facts fixing time or place.
7. Facts showing relation of parties.

1. Principle. As the 7th and 8th sections provide, generally for the admission of facts causative of a fact relevant or material to the present section may be said generally to provide for facts explanatory of a fact in issue. There are many incidents which, though they may not strictly constitute a fact in issue, may yet be regarded as forming a part of it, and some that they accord-

ply and tend to explain the main facts, such as identity²⁴ names, dates, places, the description, circumstances and relations of the parties and other explanatory and introductory facts of a like nature²⁵. The particulars received will necessarily vary with each individual case; it is not all the incidents of a transaction that may be proved, for the narrative might be run down into purely irrelevant and unnecessary detail¹. By the answers to some of such questions, if sufficiently pertinent for the purpose, the fact is individualized².

2. **Scope.** The facts made relevant by this section may be classified as follows:

- (1) facts necessary to explain or introduce a fact in issue or relevant fact;
- (2) facts which support or rebut an inference suggested by a fact in issue or relevant fact;
- (3) facts which establish the identity of anything or person whose identity is relevant;
- (4) facts which fix the time and place at which any fact in issue or relevant fact happened;
- (5) facts which show the relation of parties by whom any fact in issue or relevant fact was transacted.

These five categories of facts are admissible, *but not generally*. They are *admitted only, in so far as they are necessary for the purpose indicated in each category*.³

3. Facts necessary to explain or introduce relevant facts.

(a) *General.* The 11th section, ante, provides for evidence of the state of things under which relevant facts or facts in issue happened, and the 14th and 15th sections, post, for evidence of similar facts, closely connected with the main fact and explanatory of it. Evidence in support and particularly in rebuttal, of inferences is of a similar explanatory character⁴. The 11th section is very like the present one as to rebutting an inference, and forms an instance of *similar events, and number*⁵. All the above-mentioned facts qualify, explain, or complete the main fact in some material particular.

(b) *Illustration.* The questions to the section furnish examples of facts necessary to explain or introduce a fact in issue or a relevant fact.

(1) *Illustration (a).* In Illustration (a), the state of A's property and of his family at the date of the alleged will may be relevant facts, as explanatory

24. See Norton, Ev., 119; R. v. Rickman, (1789) 2 East P.C. 1035; R. v. Rooney, (1836) 7 C. & P. 517; R. v. Fursey, (1833) 6 C. & P. 81; Wills' Ev., 47.

25. See R. v. Amir Khan, (1871) 9 B. L. R. 36, 50, 51; 17 W. R. (Cr.) 15.

1. Philipson, Ev., 11th Ed., 77, the facts are relevant, "in so far as they

are necessary for that purpose," S. 9, *supra*.

2. Bentham cited in Norton, Ev., 44.
3. Lakshmandas Chaganlal Bhatia v. State, 69 Bom. L. R. 808; 1968 Cr. L. J. 1584; A. I. R. 1968 Bom. 400.

4. Illustration (c).

5. Norton, Ev., 115, and Introduction, ante.

or introductory. Also, when the question is will, or no will, such facts may contradict or support the terms of the alleged will, whence forgery might be presumed or negatived. Such facts would then rebut or support an inference suggested by a fact in issue.⁶ It is to be observed that the factum and not the construction of the will is here the matter in issue. As to evidence of surrounding circumstances in aid of construction, see Introduction to Chapter VI, *post*.

(2) Illustration (b). The object with which what would otherwise be collateral matter is receivable in illustration (b) is to show the malice or animus of the abettor, though to go on to the full details of a quarrel would be too remote and would waste too much time. It is sufficient to show that there was a quarrel.⁷

(3) Illustration (c). In illustration (c), the presumption or "inference", arising from the act of absconding, is thus "rebutted". The fact of absconding is in itself equivocal. It may be the result of guilty knowledge or conscience, or it may be perfectly innocent. Anything, therefore, that the party says, at the time of the act, is receivable as explanatory of a relevant fact. It would also be receivable as part of the *res gestae* and as a declaration accompanying an act. The question frequently arises in insolvency, when it is necessary to decide, whether leaving the house is an act of insolvency or not. In order to prove the intent with which the insolvent departed from his dwelling house, evidence of what he said is admissible as forming part of the *res gestae*.⁸ The details, just as in Illustration (b), are not admissible generally except as corroborating the allegation of the suddenness and urgency of the emergency which caused the departure. Declarations made or letters written during absence from home, are admissible as original evidence since the departure and absence are regarded as one continuing act.⁹

(4) Illustrations (d) and (e). Illustrations (d) and (e) show that a statement, which can be shown to be explanatory under this section, may be admissible irrespective of whether the person, against whom it is given, heard it, or was present when it was made. This may appear to be a departure from the rule against hearsay. But it is necessary to distinguish the purpose, for which it is admissible. It is presumed that the statement made by C, in the one case, and B in the other, are only to be receivable as evidence that such statements were made, as declarations accompanying, and explaining an act, not of the truth of them as affecting B or A respectively. Without some proof of authority, given by the parties to be affected, to those making the statements it is clear that a very dangerous innovation is introduced, whereby persons may suffer in life, person or property, by statements put into their mouth behind their back, a principle which the Law of Evidence has hitherto entirely eschewed.¹⁰ Justice Cunningham criticizes this statement saying: "Whether this is a dangerous innovation is a matter of opinion. The framers of the Act apparently thought otherwise. They may have considered that though such statements might weigh heavily against the man on some occasions, they might weigh strongly in his favour on others and that if evidence

6. Norton, Ev., 116.

7. Norton, Ev., 117; Simpson v. Robinson, (1848) 12 Q. B. 511; see S. 14, Illustration (c) *post*.

8. Norton, Ev., 118. Roxon, N. P. Ev., 52; Bateman v. Bailey, (1794) 5 T. R. 512; Ambrose v. Clendon,

1796 Casteln Hardw. 269; Rouch v. G. W. Ry. Co., (1841) 1 Q. B. 51; Smith v. Cramer, (1935) 1 Bing N.C. 585.

9. Taylor, Ev., ss. 588, 589.

10. Norton, Ev., 118, 119.

The opinion of the Court of Enquiry appointed under Rule 75 of the Aircraft Rules, 1944, is to be as a fact under this section, because it is a fact necessary to establish or disprove a fact in issue or relevant fact, or which supports or rebuts an inference suggested by a fact in issue or relevant fact or fixes the time and place at which any fact in issue or relevant fact happened²⁰. The plaint of the suit, the contract and correspondence that passed between the parties about the contract and correspondence regarding which subsequent case of cheating was filed would be relevant papers for considering a prayer for quashing of criminal prosecution.²¹

Statement of a witness in Committing Court admitted on record of session court under any provision of law is substantive evidence²².

4. Facts which support or rebut inference suggested by fact in issue or relevant facts. This section renders relevant facts which support or rebut an inference suggested by a fact in issue or relevant fact, whereas Section 14 postulates relevant facts, which are inconsistent with a fact in issue or relevant fact, or which make the existence or non-existence of a fact in issue or relevant fact highly probable or improbable. Where the fact of absconding suggests an inference of guilt, facts furnishing a motive other than a guilty conscience for the conduct are relevant under this section²³. Where persons are charged with conspiracy or conspiracy to commit a felony, evidence to show that persons to whom the accused were closely and intimately associating with the person, is relevant as supporting the approver's statement that a conspiracy existed²⁴. Where the question is whether a payment was made or not, the existence or absence of an entry relating to the payment in account book is relevant²⁵. To raise or the letting value of a building, evidence relating to the rent or the assessed assessment of the neighbouring premises, is relevant under this section.¹

5. Facts which establish the identity of anything or person whose identity is relevant. *(a) Identity evidence.* Identity may be thought of as a quality of a person or thing, the quality of sameness with another person or thing.

(b) General principles. The essential assumption is that two persons or things are first brought to a existing, and that then the one is alleged, because of common features, to be the same as the other. The process of inference operates by comparing common marks found to exist in the two supposed separate objects, and then with reference to the possibility of their being the same. It follows that the inference depends on the reasonableness of the association

20. *Indian Airlines Corporation v. Madhuri, A. I. R. 1965 C. 252.*

21. *S. R. Luthra v. Father R. P. Sah, 1973 B. L. J. R. 51.*

22. *Ghanshyam v. State of U. P., 1974 All. Cri. R. 119; 1974 All W. R. (H.C.) 167.*

23. *Ganga Ram v. Emperor, 62 I. C. 545 at 571; State v. Jawan Singh, 1971 Cri. L. J. 1656.*

24. *Emperor v. Emperor, 1930 Bom. 157; I. L. R. 1934 Bom. 524; 127 I. C. 189.*

25. *Ganga Ram v. Lachhi Ram, 28 I. C. 705; 19 C. W. N. 611; A. I. R. 1916 C. 61; Imam Bandi v. Mutsad-*

di, I. L. R. 45 Cal. 878; 28 C. L. J. 409; 47 I.C. 513; A. I. R. 1918 P. C. 11.

1. *Calcutta Corporation v. Province of Bengal, 1910 Cal. 47 at p. 51; I. L. R. 1910 C. 168; 189 I. C. 717; see also Pointer v. Norwich Assessment Committee, (1922) 2 K. B. 471; 91 L. J. K. B. 891; 86 J. P. 149; 20 L. G. R. 673, Ladies Hosiery & Underwear Ltd. v. West Middlesex Assessment Committee, (1932) 2 K. B. 679; 101 L. J. K. B. 632; 147 L. T. 390; 96 J. P. 336.*

between the mark and a single object. Where a circumstance, feature or mark, may commonly be found associated with a large number of objects the presence of that feature or mark in two supposed objects is little indication of their identity, because, on the general principle of relevancy, the other conceivable hypotheses are so numerous, i.e., the objects that possess that mark are numerous, and therefore any two of them possessing it may well be different. But, where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are nil or comparatively small. Hence in the process of identification of two supposed objects by a common mark the force of the inference depends on the degree of necessariness of association of that mark with a single object. For simplicity's sake the evidential circumstances may thus be spoken of as a mark. But, in practice, it rarely occurs that the evidential mark is a single circumstance. The evidencing feature is usually a group of circumstances which, as a whole, constitute a feature capable of being associated with a single object. It is by adding circumstance to circumstance that we obtain a composite feature, or mark which as a whole, cannot be supposed to be associated with more than a single object. Each of these circumstances, by itself, might be a feature of many objects, but all of them together make it more probable that they co-exist in a single object only. Each additional circumstance reduces the chances of there being more than one object so associated.² It may also be noted that a mark of identity may be negative as well as affirmative i.e., where a certain circumstance would be necessarily associated with an object in issue, the lack of that feature in a particular object offered tends to show that it cannot be the object in issue.³

Where a gun is recovered under the Arms Act and the recovered article is not sealed, and there is no link evidence to identify the gun recovered evidence of recovery can be accepted, even though the gun had not been sealed soon after the recovery, provided that Court is satisfied, on consideration of the material on record and the circumstances of the case, that the gun produced before the Court is the same which had been recovered from the possession of the accused.⁴

(c) *Identity of person* When a party's identity with an ascertained person is in issue it may be proved or disproved not only by direct testimony, or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristics, e.g. age, height, size, hair, complexion, voice, handwriting, manner, dress, distinctive mark, faculties, or peculiarities including blood group⁵ as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places, or facts and other details of personal history.⁶ In this connection, too, identity of mental qualities, habits and dispositions may become relevant, though it would be excluded in more specific enquiries. Where, however, a party's identity is only material as showing that he did some particular act, the range of facts is much narrower. In civil cases a party's identity most frequently comes in question as having executed a particular document, and here identity of name, handwriting, resi-

2. Wigmore's Ev., § 411.

3. Wigmore, Evidence, Sec. 412.

4. State of U. P. v. Dhanwan, A. I. R. 1965 A. 260; 1964 A. L. J. 621.

5. Ramsdale v. Ramsdale, (1945) 173 L. T. 393.

6. R. v. Orton, (1874)? unreported.

their gaze and vote. Since it is never the case that identification of the person by the witness, even when the person observed was so improbable as to justify coincidence with the person of the Court which saw the witness and formed its opinion, as to his credibility, and of the High Court which considered the evidence against the respondent, accepted the testimony.

Identification by location.—The fact that a person was at a place or a time is not evidence of his identity, with the inference that it is, being drawing so that the fact that he is at a place, or time, is to be, or not to be, proved by permitting the various witnesses to narrate the different facts of the case. This inference, not being used as an exception to prove or disprove a fact asserted therein, is not objectionable. It is a fact which may be proved like any other identity mark. The inference cannot be proved as being any essential value. From this point of view, the following superficially similar uses should be distinguished,—

(a) mentioning a third person's name as evidence for observing a particular fact.

(b) mentioning a person's name for establishing a fact.

(c) using one's own prior utterances of a fact to corroborate one's present testimony and repel the suggestion of recent fabrication.

The identity of the machine on which two letters have been typewritten would not be established by the witness if the two are on and the same person.¹⁵

Identification by appearance.—An identification of a male or a female by sight is not evidence of identity if the time and whose head is concealed or absent at the time of identification is by no means convincing, and when it stands alone, it is not evidence of identity.¹⁶

(c) *Fingerprints, identification by.*—The accepted conclusion of Science, after witness testimony, is that every fixed and fixed varieties of papillary ridges on finger tips are easily distinguishable, and that, by the mathematical theory of probabilities, the chance of two individuals bearing the same combination of such marks is so small as to be negligible. Hence, identity of a combination of such fixed and typical marks is strongest evidence of identity of person and such evidence is admissible.¹⁷ No two impressions of the same part of the same finger can be taken at the same time and under the same conditions, but the pattern and sequence of ridges are always the same. The pattern is conclusive proof of the impressions being of the same person. The sequence of ridges is in the same order in the fingers. In other words, it can be only stated that the impressions are from the same finger or thumb of the same individual. Likewise, the more characteristics are ascertained from the pattern as a starting point, and the more characteristics are ascertained from the sequence, also be counted.¹⁸

15. Wigmore, Ev., S. 416.

16. S. H. Jhabwala v. Emperor, 1933 All. 690; 145 I. C. 481.

17. Laijam Singh v. Emperor, 1925 All. 405 at p. 407; 86 I. C. 817;

26 Cr. L. J. 881.

18. Wigmore, Ev., s. 414.

19. Smt. Kamla Kunwar v. Ratan Lal, A. I. R. 1971 All. 304.

Where one of the main questions for determination in a case was whether a document impugned was or was not presented before Registrar by one N S, a comparison of the thumb impressions of the person who presented the document with that of N S was held to be admissible under this section, if the similarity of those impressions could establish the identity of that person with N S²⁰. Although the comparison of thumb-mark is admissible in law to establish identity, it has been held that such comparison should be made by the Court itself²¹. A jury is not bound to accept the opinion of an expert upon thumb impression without corroboration of their own mind, once as to the reasons which guided him to his conclusion²².

(h) *Foot marks, identification by.* In the case of footmarks and boot marks, the inference, from the combination of features in the mark found, to the person bearing the same combination of features, is apt to be weak because the features, usually taken is the basis of inference—size, depth, contour, etc., may not be distinctive and fixed in type for every individual, but may apply, even in combination, to many individuals. Hence, their probative significance is apt to be small. This ordinarily, should not negative admissibility, it merely affects weight²³. Where a tracker compared the admitted footprint of the accused with the impression that was left on him of the footprints which he saw two months earlier when he first came to the scene of occurrence it was held, that such a comparison made two months after the occurrence when the original tracks were no longer preserved, could not have much value²⁴.

Evidence in regard to the foot-prints of an accused may be relied upon as a corroborative circumstance to establish the identity of the accused as a culprit.²⁵

(i) *Photographs, identification by.* "Witnesses may state their belief as to the identity of persons, whether present in Court or not, and they may also identify absent persons by photographs produced and proved by any competent testimony, not necessarily, of course, that of the photographer to be accurate likenesses.¹ In matrimonial cases, however, the Court will not, unless under very special circumstances, act upon identification by photograph alone."²

It is well settled that, for certain purposes, photographs may be received in evidence. Thus, whenever it is important that the *locus in quo* should be described to the jury, it is competent to introduce in evidence a photographic view of it. So, in an action to recover damages for assault committed with a raw-hide, a plaintiff was allowed to introduce a ferrotype of his back taken three days after the injury, the person taking the same having testified that it was a correct representation.³

20. *R. v. Jaquir Mond Sheikh*, (1896) 1 C. W. N. 33, 34.

21. *Wignore, Ev.*, s. 414.

22. *K. E. v. Abdul Hamid*, (1905) 9 G. W. N. 520.

23. *Wignore, Ev.*, s. 415.

24. *Chanan Singh v. Emperor*, 1933 L.A.C. 209. See also *Raj. v. Bhatta Karsan v. The King Government*, 1956 Cr. L. J. 806.

25. *Pritam Singh v. State of Punjab*, 1956 Cr. L. J. 815; A. I. R. 1956

S.C. 115; *Margul v. State of Rajasthan*, 1970 Raj. L. W. 1.

1. *R. v. Tolson*, (1864) 4 F. & F. 103; *Frith v. Frith*, (1896) L. R. P. D. 74; *Hindson v. Ashby*, (1896) 2 Ch. 21, 27; *Hill v. Hill*, (1916) 31 T. L. R. 541.

2. *Wignore, Ev.*, 11th Ed., p. 525.

3. *Rivers* op. cit. *Harris Law of Identification*, ss. 12, 157-178, 352, 590, 642.

Photographs are admissible in evidence to prove also the contents of a lost document,⁴ or configuration, as it existed, at a particular moment.⁵ In the last cited case, A. L. Smith L. J. and other Lords Justices demonstrated the necessity of careful denotation of the uses for which upon mere production of them, photographs can be accepted as means of proof of matters of fact. Clearly, a photographic picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportion of such objects, except, by evidence of personal knowledge or scientific experience, to demonstrate accurately the facts sought to be established.⁶

Photographs can properly be used for identification, but they cannot be used for showing similarity of features or perfect facial resemblance or family likeness, to prove parentage. Parentage cannot be inferred from such a family likeness or a facial resemblance, nor negatived from such want of resemblance or likeness in a photograph of the admitted person taken together and along with the disputed person.⁷ Indeed, family likeness or facial resemblance cannot be taken as a true guide for inferring parentage, because two sons of the same father and mother may be so much dissimilar in likeness and resemblance, that it would be difficult for a person, who has no personal knowledge to say whether they are own brothers, born of the same parents, or not. The question of such likeness is a deceptive criterion.⁸ Evidence of personal resemblance however perfect and notable it may be of the disputed person with the admitted one, cannot be received or acted upon in law to prove the supposititious character of the disputed person. Such evidence of personal resemblance is loose and fanciful and, therefore, evidence let in on similarity of features should be rejected as worthless.⁹ A photograph print, therefore, of the admitted person along with the disputed person taken together, or taken separately even when there is a striking similarity between the two and there is family likeness, this similarity in features and the special resemblance between them is not admissible in evidence either under this or any other provision of this Act, for deciding the question of the parentage of the disputed person, and as such, any conclusion drawn from such likeness or unlikeness of the disputed person to the admitted one is very unsafe and conjectural.¹⁰

(j) *Family likeness or resemblance.* Family likeness has often been insisted upon as a reason for inferring parentage and identity,¹¹ where the question is whether A is the child of B, existence of the resemblance, or want of resemblance of A to B is admissible. In the *Douglas Peetrage* case,¹² Lord Mansfield said :

4. *McCullough v. Mann*, (1908) 2 I. R. 194 (C.A.) As to photographic copies of writing for purposes of comparison, see Sec. 73, post.
5. *R. v. United Kingdom Electric Telegraph Co. Ltd.*, (1826) 3 F. & F. 73; *Hindson v. Ashby*, (1896) 2 Ch. 21; 65 L. J. Ch. 515; 74 L. T. 327; 45 W. R. 252; 60 J. P. 484.
6. *United States Shipping Board v. The Ship "St. Albans"*, 1931 P.C. 189; 131 I. C. 771.

7. *Khedra v. Turia*, A.I.R. 1962 Pat. 420; 1962 B. L. J. R. 323.
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*
11. *Wills on Circumstantial Evidence*, 6th Ed., p. 188.
12. *Bagot v. Bagot*, (1878) 1 L. R. Ir. 308; *Burnaby v. Baillie*, (1889) 42 Ch. D. 282, 290, *Hubb. Ev.*, 384.
13. *2 Harg. v. Collectanea Juridica* 402; *Deek's Medical Jurisprudence*, 7th Ed., p. 402.

special features or marks of identification on them, no value can be attached to their testimony.²⁰

The identification, in a rape case, of a dress worn by the accused that it belonged to the accused or was worn by him when he took away the victim of rape and particularly in a house where ladies resided, is not of any use.²¹ But, it should not be forgotten that small and even nice points of difference distinguishing one thing from others of the same kind may, merely by the frequent sight of them and without any special attention to them make an impression on the mind. They are component parts of the thing and go to make the whole of which the mind receives an impression. In such cases, the impression is the general appearance of the thing. This sort of impression is exceedingly common; a workman has it of his tools and most people have it of their dress, jewellery, and other things, they are frequently seen handling or using. It occurs everyday that by remembrance of their general appearance a carpenter, mason, or other workman, recognizes his tools, and dress, jewellery, or other property is known by its owner. Unconsciously, an impression may be identified by mere familiarity with them. Observation and memory of identification may be safely relied upon even though the witness is not able to formulate any coherent or intelligent reason for the identification. The witness can identify their own necklaces, even without marks or particularities. At any rate articles need not be put up for identification in a case in which it is applicable both to identification of person and property. Identification in Court assumes more importance.²² The reliability of evidence relating to identification or recovery of incriminating articles depends to a large extent upon the fairness or otherwise of the investigation.²³

(2) Cases. Where the property to be identified is not shown at the time of the recovery, little value can be attached to the test identification proceeding.²⁴ If articles in question were shown to identifying witnesses by the police before they identified the same before the Magistrate and the identification would be lost altogether. But when witness identifies articles correctly out of a large number of articles and it was not suggested to Magistrate in cross-examination that police was there or that the identification was not conducted

20. State v. Wahid Bux, 1953 All. 311; 1953 Cr. L. J. 705; 1952 A. L. J. 568; see also State of Vindhya Pradesh v. Sanamuni Dhiman, 1954 V. P. 42; State of Rajasthan v. Rama, 1973 W. L. N. 934 (Raj.) (Common features are of no value).

21. Karan Singh v. State, 1966 A. W. R. (H. C.) 208, 210.

22. Public Prosecutor v. India China Lingiah, 1951 Mad. 453; 1953 M. W. N. 918; State v. Pareswar Ghosi, 1 L. R. 1967 Cut. 980; 33 Cut. L. T. 1193; 1968 Cr. L. J. 201; A. L. R. 1973 Orissa 27. Case of identification of gold ornaments without particular identifying

marks); Jillo v. State, 1971 Raj. L. W. 456; 1971 W.L.N. (Part I) 74; State of Rajasthan v. Prabha, 1971 Raj. L. W. 311.

23. Sivaram v. State, A. L. R. 1958 Orissa 51; 1958 Cr. L. J. 531.

24. Gundla Narayana Murthy, A. L. R. 1959 Andhr. Pra. 387; 1959 Cr. L. J. 947.

25. State of U. P. v. Jagney, 1971 All. W. R. (H. C.) 163.

1. Chinnna v. State, 1 L. R. (1960) 10 Raj. 921; A. L. R. 1961 Raj. 35; State of U. P. v. Dhanwan, A. L. R. 1966 A. W. R. 1000.

2. (1975) 2 Cr. L. T. 285 (Him. Pra.).

in a proper manner, the identification of articles is reliable.³ But, even a total failure to hold a test identification proceeding does not make inadmissible the evidence of identification in Court.⁴

It may be noted that Section 164 of the Code of Criminal Procedure and this section deal with different situations. Section 164 of the Code of Criminal Procedure prescribes a procedure for the Magistrate recording statements made by a person during investigation or before trial. This section, on the other hand, makes certain facts which establish the identity of a thing as relevant evidence for the purpose of identifying that thing. If a statement of a witness, recorded by a Magistrate in derogation of the provisions of Section 164, will go in as evidence under this section, the object of Section 164 will be defeated. It is therefore, necessary to resort to the rule of harmonious construction, so as to give full effect to both the provisions. If a Magistrate speaks to facts which establish the identity of anything, the said facts would be relevant under this section; but if the Magistrate seeks to prove statements of a person not recorded in compliance with the mandatory provisions of Section 164, such part of the evidence, though it may be relevant under this section will have to be excluded.⁵ A Magistrate may depose to relevant facts if no statute precludes him from doing so, either expressly or impliedly. Neither this Act nor the Code of Criminal Procedure prohibits a Magistrate from deposing to relevant facts within the meaning of this section.

In *Ram Lohani v. State of West Bengal*⁶ a superimposed photograph showed the shape and contour of the bones of the face underneath the fact, as it looked when the deceased was alive and the prosecution sought by means of this document to establish the identity of the skull as that of the deceased, or in any event to dispel any positive argument for the defence that the skull was not that of the deceased. It was contended that this photograph was not admissible in evidence, but their Lordships held that it was admissible under this section. Their Lordships said that the question at issue in the case is the identity of the skeleton. That identity could be established by its physical or visual examination with reference to any peculiar features in it, which would mark it out as belonging to the person whose bones or skeleton it is stated to be. Similarly, the size of the bones, their angularity or curvature, the prominences or the recessions would be features which on examination and comparison might serve to establish the identity of a thing within the meaning of this section.

In *Jahumdhari v. Dera Rai*,⁷ it was held that, in a suit regarding land to establish its identity, the survey plot number is important, and no mention or wrong mention of khata number makes no difference.

If a Magistrate speaks to facts which establish the identity of any property, the said facts are relevant within this section. Thus a memorandum prepared

3. (1975) 2 Cr.L.T. 285 (Him. Pra.)

4. *Kanta Prashad v. Delhi Administration*, A. I. R. 1958 S. C. 350; 1958 Cr. L. J. 698; 1958 Mad. L. J. (Cr.) 508; 1958 All. W. R. (H.C.) 588; 60 Pun. L. R. 583; (1958) 2 An. W. R. (S.C.) 113; 1958 All Cr. R. 387; 1958 S. C. J. 698.

5. *Deep Chand v. State of Rajasthan*,

A. I. R. 1961 S.C. 1527; 1961 All. W. R. (H.C.) 550; (1961) 2 Cr. L. J. 705; (1961) 2 Ker. L. R. 500; 1961 All Cr. R. 339; 1973 Cut. L. R. (Cri.) 413.

6. *Ibid.*

7. (1964) 1 S. C. J. 82; A. I. R. 1963 S. C. 1074.

8. A. I. R. 1965 Pat. 279.

by a Magistrate describing the present condition of a house when the victim of abduction was confined and the evidence given by him on the basis of that memorandum would be relevant under this section. But the statements made by the victim, describing the details of the house and how he was confined, to the Magistrate, not recorded in the manner prescribed by Section 164, would be inadmissible.⁹ Memorandum of verification prepared by Magistrate showing places where murders took place would be admissible along with index, but the confessional statement contained in it would be inadmissible.¹⁰

In a case where the finding was that the accused died as the result of gunshot injuries and the common case of the parties was that there was only one gun at the time of the occurrence and that gun belonged to the accused, it was not further necessary for the prosecution to establish that injuries caused by the gunshot were from the gun of the deceased.¹¹

If a *hansli* (ornament for the neck) is distinguished from other *hanslies* mixed with it by having four rings attached to it, the recovery by identification cannot lead to the conclusion that the *hansli* recovered was the one removed from the body of the girl raped and murdered.¹²

(n) *Identification Parade* (1) *General*. Identification parades have a twofold object, viz. :

- (i) to satisfy the investigating authorities that a certain person not previously known to the witness was involved in the commission of the offence or a particular property was the subject of the crime; and
- (ii) to furnish evidence to corroborate the testimony which the witness concerned tenders before the court.¹³

In a civil suit, identification parade cannot be held in order to see whether plaintiff could identify the defendant.¹⁴

In criminal cases it is improper to identify the accused only when in the dock, the police should place him beforehand, with others, and ask the witness to pick him out. The witness should not be guided in any way, nor asked, "Is that the man?"¹⁵

Facts which establish the identity of an accused person are relevant under this section. As a general rule, the substantive evidence of a witness is the statement made in court. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused, who are

9. Deep Chand v. State of Rajasthan, A. I. R. 1961 S.C. 1527; 1961 All W. R. (H.C.) 750; (1961) 2 Cr. L. J. 705.

10. State of Assam v. A. N. Rajkhowa, 1975 Cri. L. J. 354.

11. Paramananda Mahakud v. State, I. L. R. 1969 Cut. 73; 1970 Cr. L. J. 931, 933.

12. Kanan Singh v. State, 1966 A. W.

R. (H.C.) 208, 210.

13. Harnath Singh v. State of Madhya Pradesh, 1970 B. L. J. R. 417 (S.C.) 420.

14. I L.R. (1972) 1 Delhi 714.

15. Phipson, Ev., 11th Ed., p. 526, R. v. Cartwright, (1914) 10 Cr. App. R. 219; R. v. William, (1912) 8 Cr. App. R. 84.

strangers to them, in the form of earlier identification proceeding. There may be, however, exceptions to the general rule where, for example, the court is impressed by particular witness on whose testimony it can safely rely without such other corroboration.¹⁶ The identification during police investigation can only be used to corroborating or contradicting the evidence of the witness concerned as given in court.¹⁷

Identifying parables are held by the police in the course of their investigation for the purpose of enabling witnesses to identify the properties which are the subject-matter of the offence, or to identify the persons who are concerned in the offence. A test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the Court.¹⁸ When the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of considerable importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on the right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial.¹⁹ It is important both for the investigating agency and for the accused and the public for the proper administration of justice that such identifications should be held without any undue and unreasonable delay after the arrest of the accused and that all the necessary precautions are effectively taken. It would be advisable to let to the witness concerned who was a stranger to the accused because in that event the chance of his memory fading is reduced and he is required to identify the alleged culprit soon after the occurrence. Thus justice and fairness can be assured both to the accused and to the prosecution.²⁰ Identifications do not constitute substantive evidence which is the evidence given by the identifying witness in court.²¹ They are not held merely for the purpose of identifying property or persons irrespective of their connection with the offence. Whether the police officers interrogate the identifying witnesses or the Prosecution does so, are produced by the police do so, the identifying witnesses are examined for the purpose of holding these parables, and are asked to identify the properties which are the subject-matter of the offence or the persons who are concerned with the offence.

The process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject-matter of the offence, or the persons identified were concerned in the offence. This statement may be express or implied. The identifier may point out by his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf, or may make signs or gestures which are tantamount to saying that the particular property identified was the subject-matter of the offence, or the person identified was concerned in the offence. All these statements, express or

16. *Budhisen v. State of U. P.*, 1970 Cr. A. R. 937; (1971) 1 S. C. J. 923; 1971 M. L. J. (Cr.) 131; 1970 Cr. L. J. 1149; 1970 Jab. L. J. 18; N.Y. 141; A. I. R. 1970 S.C. 1321, 1324.

17. *Rameshwar Singh v. State of Jammu and Kashmir*, 1971 C. A. R. 116 (S.C.).

18. *Ashafi v. State*, A. I. R. 1961 A. 153; I. L. R. (1960) 2 A. 488.

19. *Rameshwar Singh v. State of Jammu and Kashmir*, 1971 C. A. R.

416 (S.C.); see also *Matru v. State of U. P.*, (1971) 1 S. C. W. R. 465; 1971 S. C. Cr. R. 391; A. I. R. 1971 S.C. 1050, 1057; *State of M. P. v. Padam Singh*, 1973 M. P. L. J. 129; 1973 Jab. L. J. 126; 1973 Cr. L. J. 877.

20. *Ibid*.

21. *Matru v. State of U. P.*, (1971) 1 S. C. W. R. 465; 1971 S. C. Cr. R. 391; A. I. R. 1971 S.C. 1050, 1057. 5 (n) 3 Evidentiary value,

implied, including the signs and gestures amount to a communication of the fact of the identification by the identifier to another person.²

There had been a conflict of opinion between various High Courts in regard to the admissibility of evidence concerning these test identification parades. The Calcutta High Court³ and the Allahabad High Court⁴ had taken the view that identification of a person made by a statement within Section 162 of the Criminal Procedure Code is not admissible evidence. The High Court of Madras⁵ and the Judicial Committee of the Privy Council⁶ had taken the contrary view. This conflict has now been resolved by the Supreme Court⁷ adopting the view taken by the Calcutta and Allahabad High Courts in preference to the view taken by the Madras High Court and the Judicial Committee of the Privy Council at Nagpur. The distinction to be made between the mere fact of identification and the communication thereof by the identifier to another person is logical and such communications are tantamount to statements made by the identifiers to a police officer in the course of investigation and come within the ban of Section 162. The physical fact of identification has thus no separate existence apart from the statement involved in the very process of identification, and in so far as a police officer seeks to prove the fact of such identification, such evidence of his would attract the operation of Section 162 and would be inadmissible in evidence, the only exception being the evidence sought to be given by the identifier himself in regard to his mental act of identification, which he would be entitled to give by way of corroboration of his identification of the accused at the trial. It must, however, be remembered that every statement made to a person assisting the police, during an investigation, cannot be treated as a statement made to the police and as such excluded by Section 162.⁸ If, after arranging the test identification parade, the police completely obliterated themselves and the *Panch* witnesses or a Magistrate thereafter explained the purpose of the parade to the identifying witness and the process of identification was carried out under their or his exclusive direction and supervision, the statements involved in the process of identification would be statements made by the identifiers to the *Panch* witnesses or the Magistrate and would be outside the purview of Section 162. But if the whole of the identification parade was directed and supervised by the police officer and the *Panch* witnesses took a minor part in the same and they were only for the purpose of guaranteeing that the requirements of the law in regard to the holding of the identification parade were satisfied, the statements made by the identifiers would be hit by Section 162.⁹

22. *Ramkishan v. State of Bombay*, 1955 S. C. 104; 57 Bom. L. R. 601; (1955) 1 M. L. J. (S.C.) 60; 1955 All W. R. (Sup.) 41.

23. *Khahiruddin v. Emperor*, 1943 Cal. 614; 210 I. C. 409; 45 Cr. L. J. 258; *Swendra Dinda v. Emperor*, 1949 Cal. 514; I. L. R. (1945) 2 Cal. 513.

24. *Daryan Singh v. State*, 1952 All. 59; 53 Cr. L. J. 265.

25. *Gurusami Tevan v. Emperor*, 1936 M. W. N. 177; *In re Kshatri Ram Singh*, 1941 Mad. 675; 196 I. C. 342; 1941 M. W. N. 521.

1. *Ramadhini v. Emperor*, 1929 Nag.

2. *Ram Kishan v. State of Bombay*, 1955 S. C. 104 at p. 114; 1955 S. C. J. 129; *State of U. P. v. Ramji Lal*, 1968 All Cr. R. 224; 1968 A. W. R. (H.C.) 344, 345.

3. *Shiv Bahadur Singh v. State of Vindhya Pradesh*, 1954 S. C. 322 at pp. 333-334; 1954 Cr. L. J. 910; 1954 S. G. J. 362; 1954 S. C. A. 1816; 1954 S. C. R. 1098.

4. *Abdul Kader v. Emperor*, 1946 Cal. 452; 228 I. C. 24; 50 C. W. N. 88.

5. *Ram Kishan v. State of Bombay*, 1955 S. C. 104 at pp. 114-115, *supra*.

An identification parade, if it has to have any value, must be held in the absence of the police.⁵ It is not absolutely necessary that it should be held in the presence of a Magistrate.⁶

(2) *Power to identify.* The power to identify varies according to the power of observation and the observation may be based on small minutiae which a witness cannot describe himself or explain. It has no necessary connection with education or mental attainments. An illiterate villager, may be, and frequently is, much more observant than an educated man.⁷

(3) *Probative value.* The actual evidence, regarding identification, is that which is given by the witnesses in Court. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance, corroborative of the identification in Court. The earlier identification made by a witness at the identification parade has, by itself, no independent value.⁸ This view has now been affirmed in a number of cases by the Supreme Court.⁹ The value of identification parade can however be not denied because unless it is there to support the fact of identification in Court it would be unsafe to act on the identification in Court (unless there is some exceptional circumstance such as description of the accused given earlier to someone by a witness).¹⁰ Identification parade evidence is not to be rejected simply because the accused was on bail. The main consideration is, whether the parade was conducted in a fair manner and whether the witnesses in fact saw the accused before the commission of the offence and the identification parade.¹¹ Where a person identifies one suspect correctly but commits several mistakes, that identification would not be a fact 'proved' under Section 3 of the Evidence Act and hence would lose its probative value.¹² It is very difficult for one who has seen a dacoit during dacoity to give detailed description unless he has distinguishing conspicuous marks, still more so, for villagers and young boys to give detailed descriptions of those whom they have seen for a short while. The fact that in a dacoity everyone of the identifying witnesses was not able to identify everyone of the accused in the case does not detract from the evidence of those witnesses who had identified particular accused.¹³ Where, however, the accused was identified by only one witness, the identification was held not sufficient to corroborate the statement made by an accomplice before his death. In an assault at dead of night, in an intermittent light, with a large number of people being amongst those who were assaulting,

5. *Chatru v. State*, 1953 Bilaspur 3 at n. 6.

6. *Mor Mahmud v. Emperor*, 1940 Sind 168; 11 L.R. 1940 Kar. 487; 190 I.C. 409.

7. *Khilawan v. Emperor*, 3 O.W.N. 740; 112 I.C. 337; 29 Cr. L.J. 1009; A.I.R. 1928 Oudh 430, 130; *Prabhari v. State*, 1 L.R. (1966) 16 Raj. 14; 1966 Cr. L.J. 1332; A.I.R. 1966 Raj. 241.

8. *Salva Narain v. State*: 1953 All. 385; 1953 Cr.L.J. 848; *In re Sangiah*, 1918 Mad. 133; 11 L.R. 1918 Mad. 667; (1947) 2 M.L.J. 252; *Kanailal v. State*, 1950 Cal. 413; 51 Cr.L.J. 1520.

9. *Sampat Jivada Shinde v. State of Maharashtra*, 1974 U.J. (S.C.) 177; 1974 Cr. L.J. 674; 1974 Cr. L.R. (S.C.) 221; 1974 S.C.C.

(Cr.) 382; (1974) 4 S.C.C. 213; 1974 S.C. Cr. R. 210; A.I.R. 1974 S.C. 791 at 793; *Hajib v. State of Bihar*, 1971 Cr. Ap. R. 110 (S.C.); (1971) 2 S.C. W. R. 446; 1971 U.J. (S.C.) 830; 1972 Cr. L.J. 233; A.I.R. 1972 S.C. 283; *Santokh Singh v. Izhar Hussam*, A.I.R. 1973 S.C. 2190; 1973 Cr.L.J. 1176.

10. *State of Orissa v. Chhaganlal*, 1977 Cr. L.J. 319.

11. *State v. Kulawat*, 1959 A.I.J. 548, overruling *Ganga v. State*, A.I.R. 1956 All. 122.

12. *Bechu v. State of U. P.*, 1957 Cr. L.J. 113.

13. *Aziz Khan v. State*, 1958 Raj. L. W. 327. See also *Narpat v. State*, 1960 A.I.J. 567.

and the natural fear and confusion that the presence of dacons creates in the hearts of men and women, persons would not be in a position to so carefully note the features of those who were assaulting them, as to enable reliance to be placed upon their identification parades, after a long time, particularly, when upon a total view of their picking out they had picked out an equal number of suspects and non-suspects.¹⁴ As stated by Viscount Haldane, L. C. in *Rex v. Christie*.¹⁵

Its relevancy is to show that the witness was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock was an after-thought."

As Lord Moulton said :¹⁶

"Identification is an act of the mind and the primary evidence of what was passing in the mind of the man is his own testimony, where it can be obtained."

Evidence of identification is, in fact, the evidence of mental impression made by the witnesses of the appearance of the accused at the time of the occurrence. The evidence of even one good identifying witness may be treated as sufficient, but as a matter of precaution the Court acts on the rule of caution that the larger the number of witnesses correctly identifying the accused and lesser the number of errors made by them, the margin of error is reduced and the probability that the accused was seen by the witnesses at the place of occurrence becomes greater. Identification (Latin: idem—the same) means the process of establishing the identity of a person, or in other words, the determination of his individuality, by proving that he is the man he purports to be, or if he is pretending to be someone else, the man he really is, or in case of dispute, that he is the man he is alleged.¹⁷

The evaluation of identification evidence is perhaps one of the most difficult problems which confront a judge, when we remember the extent of human fallibility and the fragility of memory and the tricks played by our senses. It can cause us no surprise that in England and America it has been found that the major sources of miscarriage of justice are due to wrong identification. Dwight McCarty's *American Classic Psychology for the Lawyer* (New York: Prentice Hall in C. 1929 in C.S. VII, p. 2051 foll.) and Professor Glanville Williams in *Proof of Guilt* (Hamlyn Lectures at page 83 and foll.). Identification evidence has expounded the manifold inaccuracies of recall. Therefore, identification evidence should be examined with great care.

In criminal cases, identification parades have to be held to establish the identity of the culprit. Identification parades are held, not for the purpose of giving defence advocates material to work upon, but in order to satisfy investigating officers of the bona fides of the P.W.s and that they are on the right track.¹⁸

The result of the identification parade conducted at the stage of investigation is not a piece of substantive evidence and cannot be the basis of a conviction.

14. *Gokul v. State*, A.I.R. 1958 All. 616; 1958 Cr. L.J. 996.

15. (1914) A.C. 545, 551.

16. *ib.*, at p. 558.

17. *Kamaraj Gounder v. State*, 1959 M.

W.N. 369, 373; 1959 M.W.N. Cr. pp. 133-134.

18. *State v. Ghulam*, A.I.R. 1951 All. 475.

tion by itself¹⁸. The evidence given in the witness box by the evidence given by the identifying witness in the witness box. It, however, provides a very good piece of corroborative evidence and greatly enhances the credibility of the evidence of identification given in court¹⁹. In fact, mere evidence of identification in court in the absence of a prior identification test is of very little consequence. The mere fact that a person is in the dock when accused is likely to influence the mind of a witness and makes him think that the person in the dock is the person who committed the crime and thus reduce the evidentiary value of the evidence of identification given in court²⁰. Although the accused may have no right to claim an identification parade, if the prosecution turns down its request for identification, it runs the risk of the veracity of the evidence being challenged on that ground.²¹

The whole idea of a test identification proceeding is to see if the witness who claims to have seen the accused at the time of the occurrence can identify him from amongst others who are put up and from any other source. If he can, then it becomes more or less certain that the evidence of identification as deposed to by the witness is genuine. Before the evidence of identification given in court can be accepted as sufficient to establish the identity of an unknown accused, it is necessary to see that there is some good corroborative evidence in support of the evidence of identification in court. And such corroborative evidence usually comes from the evidence of the test identification proceedings. The witness picks up the accused from the witness box, identifies him, and then goes back to the witness box. Thus, the evidence of the witness in the witness box is corroborated by the evidence of identification parade has no substantive value, but it is a very important corroborative evidence in court. Thus, in the absence of test identification proceedings, the judge may doubt the veracity of the witness that the accused was one of the culprits could not be believed at all. But failure to hold a test identification parade does not make inadmissible the evidence of identification in court. The weight to be attached to such evidence is a matter for the court of fact.²²

So, where the culprits are unknown to the witnesses, the witnesses say as a course of their examination by the investigating officer that they would be able to recognise some of the culprits, a shown a test identification parade of the suspects and it is found that the culprits possible opportunity, whenever possible, to see the culprits. In *M. S. Singh v. The State*,²³ it was held, that non-holding of a test identification parade, though it may not be a ground to vitiate the trial is undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification.

It may, finally be pointed out, that the evidence of identification of the accused or of the recovered property before a Police Officer, and then to a statement

18. *Bechan Singh v. State*, 1973 All Cr. 252.

19. *Varkuntam Chandappa v. State of A. P.*, A.I.R., 1960 S. C. 1340; (1960) Cr. L.J. 1681.

20. *Shiam v. Rex*, 1953 Cr. L.J. 367. See also Prof. Glanville Williams: *Proof of Guilt*.

21. *Lajja Ram v. State*, (1955) Cr.L.J. 1547.

22. *Pravash Kumar v. The King*, (1951) 52 Cr. L.J. 819; 1 L.R. (1974) 2 Delhi 701; *Sadha Beg v. State*,

18 Cr. L.J. 291; 1972 Cr. L.J. R. (C.) 173; 1972 Cr. L.J. 1113.

23. *Birey Singh v. State*, 1953 Cr.L.J. 1817.

24. *Kanta Prasad v. Delhi Administration*, A.I.R., 1958 S.C. 350; 1958 Cr. L.J. 698; 1958 Mad. L.J. (C.) 508; 1958 All. W.R. (11.C.) 588; (1958) 2 Andh. W.R. (S.C.) 113; 60 Punj. L. R. 583; (1958) 2 M.L.J. (S.C.) 113.

25. 1951 Cr. L.J. 1516.

within the meaning of Section 162 of the Code of Criminal Procedure and as such becomes inadmissible in evidence.¹

The suspect should be mixed up with a fairly large number of persons of similar status and dress and the witnesses should be called one by one so that identification by one witness may be conducted out of the sight and hearing of other witnesses. The proportion of outsiders to be mixed with the persons to be identified must be sufficiently large to eliminate the chance of the accused being picked up by chance. Where, therefore, six suspects were mixed up with only seven outsiders, it was held that the chances were all in favour of the witnesses picking up the accused in view of their number being almost equal to the number of outsiders and as such the court would not rely much on this sort of an identification parade.² It should also be remembered that if too large number of persons are mixed up with the suspect, there might be a danger of putting too much strain on a witness's ability to pick up a suspect. In such a case, he will get easily bewildered. Where the proportion of suspects to undertrials bore the ratio of 5 : 1 it was held that the identification parade was a fair one.³ In *Satya Narayan v. State of Delhi*,⁴ it was held that the proportion should at least be 9 : 1. In *S. Hanuman v. State of Orissa*,⁵ the High Court of Orissa held that identification parade was a fair one when 13 undertrials were mixed with two suspects.

It has been held in a number of cases that the value of a test identification parade is much less, if it is held a considerable period after the arrest of the accused.⁶ So also is the case if the test identification parade is held long after the occurrence. Where, therefore, the test identification parade was held fourteen months after the occurrence, the evidence of identification was looked at with an eye of suspicion. "Human memory is fallible. It is sometimes difficult to identify a person not very well known, whom one has only seen with different appearance about 15 months later after the crime has occurred."⁷

Test identification parade should be arranged early, at any rate, before the accused goes on bail.⁸ In fact, courts ought to refuse bail if an identification parade is going to be and ought to be held. So not only the test identification parade has to be arranged at the earliest possible opportunity but it will have to be opposed strenuously until the test identification parade is finished.

As regards the actual conduct of the identification proceedings, the following important observations should be noted and observed :—

1. *Ram Kishan v. State of Bombay*, 1955 S.C. 104; 1955 Cr. L.J. 196; 57 Bom. L.R. 600; 1955 Mad. W.N. 146; 1955 All. W.R. (Sup.) 41; (1955) 1 Mad. L.J. (S.C.) 66. See also *In re Venkata Subbiah*, (1955) Cr. L.J. 1152; *Santa Singh v. State of Punjab*, 1956 Cr. L.J. 930; *State of Rajasthan v. Rama*, 1971 W.L.N. 94 (Raj.).
2. *Bhagnu Ranchhod v. State*, 1955 Cr. L.J. 31.
3. *Dad Chaudhary v. State*, 1959 Cr. L.J. 356; *Ranjha v. State*, 1952 Cr. L.J. 15; *State v. Wahid Rux*, 1953 Cr. L.J. 70; *Gope v. State of Rajas-*

- han*, 1974 W.L.N. 78; 1974 Raj. L.W. 192.
4. 1953 Cr. L.J. 848.
5. 38 Cut. L. T. 294; 1972 Cut. L. R. (Cri.) 173; 1972 Cr. L.J. 1113.
6. 38 Cut. L. T. 294; 1972 Cut. L. R. (Cri.) 173; 1972 Cr. L.J. 1113.
7. *Debi v. State*, 1953 Cr. L.J. 447; *Kasim Rizvi v. State of Hyderabad*, (1951) 52 Cr. L.J. 1123.
8. *Daryao Singh v. State*, (1955) Cr. L.J. 1.
9. *Hazara Singh v. State*, (1951) 52 Cr. L.J. 492; *Ganes Singh v. State*, 1956 Cr. L.J. 181.

Although human memory is fallible and it is sometimes difficult to identify a person not well known, whom one sees with a rather different appearance at the time of identification proceedings, yet this does not necessarily cause any diminution in the evidentiary value of the witnesses, who find it possible to identify the accused even after lapse of a long time after commission of the offence. The evidence of the identification has to be dealt on the basis of various facts and circumstances of each particular case. It is not possible to lay down any hard and fast rule, as to when a particular identification should or should not be accepted.¹⁴

Although, in assessing the evidence of identification, there are no hard and fast rules for guidance, yet the basic principle of criminal law is, that a fact or circumstance must be proved against the accused before it can be relied upon and used against him. The evidence of identification is as much subject to the definition of the word "proved", and it must satisfy the test provided by Section 3. The Court should approach the evidence with reasonable doubts, and accept it only, if those doubts are removed. Evidence of identification can be accepted only, if the Court is satisfied that

- (1) a witness had at least a fair, if not good opportunity of seeing the accused ;
- (2) the identification parade was held within a reasonable time of the incident ;
- (3) the witness has reliable powers of observation to be judged from the facts, that the parade was not made too easy for him to pick out the suspect and that he did not commit so many mistakes that it would create a doubt in the mind of a reasonable man ;
- (4) the statement of the witness that he did not know the suspect from before is believable ; and
- (5) the witnesses were not, given an opportunity to see the accused after their arrest, and that the investigation conducted inspires confidence.¹⁵

The evidence of identification at its best is weak, for the chances of mistake are far greater in this type of evidence than where the witness deposes about facts within his knowledge.¹⁶ Where the identification is tainted, the statement of the witness cannot be accepted at its face value.¹⁷

If the intention is to rely on the identification of a suspect by a witness, his ability to identify should be tested without showing him the suspect or his photograph or furnishing him the data for identification. Showing a photograph prior to the identification makes the identification worthless.¹⁸ Where

14. Sheo Nandan v. The State, A.I.R. 1964 A. 139.

15. Anwar v. State (I.I.R. 1958) 1 A 151; A.I.R. 1961 A. 50.

16. Ibid.

17. Ibid.

18. Laxmipat Choraria v. State, (1968)

1 S.C.R. 224; 1968 1 S.C.A. 682;
1 S.C.R. 10; 1968 2 S.C.J.
10; 1968 1 R. 16 1st
Rep. 473; 1968 M.L.J. (Cr.) 614;
1968 Cr. L.J. 1124; A.I.R. 1968
S.C. 938, 947.

proofs of the accused have been shown to the witness, the value of any subsequent identification by the witness only is impaired.¹⁹

The purpose of test identification is to test the substantive evidence in court. The sworn testimony of witnesses as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration, which should be in the form of an earlier identification proceeding. There is an exception to this rule, where the Court is satisfied that the evidence of a particular witness can be relied on without an earlier identification proceeding.²⁰ It is suggested that in those cases where the prosecution case depends upon the evidence of identification, the Committing Magistrate should examine witnesses in court, giving an opportunity to identify accused persons to obviate the necessity of a test identification. It is suggested that there was insufficient corroboration of the evidence of identification.²¹ In cases where there are no such exceptional circumstances, identification evidence should always be examined with great care.²²

(f) *Identification parade not essential.* But simply because the statements made by the witnesses before the Magistrate conducting the identification proceeding are not evidence as previous statements to corroborate their evidence in Court, it cannot be said that if such evidence is lacking the evidence in Court is no evidence. The Evidence Act does not require any particular number of witnesses to prove any fact nor does it require that the evidence of any witness should be corroborated.²³ The question at all times is of believing or not believing the witness.²⁴ But, in practice, it is not safe to accept the statement of a witness about the complicity of an accused in the crime, if he has not described him by name or other particulars during the investigation, and still was not made to identify him out of a group. The evidence of a witness that he recognizes the accused whom he had not seen before the occurrence, as the offender is inherently weak, and prudence and discretion require that there must be corroboration before it is accepted.²⁵ If a witness has not seen the accused at a parade or otherwise during the investigation the fact may be relied on by the accused, but there is nothing in law which compels or requires the accused to demand that an identification parade should be held prior to the enquiry or the trial.²⁶ Identification parades are held not for the purpose of giving defence advocates material to work on, but in order

19. *Sharaf Shah Khan v. State of A.P.*, 1 L.R. 1962 A.P. 96: A.I.R. 1963 A.P. 314.

20. *Abdullah v. State of A.P.*, A.I.R. 1960 S.C. 1540: 1960 Cr. L.J. 393; *Bhishen v. State of H.P.*, 1969 Cr. A.R. 357: 1970 Cr. L.J. 1149; 1970 Lab. L.J. (S.N.) 101; A.I.R. 1970 S.C. 1211, 1974 S.C. 1111; *State of Bihar v. State of Bihar*, 1961 Cr. A.R. 410, (reversing judgment of High Court); *Ram Nath v. State of Bihar*, A.I.R. 1965 A.W.R. (H.C.) 811, 812; 1965 All. Cr. R. 543; *Dhan Singh v. State*, 1966 A.W.R. (H.C.) 584; *Ahmad Ali v. State*, 1969 Cr. L.J. 833 (All.); *Maji Taha v. State*, 1973 Cr. L.J. 526 (Gauhati).

21. *Abdul Rashid v. State*, 1964 A.W.R. (H.C.) 6: 1966 Cr. L.J. 200.

22. *State of Orissa v. Maheshwar*, 1 L.R. 1963 Cut. 762: A.I.R. 1964 Orissa 37.

23. *Satya Narain v. State*, 1963 All. 385 at p. 393: 54 Cr. L.J. 848.

24. *Dhaja Rai v. Emperor*, 1945 All. 241: 49 Cr. L.J. 287; 1947 A.I.J. 687.

25. *Satya Narain v. State*, 1953 All. 385 at p. 393; *Sarvag Mehton v. State of Bihar*, 1971 Pat. L.J.R. 107; 1975 W.L.N. (H.C.) 139 (Raj.); *State of Orissa v. Chagan Lal*, 1977 Cr. L.J. 319.

26. *In re Sangiah*, 1948 Mad. 113, see also *Satya Narain v. State*, *supra*; *Ali Jan Imam Ali v. State*, 1968 Cr. L.J. 9: A.I.R. 1968 All. 28, 31; *Lajjaram v. The State*, A.I.R. 1955 All. 671.

to satisfy investigating officers of the *bona fides* of the prosecution witnesses.² But save in the most exceptional circumstances the Court should direct an identification parade if it is necessary in the interest of justice.³ Especially when the accused persons emphatically assert that they were unknown to the prosecution witnesses either by sight or by face and they requested the authorities concerned to have the necessary identification parade held.⁴ If the witnesses do not give the name of the accused, it is necessary to hold a test identification parade; also if the accused denies any charge. There is however one exception. If the accused is arrested on the spot, and he is in custody from that time up to the date of his trial, and no question at all about his identity. It is not necessary for the State to hold identification parade when the accused were arrested on the spot. In such a case, if the accused put that the witnesses would not be able to identify them, they should have requested for an identification parade.⁵ There is no question of identification where the accused is apprehended or caught red-handed in the presence of a number of persons who are produced by the prosecution as witnesses in the case.⁶ The absence of test identification is not fatal in all cases and if the accused person is well known by sight, it would be waste of time to put him up for identification.⁷ The non-holding of a test identification parade, though it may not vitiate the trial, is undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification.⁸ But having regard to the peculiar facts and circumstances of the case, especially when the fact that the witness is corroborated by another, the existence of the identifying witness will not be rendered incredible.⁹ As was pointed out in *Narain v. Emperor*,¹⁰ for a Magistrate or other officer to come into Court and depose that a particular witness in his

2. *Public Prosecutor v. Sankarapandita Naidu*, 1932 M.W.N. 427.

3. *Amar Singh v. Emperor*, 1943 Lah. 303; 209 I.C. 231; 45 Cr. L.J. 48; *Sajjan Singh v. Emperor*, 1945 Lah. 48; I.L.R. 1944 Lah. 236; 219 I.C. 259; 46 Cr. L.J. 550.

4. *Awadh Singh v. State*, 1954 Pat. 483; see also *Provash Kumar Bose v. The King*, 1951 Cal. 475; 52 Cr. L.J. 87; *Joginder Singh v. State of Punjab*, 75 Punj. L. R. 786; 1974 Chand L. R. (Cri.) 588; 1974 Cri. L. J. 240; 1972 All C. R. 101.

5. *State v. Dhanpat*, A. I. R. 1960 Pat. 582; 1960 Cr. L. J. 1650.

6. *State of U. P. v. Rajju*, 1971 S. C. C. Cr. 228; 1971 Cr. L. J. 642; A. I. R. 1971 S.C. 708; 710.

7. *Dhan Singh v. State of U. P.*, 1963 A. W. R. (H.C.) 584, 585. 'The standard of judging the identification of such persons differs from that applicable to general identification of persons long after the crime (*State of U. P. v. Jagdish Prasad*, 1968 Cr. L. J. 110; A. I. R. 1968 All. 335, 337).

8. *Jodanath Singh, Swarn v. State of U. P.*, 1971 S. C. W. R. 159, (followed in *Har Bhajan Singh v. State of J. & K.*, 1975 Cri. L. J. 1553; A. I. R. 1975 S. C. 1814);

Mehtab Singh v. State of M. P., 1974 Cri. App. R. (S.C.) 374; 1975 S. C. G. (Cri.) 33; 1975 Cri. L. T. 290; 1975 Cri. L. R. (S.C.) 31; 1975 S.C. Cri. R. 44; (1975) 3 S.C.C. 407; A. I. R. 1975 S.C. 274; *Gulam Majibuddin v. State of W. B.*, 1972 Cri. App. R. (S.C.) 47; 1971 U. J. (S.C.) 885; 1972 Cri. L. J. 1342 (when it was not known to witnesses previously); *Meera Puri v. State of Nagaland*, 1971 Cri. L. J. 539, Assam L. R. (1971) Assam 22; *Kuruchivan Pillai v. State of Kerala*, 1974 Ker. L. T. 328; *Surya Muni v. State of U. P.*, 1971 U. J. (S.C.) 126; (1970) 3 S.C.C. 530; *Awadh Singh v. State of U. P.*, 1964 Pat. 483; *Mahavir Singh v. State of U. P.*, 1973 All. Cr. R. 139.

10. *Johri Lal v. State of M. P.*, 1971 Jah. L. J. 165; 1971 M. P. L. J. 64; 1971 M. P. W. R. 129; A. I. R. 1971 Madh. Pra. 116, 118; I.L.R. 1971 Cutt. 1284. Corroboration could be by the fact that witness has given earlier adequate descriptive particulars of the accused).

11. (1921) 19 A. L. J. 947; 95 I.C. 477; A. I. R. 1921 A. 215.

parties identified one of the accused as having taken part in the dacoity is not sufficient to bear any evidence. The Magistrate's evidence amounts in substance to this:

"The witness said in my presence that a particular accused whom he pointed out took part in the dacoity."

The statement of the witness is not made in Court, and it is not made in Court. The statement can only be proved either to corroborate the evidence given by the witness when he gives his statement in accordance with Section 157 of the Evidence Act, or under some other provision of the Evidence Act. If the witness at the trial is not able to recognise the accused, there are two ways in which his previous statement can be rendered admissible. The statement made by the witness before the committing Magistrate may be brought before the Court under Section 157 of the Evidence Act. This was the course adopted in *Nagendra v. Emperor*.¹² It is only available where the witness was not a pick-up at the accused before the committing Magistrate though he could not do so before the judge. The other method is to call from the witness at the trial a statement that he identified certain persons at the jail and that the persons so called there identified were persons whom he had seen taking part in the dacoity. If the witness is prepared to swear to this, the Court is open to the Court to accept this statement to establish by other evidence the identity of the accused whom the witness identified at the jail. For this purpose, the best evidence is the statement of the Magistrate who conducted the identification and his evidence will be strictly received under the provisions of this Act. The rule is that the sworn statement of a witness in Court, as to the opinion of the accused who are strangers to him, requires corroboration when such statement is made in a Court of Session. If the evidence of the witness is not a pick-up at the accused before the committing Magistrate, it would not be safe to accept his isolated identification in the Sessions Court. The case of a witness whose statement becomes doubtful if he is led to identify certain persons,¹³ but if he was not sent to take part in identification, it is not safe to accept his evidence.

There are certain principles which a Court has to bear in mind in deciding whether the identifying witnesses are worth relying upon or not. Among these principles which the Court of law has to see can be categorised as follows:

- (1) The number of wrong persons pointed out by the identifying witnesses;
- (2) The consistency of the statements of the witnesses;
- (3) Sufficiency of number of men paraded; and

There are certain principles which a Court has to bear in mind in deciding whether the identifying witnesses are worth relying upon or not. Among these principles which the Court of law has to see can be categorised as follows:

12. (1921) 19 A.L.J. 947; 95 I.C. 477; A.L.R. 1921 A. 215 (This course is not available under the new Cr. P. C. as there is no equivalent provision).
13. Abdul Wahab v. Emperor, 1925 All. 223; 1. L. R. 47 All. 39.

14. *Vaikuntam v. State of U. P.*, A.L.R. 1960 S.C. 1340; 1960 Cr. L.J. 1681.
15. 1972 Cut. L. R. (Cri.) 554; *State of Punjab v. Rameshwar Das*, 1975 Cr. L. J. 1630 (Punj.).
16. 1972 Cut. L. R. (Cri.) 554.

prominent part which entered the witnesses in the matter of identification of the weight to be attached to the identification of a suspect by a witness should ordinarily not depend upon his failure to identify other suspects. It follows that it should not depend upon the mistakes committed by him (i.e., upon the number of innocent men mixed up with him as other offenders).

When the question of a suspect is sought to be established, it is better that a large number of individuals are mixed up with the accused, although one can not expect the same ratio between the accused put up for identification and the person mixed with them, in a case where the number of accused is one or two, because there is a greater probability of a single accused being identified by chance if he is mixed up with only two or three other persons. There is much less probability when the number of accused is large and are mixed up with many or many other persons. But that does not mean that the identification was correct or correct.¹⁷ When question of identification arose during the trial, it can be stated that the credibility of prosecution witness does not rise or fall when he identifies the accused during the examination-in-chief. The fact is that when the accused cannot stand him to any test. In such examination he is under the control of the State counsel. The accused cannot refuse to the Magistrate to have an examination on parade or to collect men to stand. It is only when the witness is being cross-examined that the counsel for the accused may take the witness to the stand and say that I am not the person who was mixed up with the accused.

(5) For the purpose of the present, Magistrate is usually satisfied if the genuineness of the identification is established by the witness based on the general level of intelligence and the capacity of the witness to identify persons that he has seen only in the light of a photograph. It is not necessary that the person could be recognized by the witness after some months. It is enough that the identification proceedings were conducted properly and properly in order to insure confidence in the trial. The fact is that the identification is necessary that every identification should be made in the same circumstances similar to those in which the suspect was examined. In prosecution witnesses to identification is a matter of fact and it is a matter of fact for the prosecution to prove affirmatively that every possible precaution was taken to ensure the identification of the suspect. It is not necessary that the identification be correctly made.¹⁸ Magistrate found 13 persons who were identified with the accused, the police officers who were identified with the accused and Magistrate found that the identification was correct. No evidence was shown on such identification.¹⁹

In a *Punjab High Court* case, *State v. B. S. Singh*, 1923, 10 Cr. App. 100, the facts of test identification were stated. The court said that the identification of a person is a matter of fact and it is a matter of fact for the prosecution to prove affirmatively that every possible precaution was taken to ensure the identification of the suspect.

17. *State v. B. S. Singh*, 1923, 10 Cr. App. 100, 111. See *Shoo Sahai v. Emperor*, 1952 Cr. App. 100, 111.

18. *Att. Khan v. State*, 1952 Cr. App. 100, 111. *W. 527*.

19. *State v. B. S. Singh*, 1923, 10 Cr. App. 100, 111. *Att. Khan v. State*, 1952 Cr. App. 100, 111.

20. *Saty Narain v. State*, 1952 Cr. App. 100, 111. *Att. Khan v. State*, 1952 Cr. App. 100, 111.

Munni Dhimar, 1954 V P. 42 (the precaution to be taken are fully stated). *R. (Cr.) 413*.

State v. B. S. Singh, 1923, 10 Cr. App. 100, 111. *Att. Khan v. State*, 1952 Cr. App. 100, 111. *James and Takru, II*.

all the answers to the multifarious problems relating to procedures and precautions and the correct legal inferences to be drawn from them.

This would be no ground for rejecting identification evidence that the parade accused and persons mixed with them were not similarly dressed²⁴

Even though a person is arrested under the Arms Act, 1878, if he is suspected of having taken part in a dacoity case, normal precautions for identification in a dacoity case should be taken.²⁵

(b) *Who can hold a test identification.* Their Lordships of the Supreme Court pointed out that the communication of the fact of identifications by the identifier to the person holding the proceedings is tantamount to a statement made by the identifier to that person. The note or memo of the proceedings prepared by the person in question is, therefore, a record of the statement of the identifying witnesses. But since there is no legal bar to any person recording the statement of another (provided the statement has been voluntarily made), *any person can conduct a test identification.* Other conditions being satisfied, identification proceedings may be conducted by *punch* witnesses who are all ordinary citizens.¹ If after marshalling the parade, the police leave the field and allow identification to be made under the exclusive direction and supervision of *punch* witnesses, Section 162 is not attracted.²

A test identification may be held either by *punch* witnesses or Magistrate having power.³

An identification parade held by a Police Officer or a Junior Magistrate has no legal value. Any statement by the *punch* witnesses would be hit by Section 162, Cr. P. C.⁴

A Magistrate has no power to interfere with the number and method of investigation by the police.⁵ The holding of a test identification parade is merely a step in the investigation of a crime and it is only up to the investigation agency to decide as to whether it would hold a test identification parade or not and if it decides to hold one, the venue for it.⁶

(7) *Legal effect of identification memo.* We have already seen that a test identification furnishes evidence to corroborate the evidence which the witness renders before the Court, and that the identification memo is nothing more than a record of the statement which the witness has expressly or impliedly made before the person who conducted the identification. Determination of the legal effect of the memo should therefore present little difficulty. The persons who can conceivably hold identification proceedings are (a) the police, (b) ordinary citizens, and (c) Magistrate. The laws applicable to these categories of persons are different.

24. *Ram Chandra v. State of Orissa*, (1976) 42 C. L. T. 228.

25. *Tahir v. State*, 1969 Cr. L. J. 680 (All.) 681.

1. *Ramkishan Mithanlal v. State of Bombay*, A. I. R. 1955 S. C. 104.

2. *Santa Singh v. State of Punjab*, A. I. R. 1956 S. C. 526; 1955 Cr. L. J. 930.

3. *Asharfi v. The State*, I. L. R. (1960) 2 A. 488; A. I. R. 1961 A. 153.

4. *Leonard Lobo v. State*, 1967 Cr. L. J. 746; A. I. R. 1967 Goa 60, 65.

5. *Abhinandan Iha v. Dinesh Mishra*, (1967) 3 S. C. R. 668; (1967) 2 S. C. A. 610; 1967 S. C. D. 985; (1967) 2 S. C. W. R. 321; 1968 A. I. L. 373; 1968 B. L. J. R. 273; 15 Law Rep. 418; 1968 Cr. L. J. 197; A. I. R. 1968 S. C. 117. See also *K. F. v. Nazir Ahmad*, A. I. R. 1945 P. C. 18 and *State of W. Bengal v. S. N. Basak*, A. I. R. 1963 S. C. 447.

6. *State v. Raghunaj Singh*, 1963 A. W. R. (H. G.) 855; 1970 Cr. L. J. 78, 81.

In theory, there is no objection to a test identification being held by the police. But in such an event the express or implied statement made by the identifier before them would be a statement which would immediately be hit by Section 162 Cr. P. C., whereunder it can be used only for the purpose of contradicting him under Section 145 of the Evidence Act and cannot at all be used for corroborating him. Consequently, a test identification held by the police nullifies the object of using the identification for corroborating the testimony given by the identifier before the Court. It is for this reason that such proceedings should never be held by the police.

As to ordinary citizens, e.g., Panch witnesses,⁷ there is no legal objection to their holding identification proceedings even though these are arranged for by the police. But as pointed out by the Supreme Court in *Ramkishan v. State of Bombay* (supra), it is essential that the process of identification be carried out under the exclusive direction and supervision of the citizens themselves, and the police should completely obliterate themselves from the parade before the statements made by the identifiers could fall outside the purview of Section 162, Cr. P. C.

Where the Magistrates have the power to act, they must do so under Section 164 or not at all.⁸

Where the proceedings have been held before a Magistrate of the 2nd class not specially empowered, or a Magistrate of the 3rd class, the statement is one under the unwritten general law. There is a difference between the legal status of the two kinds of statements. Nevertheless, the statement irrespective of the powers of the Magistrate before whom it is made remains a formal statement of the witness which can be used not only for the purpose of contradicting him under Section 145 or 155 of the Evidence Act, but also for corroborating him under Section 157 of the Act.

As a record of the statement of the witness, the identification memo can be utilised under Section 159, Evidence Act, for refreshing the memory of the person who prepared it. But Section 157 is of greater consequence, for it provides specifically for corroborating the testimony of the witness. It reads:

"In order to corroborate the testimony of a witness any fact stated in a statement made by such witness relating to the same fact at or about the same time when the fact took place, or before any authority legally competent to investigate the fact, may be proved".

For purposes of the present discussion, the term 'any authority legally competent to investigate the fact' in the second part of the section can be safely ignored. But what is material is the first part, i.e., 'any formal statement made by such witness relating to the same fact at or about the same time when the fact took place'. The fact is not that the accused is guilty of the offence; it is that before the Court the witness identifies the accused, that is to say points to him in the dock and states on oath that in his opinion he was the offender. But, at the test identification held earlier, he had expressly

7. See *Jamna Das v. State*, A. I. R. 1963 M. P. 106; 1962 M. P. L. J. 1064.

8. *Asharfi v. The State*, 1 L. R. (1960) 2 A 488; A. I. R. 1961 A 153.

or impliedly stated the same and this 'former statement' of his was recorded in the identification memo prepared by the person who conducted the proceedings. Indisputably, the memo was prepared 'at or about the time' of the identification. It was, as that, by virtue of the first part of Section 157, the identification memo becomes admissible for corroborating the witness's testimony given before the Court. In *Bhogilal Chundal v State of Bombay*⁹ although the point at issue before the Supreme Court was somewhat different, their Lordships arrived at a similar conclusion.

It will have been noticed that on this reasoning, except for the police (in whose case the special law embodied in Section 162, Cr. P. C. would remain an insurmountable obstacle), an identification memo prepared by anyone, be he a private person or a Magistrate exercising any powers or jurisdiction, can be used for corroborating the testimony regarding identity subsequently given by the witness before the Court.

There remains to consider the legal status of an identification memo prepared on the one hand by a Magistrate of the first class or a Magistrate of the second class specially empowered, and on the other by the remaining kinds of Magistrates. In the case of the former, the memo, as already shown, is the record of a statement taken under the provisions of Section 164, Cr. P. C. It is, therefore, evidence given 'before any officer authorised by law to take evidence'.

In consequence, Section 80 of this Act applies, whereunder the Court must presume the genuineness of the memo. And not only this. Under the same section there is also a legal presumption as to the circumstances under which the memo was prepared, so that it becomes evidence not only of the fact that the witness identified the suspect but also of the various steps or precaution taken by the Magistrate to ensure a fair and just identification procedure. On the practical plane, the result is that where a test identification has been held by a first class or a specially empowered second class Magistrate, it is not necessary to call him in evidence; his memo, under the terms of Section 80, is evidence of everything that it contains. He should be called only, if it is desired to obtain confirmation of doubtful matters in the memo or matters omitted therefrom. Even if a question is raised as to the identity of the witness who appears at the identification, it is unnecessary to call the Magistrate; the doubt can be resolved by summoning the police or jail official who produced him, as was held in *Sadulla v Emperor*¹⁰. Rajasthan High Court however held that the memo is not a record of evidence under Section 80 and happenings at identification parade cannot be proved by production of the memo.¹¹

As to the remaining kinds of Magistrates, their memo does not fall under Section 164, Cr. P. C. Hence Section 80 of the Evidence Act is not attracted to them, so that their deposition in Court is necessary. The same applies to ordinary citizens, or Panch witnesses.

9. A. I. R. 1959 S.C. 356; 1959 Cr. L. J. 389; 6 Bom. L. R. 746; (1959) 1 Mad. L. J. S. C. 101; 1959 All W. R. (H.C.) 156; 1959 Andh. W. R. S.C. 101; 1959 S. C. 190.

10. A. I. R. 1938 Lah. 471; 39 Cr. L. J. 864; 177 I. C. 32.

11. Gopi v. The State of Rajasthan, 1974 W. L. N. 78; 1974 P.S.I. L. W. 192 (also see page 402, Note 49).

To sum up, any person can conduct a test identification,¹² but Magistrates are preferred. This identification memo is a record of the statement which the identifier expressly or impliedly made before him. The statement is a former statement of the identifier and in Court is admissible not only for contradicting him under Section 145 or Section 159 of the Evidence Act but also for corroborating him under Section 157, except when it was made before the Police, in which case it is hit by Section 162, Cr. P. C., and is, therefore, not admissible for purposes of corroboration.

To reiterate, if the person holding the identification is a Magistrate of the first class, or one of the second class specially empowered, Section 164, Cr. P. C., applies and his identification memo is admissible in evidence under Section 80 of the Evidence Act without proof. But, if other Magistrates, or private persons, hold it, they must be called in evidence to prove their memo. Where Section 164, Cr. P. C., operates, the proceedings are independent even of the territorial jurisdiction of the Magistrate concerned.

(8) *Precautions to be taken by Magistrate and Police to ensure that the test was a fair one.* The various precautions the Magistrate should take have already been dealt with. There is no presumption that the necessary precautions were taken, and it is always for the prosecution to prove that they were. But it is not the duty of the prosecution to show that *prior* to identification every precaution possible was taken for concealing the identity of the suspect who, while being moved by train, was exposed to the gaze of witnesses who were railway servants.¹³

It is for the police authorities to specify and carry out the precautions to be taken to avoid the accused being seen by the potential witnesses, prior to the test identification, so that the value of their identification may not be lost. It is not necessary for the Court to lay down rules for the conduct of the police in a matter of this nature. Much depends upon the circumstances of each case in evaluating the evidence of identification.¹⁴ When a suspect was seen by identifying witnesses before test identification parade, and he was put up in the parade with tape on his neck but no other person similar in appearance was included in the parade identification evidence is *tarce*.¹⁵ When the identification is not conducted properly, there remains no reliable corroborative evidence regarding identification in court and accused is entitled to benefit of doubt.¹⁶ One accused had distinguishing features (brown eyes) but persons with such features were not mixed in the parade. He is entitled to benefit of doubt, but other accused who did not have such features though identified by lesser number of witnesses are not entitled to benefit of doubt.¹⁷

12. *In re Narayan Singh*, A. I. R. 1965 M. P. 225.

13. *Palaniswamy Velupuri v. State*, 68 Bom. L. R. 94, 1967 Mah. L. J. 25; A. I. R. 1968 Bom. 127. See also *State of Rajasthan v. Ranjita*, 11 L. R. 1011; 11 Raj. L. W. 24; 1962 (1) Cr. L. J. 461; A. I. R. 1962 Raj. 182 (F.B.) holding that the proposition laid down in *Dhokal Singh v. State*, 11 L. R. 1953; 3 Raj. L. W. 154, that such duty exists, was stated too broadly.

14. *State of Rajasthan v. Ranjita*, I. L. R. (1961) 11 Raj. 1010; A. I. R.

1962 (1) Cr. L. J. 461 (F.B.).

15. *Y. S. Narayana v. State of Andhra Pradesh*, 1972 S. C. C. 639; 1972 U. J. (S.C.) 977; 1972 S. C. (Cr.) 684; 1972 S. C. L. J. 254; A. I. R. 1973 S. C. 1200.

17. *Chander Singh v. State of U. P.*, 1973 S. C. C. 55; 1973 U. J. (S.C.) 254; 1973 Cr. L. J. 926; A. I. R. 1973 S. C. 1200.

The value of evidence obtained by Identification Parades as corroborative evidence of identification in court is great only when they are held in the manner and under conditions which preclude even faint possibility of collusion or machination during investigation. To hold such parades in the precincts of the police court would be violation of reasonable guarantee against any collusion.¹⁸

(9) *Inference that accused was shown to identifying witnesses should not be based on surmises.* If inferences are drawn on mere possibilities, then there is a possibility in every case of an accused being shown to the witnesses before they are put up for identification. But a judicial finding cannot be based on such surmises. It must be based on proof, that is, after considering the matters before it, the Court must either believe it to exist, or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It is only then that the Court should hold that that fact has been proved.¹⁹

(10) *What was the state of the prevailing light.* In the case of every offence committed during the hours of darkness the prevailing light is a matter of crucial importance. In such cases, the stock argument is that owing to inadequate light the witnesses could not see the faces of the culprits. The argument frequently finds favour with Courts and it is held that merely because no source of light was mentioned in the first information report, the crime was committed in darkness, so that its perpetrators could not be seen. Difficulties would be alleviated, if those who have to deal with such arguments keep certain basic facts in mind.

To begin with, a crime, like dacoity, by its very nature, cannot be committed in pitch darkness, for the criminals (being strangers) have to find their way about, have to discover the whereabouts of goods, have to sort out those articles which they intend to appropriate, and have to take precautions to guard against counter-attacks by the villagers. All this makes the presence of adequate source of light imperative. Rising standards of living have enabled villagers to replace their old-fashioned *diyas* with kerosene lamps and also to provide themselves with electric torches. Again, increasing lawlessness in the countryside has obliged villagers, specially those in more affluent circumstances, to keep lights burning all night.

Such lights are not kept burning, to enable criminals to be identified, but to keep them away. The existence of the sources of light, just mentioned, must, therefore, be taken as normal these days: Moonlight too cannot be ignored and the Court should always consult the calendar in order to determine the state of the moon at the time of the offence. Even making allowance for the increase in the distance in tropical countries, the distance of moonlight vision cannot go from 12 yards or 17 yards to 45 yards and 52 yards.²⁰ Dacoits, as it may be, arm themselves with electric torches both for enabling them to see their way and to facilitate their work of plunder. It is true that, if a dacoit flashes his torch into the face of a witness, the latter will get dazzled and for some moments will not be able to see anything.

18. *Prabhu Lal Das v. State*, 1965 Cr. L. J. 40; A. I. R. 1968 Cal. 38, 48.

19. *Sheo Nandan v. The State*, A. I. R. 1964 A. 159.

20. *Kunnummal v. State*, A. I. R. 1963 Ker. 54; 1962 Ker. L. T. 120.

But inevitably, a torch has to be flashed in various directions, so that frequently some of the dacoits themselves come in the way of its beams and must, therefore be seen by some of the witnesses. As to the flashing of a torch inside a room, more specially the small rooms, which characterise village houses, the light reflected by the walls is bright enough for the offenders' features to be marked. Also, when village people rush to the scene of the crime, those who follow the torch invariably bring them and further for the purpose of searching for the bandits, some villagers set alight a convenient heap of straw thereby illuminating the entire area.

Thus, no scene of dacoity can be without sources of light sufficient to enable the witnesses to see the faces of miscreants. This does not mean that there is a presumption of the existence of such sources of light—that has always to be proved by the prosecution; but, if evidence with regard to them is led it is *prima facie* believable. Punjab High Court has however held that existence of artificial light in an occurrence of dacoity during night should be presumed in absence of negative circumstances.²¹ This case went in appeal to Supreme Court but that observation was not disputed. As to burning straw, perhaps its strongest proof is a patch of ash found by the police when they visit the scene of the occurrence. With regard to the recital in the first information report, any omission to mention of a normally existing source of light should not be deemed to be a fatal defect.

In cases of crimes, where the only evidence is of identification, the question of light is of paramount importance. This should be approached in a careful and pedantic manner.²² Where the dacoits had remained at the scene of occurrence for over half an hour and witnesses had taken up their positions around house and there was adequate light and opportunity to see the faces of the miscreants, the evidence of identification is reliable.²³

A known person can be recognised from a short distance even in the light of stars and where testimony of witnesses could not be shaken in cross-examination and nothing had obstructed the view of the witnesses it is reliable.²⁴ But a man of 70 years even if possessed of full eyesight was held not likely to identify a person in partial moonlight from 100 yards.²⁵

Where visibility was poor due to darkness and witness admitted inability to see what the accused was holding in his hands, identification of accused by the witness was held doubtful.¹

Witness stepping forward of accused could be expected to recognise accused in dark room at the time when accused gave blows to her and her husband, particularly when she had physically intervened and had the opportunity of feeling presence of accused by touch.²

21. *State of Punjab v. Hardeo Singh*, 1963 Cr. L. J. 1033 (I.L.R. 203 in app. 1963) 1033 (S.C.) State of Punjab A.I.R. 1963 S.C. 100.

22. *Mukon v. State*, A.I.R. 1961 A. 112.

23. *Chander Singh v. State of U. P.*, 1973 2 S.C.W.R. 200 (1973) C.C. (C.J.) 122 (1973) 3 S.C.C. 1973 1 I.L.R. 24 (1973) Cr. L. J. 920. A.I.R. 1973 S.C. 1200.

24. *Hazari Panda v. State of Orissa*, 40 Cut. L. R. 422 (1974) 1 Cut. W. R. 468; 1974 Cr. L. J. 1212.

25. *As Mohammad v. State of Rajasthan*, (1976) 1 Raj. Cr. C. 39; 1975 W. L. N. (C.C.) 186 (Raj.).

1. *Brahmananda v. State*, (1971) 1 Cut. W. R. 331; 1 I.L.R. (1971) Cut. 406.

2. *State of Orissa v. Javadhar alias Randhar Maran*, (1975) Cut. L. R. (Cr.) 433; I.L.R. (1975) Cut. 1557.

(11) *What was the condition of the eye-sight of the identifier.* Before the Court can rely on the evidence of an identifier, it must satisfy itself as to the condition of his eye-sight. There is no difficulty at all, if it is found to be normal. But complications arise, if it is not so. If his vision is discovered to be dim, his claim to have marked the features of the suspect becomes doubtful; if, at the time of the crime, he saw the suspect from a distance, he must not be short-sighted; if he saw him from close quarters, he must not be long-sighted; if he saw him in night, he must not be night-blind; if he noted some colour, he must not be colour blind.

Luckily, with the exception of night-blindness these are matters which, if occasion arises, the trial Court can verify for itself by testing the witness in the Court-room. Cataract is a widespread ailment among elderly people in the countryside and must be guarded against, though what the Court should consider is not the state of the cataract at the time the witness appears in the witness box but at the time of the crime for cataract usually gets aggravated with the passage of time.

(12) *What was the state of his mind.* This subject lies more within the province of the psychologist than the Court, hence, in a criminal trial, undue stress cannot be laid on it. Nevertheless, some observations may not be out of place. It cannot be disputed that calm minds view a thing better than emotionally-stirred persons, for excitement or fear or terror may subvert the mind. Yet, a witness's mind may, all the time, be riveted on the subject or the incident that impresses his mind, and thus a close detachment may follow in his observing connected matters even though there happen simultaneously. Witnesses, who stand at convenient places outside the house of the victim of a dacoity and watch the progress of the crime, do, on the whole, view it with a detachment sufficient to lend assurance to their being identifiers.

With regard to the victims themselves, it would, broadly speaking, be true that the features of their tormentors would get photographed in their minds—it is difficult to conceive of a man, who has been tortured or a lady who has been stripped of her jewellery forgetting the faces of the persons who perpetrated such atrocities. All the same, since relevant data will hardly be available, in the case of each witness, the Court will have to judge for itself, whether or not his state of mind was such as to give credence to his identification, and this judgment will have to be based on personal observations in the court-room.

(13) *What opportunity did he have of seeing the offender.* It is difficult to conceive of a dacoit's "hit" party, that is, as soon as a gang of dacoits are informed of the whereabouts of the house they have to raid in their life is until the least is clear. The villagers are not so chicken-hearted. Had this not been so, they would never have had to deal with primitive weapons, suffering and inflicting casualties and sometimes capturing dacoits. Villagers, besides being afraid of the use of the victim's name for self-protection and for offering resistance whenever possible, and, for this, watch the miscreants.

Consequently, the opportunity of many of the witnesses to the trials. The reliability of a statement by a witness depends on the opportunity the latter

3. See the facts in *Talabdal Singh v. State*, A.I.R. 1958 A. 255: 1958 Cr.L.J. 424.

has of seeing his face and marking his features. This, in turn, depends on : where the witness was posted, what the distance was from which he saw the accused and what amount of time was available for doing so. These are matters the Court is bound to enquire into. The place, where the witness stationed himself must be one from where he could, whenever he wished, obtain an unobstructed view of the scene of the crime. In this behalf, the inmates of the house are always at an advantage, and so are those villagers who participate in an encounter with the dacoits, for, in both events, the parties come face to face.

The distance of the witness must be short enough for features to be marked in the available light. With regard to the time element, it is patent that the longer the time available for the witness to see the face of the miscreant, the greater are the chances of the face being impressed upon his mind. An inmate of the house, or a witness who watches the crime from a vantage point outside, is able to see the criminals for a considerable space of time, and is accordingly in a far more favourable position to see their faces than one who merely views them fleeing with their booty. And the overriding consideration, in all cases, is the state of the prevailing light. Where dacoits were of some district, speaking familiar language and were seen by the witness for half an hour looting the witness and attacking her husband and several torches were focussed on the spot there would be no reason to disbelieve the witness as regards her identifying the dacoits.⁴

Another objection which is often advanced, is that the dacoits were putting on *dhatus* (pieces of clothes tied round the face) hence the witnesses could not see their faces. It may be conceded that where the dacoits are well-known to the village people, they may wear *dhatus*—support is lent to this view by the case of *Rae, Shankar Singh v. State of U. P.*⁵ But this does not happen in the vast majority of cases, for there the dacoits have to avoid detection by the fact of being total strangers. The simple reason for this is that dacoity is essentially a crime requiring physical activity and secrecy and a *dhata* if used may come off within a short time.

(14) *What were the errors committed by him.* No question of error would arise, if identification parades are held with only one suspect at a time. It is therefore unnecessary to pass any opinion on the practice wholly arbitrary, of evaluating a witness's testimony by the number of right and wrong identifications that he made. Mistakes in identity are usual when large number of persons are before the court. But this does not vitiate the entire evidence of identification.⁶

(15) *Was there anything outstanding in the features or conduct of the accused which impressed him.* As pointed out in *Lachhman v. State*,⁷ if among the criminals there were persons with outstanding features or peculiarities which were noticeable to the witnesses who saw them, the witnesses should be able to mention them. This would lend assurance to their identification. The same applies to any special conduct of any of the miscreants which came to

4. *State of Orissa v. Chhaganlal*
1977 Cr.L.J. 319.

5. A. I. R. 1955 S.C. 441; 1956 Cr.
L. J. 822; 1956 S. C. C. 307.

6. *B. M. Dana v. State of Bombay,*

A. I. R. 1960 S. C. 289; 1960 Cr.
L. J. 424; 1960 Mad L.J. (Cr.)
398; 1960 A.I. W. R. (H. C.)
258-62 Bom. L. R. 269.
7. 1956 All L. J. 718.

the notice of the witnesses, for this enables their mind to retain a clearer picture of the persons concerned. The witnesses should also be able to state what weapon the man they identified was armed with, or what particular part he played in the dacoity. The investigating officer should try to gather from the witnesses the particulars of appearance and part played by the accused seen by them.⁸ However the failure of a witness to state the particular part played by the accused will not make his evidence inadmissible.⁹

(16) *How did the identifier fare at other test identifications held in respect of the same offence.* It used to be thought that in appraising the evidence of witnesses who identified a particular accused, the Court should take into account the result of their identification in all other parades held in connection with the same offence. The error of this view has been exposed in *State v. Wahid Bux*¹⁰ and *Ram Aur v. State*.¹¹ The correct law is that normally the result of identification proceedings, in which a particular accused is put up, must alone be taken into consideration in deciding the value of identification of a particular witness with respect to that accused; other test identifications, provided they were held within a short period of the test under consideration, can be taken into account solely for judging the memory and power of observation of the witness concerned.

A witness correctly identifying two persons but making mistake in identifying third person is reliable.¹²

(17) *Was the suspicion of identification sufficient.* Before the Court holds an accused guilty, it must make certain that chance has not been responsible for his identification. If a suspect is mixed with nine innocent persons and is identified by a witness, the mathematical probability of the witness picking him out by chance is one in ten. Hence only one identification cannot eliminate the possibility of the pointing out being purely through chance, and for this reason is insufficient to establish the charge. If the same suspect is identified by two witnesses, the probability of his being pointed out by chance is much less.

The possibility of chance playing a part in identification is therefore slight; and, other conditions being satisfied, two good identifications may be enough to establish his guilt beyond reasonable doubt. If three witnesses identify the same suspect, the probability of this being done by chance becomes very little. In such a case, it may safely be assumed that his identification was perfectly genuine. If the identification is made by even more than three witnesses, the Court may not have a doubt about his being the culprit.

(18) *Witness unable to give reasons for identification.* Sometimes, defence counsel ask a witness the reasons why he identified a particular accused or article, and when he fails to do so argue that his identification cannot be trusted. In *In re Gounda Redd*,¹³ it has been held that merely a witness would not be able to formulate his reasons for the identification of a person or thing,

8. 1973 Cut. L. R. (Cri.) 402.

9. *State of Andhra Pradesh v. Venkata Reddy*, A. I. R. 1976 S.C. 2227 (1976) 3 S.C.C. 454; (1976) S.C.C. (Cri.) 448; 1976 Cri. L. J. 1723 (1976) C. A. R. 298; I. L. R. 110-111 P. 1123.

10. A. I. R. 1953 All. 314.

11. 1958 All L. J. 431.

12. *Nar Chand v. State*, 1975 All. Cri. G. 185.

13. A. I. R. 1963 Mys. 150; 1958 Cr. L. J. 1485.

since it is based upon general understandable impressions on the mind. It would be fatuous to discredit such identification on the ground that notions were not being formulated for them.

(19) *Non-identification by other witnesses.* It may be suggested that, since in the jail parade the accused was identified by only seven out of twelve witnesses, in judging the guilt of the accused the court should counterbalance the identifiers by those who failed to identify them. The decision in *Sunder v. State*¹⁴ shows the argument is ill-founded. Therein it was stated, that it cannot be said that the number of witnesses who failed to identify an accused should be set off against those who identified him, so that if an accused was identified by two but not by two others, he should be deemed to have been identified by none; their Lordships emphasised that a witness should be judged on the strength of what he himself has seen and not on the basis of what somebody else to see it.

(20) *Identification by single witness.* The general rule of practice and prudence in dacoity cases is that identification by a single witness should not be acted upon though it may suffice in exceptional cases.¹⁵ Where the evidence of single witness is flawless and corroborated by other material evidence, conviction can be based on it.¹⁶ But where there are suspicious features such as parade being held after delay, light at occurrence not sufficient or other other doubtful circumstances it would not be safe to rely on single identification.¹⁷

(21) *Witness not able to identify an accused in the Sessions Court.* It sometimes happens that, owing to the delay in holding the Sessions trial, a witness is unable to identify an accused whom he had pointed out at the jail parade, the lapse of time having resulted in the vision of the witness being affected, or the appearance of the accused having undergone a change. In such an event, it is not to be understood that the value of his identification in the jail parade is nil. The question came up for consideration in *Abdul Wahab v. Emperor*.¹⁸ Their Lordships observed:

"If the witness at the trial is no longer able to recognise the accused, there are two ways in which his previous statement can be rendered admissible. The statement made by the witness before the Committing Magistrate may be brought on the record under Section 248 Cr. P. C. This was the course adopted in *A. I. R. 1921 All. 215*. It is only available where the witness was able to pick out the accused before the Committing Magistrate, though he could not do so before the Judge. The other method is to elicit from the witness at the trial a statement that he identified certain persons at the jail and that the persons whom he identified were persons whom he had seen taking part in the dacoity. If the witness is prepared to swear to this, then it is open to the Court under Section 9 of the Evidence Act to establish by other evidence the identity of the

14. *A. I. R. 1957 All. 809; 1957 Cr. L. J. 1578.*

15. *Pirithi v. State, 1966 Cr. L. J. 1369; A. I. R. 1966 All. 607-613.*

16. *Union Territory of Manipal v. M. K. Singh, 1971 Cr. L. J. 1779.*

17. *Pritam Singh v. State, I. L. R.*

(1970) 20 Raj. 439; 1971 Cr. L. J. 974; 1970 W. L. N. (Part I) 38; A. I. R. 1971 Raj. 184.

18. *Phool Chand v. State of Rajasthan, 1977 Cr. L. J. 207.*

19. *A. I. R. 1921 All. 215; I. L. R. 47 A. 39.*

accused whom the witness identified at the jail. For this purpose, the best evidence will be that of the Magistrate who conducted the identification, and his sentence will be strictly relevant under the provisions of the Evidence Act."

The jail identification by the witness has a positive value, though the value is reduced by the fact of his nonidentification at the trial. Standing by itself, the jail identification cannot form the basis of a conviction, but it can be used for increasing the force of other evidence.

(22) *Examination of identifier in Sessions Court but not in Committing Magistrate's Court.* Where, in a dacoity case, the prosecution adduces evidence of identification in the Sessions Court, but does not adduce that evidence in the Committing Magistrate's Court, such evidence should not be disbelieved merely on the ground that the witness was not produced by the prosecution in the court of the Magistrate's Court for the purpose of identification. Whether the witness should be believed or not is a question of fact. The fact that he was not examined in the committing Magistrate's Court is not a ground for disbelieving his evidence given in the Sessions Court. The reason is that the Sessions Court cannot refrain from examining such witness in the Magistrate's Court cannot be even indirectly curried. The evidence of such witness must be judged by the Sessions Judge like that of any other witness without exception, in the light of all the circumstances excluding the nonexamination of the identifier in the Committing Magistrate's Court, to decide whether it should be believed or not, and if believed, what weight should be attached to it. He cannot draw a presumption adverse to the prosecution from the fact of such nonexamination and he cannot assume that the witness was withheld from an oblique or bad motive.²⁰

Identification proceedings are meant for lending assurance to the Court, regarding the creditworthiness of the evidence of the witness at the trial, but it is not the law that in identification proceedings the evidence of a witness at the trial is not worthy of consideration.²¹

(23) *Examination of identifier in the Committing Magistrate's Court.* The Legislature has conferred a power upon the prosecution, which results in the curtailment of the right of the accused, to utilise a witness's statement in the Committing Magistrate's Court for his own benefit. Since this is the consequence of a statutory provision, no grievance can be made of the fact that the accused is deprived of an identifying witness in the Magistrate's Court the accused has been deprived of a possible chance of discrediting him in the event of his failure to identify him in that court.

Besides, it is seriously open to question as to why an identifier is necessary in a Sessions trial, which is subjected to a double check, to wit, first, by identification in the Magistrate's Court. Now, if an offence happens to be one cognizable by a Magistrate and yet rests on evidence of identification, only one check on it is possible, namely, the jail identification procedure. Yet all that the law requires is that the evidence should be free from any reasonable doubt and the standard of proof required is the same whether the offence is triable

20 *Jwala Mohan v. The State*, 1 L. R. (1963) 1 A. 585; A. I. R. 1963 A. 161 (F.B.).

21 *State of Rajasthan v. Shiv Singh*, 1 L. R. (1961) 11 Raj. 299; A. I. R. 1962 Raj. 5.

by the Sessions Court, for example, dacoity, or unable by a Magistrate, for example, theft.

Hence, if, in a theft case, the law considers a single lock sufficient, there can be no real question of the admission of a second lock as evidence. It might also be pointed out that to think that a witness who has identified the accused in the jail parade and in the Court of Sessions would have failed to do so had he been produced before the Magistrate is pure speculation—it is extremely rare to find this happening in practice.

Under these circumstances, in Sessions cases, relying on the production of evidence the Court should not insist that every identifiatory witness be produced in the committing Court, or that, if any such witness is produced, his evidence in the Sessions Court, becomes clothed with supernatural sanctity. It should be noted that by virtue of the second part of clause (a) of Section 204. And if the Magistrate is of opinion that it is necessary in the interest of justice to take the evidence of any particular prosecution witness, he is empowered to do so, so that injustice can be avoided, where the accused succeeds in persuading the Magistrate to examine the identifiers before himself.

(21) *Identification at the instance of the accused.* It sometimes happens that witnesses claim to know an accused person, but he contends that they do not know him and applies to the Court for the holding of his test identification to check the veracity of the witnesses. The point came up before P. L. Bhargava, J. in *State v. Ghulam Mohammad*.²² The learned Judge held, that the Court could not order the holding of an identification parade because there was no provision in the Cr. P. C. authorising it to do so. He observed that it could in its discretion satisfy itself by asking the accused to stand among other persons present in Court and then call upon the witnesses to identify him.

But, in the latest case of *Laja Ram v. State*,²³ a Division Bench went further and held, that although the accused has no right to claim identification, if the prosecution turns down his request for identification, they run the risk of the veracity of the eye-witnesses being challenged on that ground. The prosecution would be exposing itself to the criticism that the test identification was shirked, because the witnesses would not have been free to stand the test and the accused may be entitled to benefit of doubt.²⁴ It seems that if the Court reasonably comes to the conclusion that there was no case in which the accused contends, it should direct the holding of a test identification, in order that the witness's veracity may be tested.²⁵ The Court has ample power under Section 311 (old Section 340), Cr. P. C., to secure this evidence.

But failure to hold an identification parade may not be maintainable as **the evidence of identification in court.**²⁶

(22) *Presence of Counsel at test identification.* Since justice must not only be done but must seem to be done, the accused must be afforded a reasonable opportunity not only to safeguard his interest but also to satisfy himself that the

22. A. I. R. 1951 All. 475.

23. A. I. R. 1955 All. 671; 56 Cr. L. J. 1547.

24. *Md. Yaqub v. State of U. P.*, 1973 All. Cr. R. 307.

25. *Kanta Parshad v. Delhi Administration*, A. I. R. 1958 S.C. 350; 1958 Cr. L. J. 696; (1958) 2 M. L. J. (S.C.) 113; 60 Punj. L. R. 583.

proceedings are conducted fairly and honestly. Hence if he requests for the presence of his counsel at the test identification, his request should never be taken down though of course the counsel is not entitled to take any part in the actual taking of the test. Similarly, the prosecution too have a right to be represented by counsel if they wish to do so.

(26) *Test identification of a person accused on bail* As pointed out earlier, there should be reasonable certainty that the accused was not seen by the witness at any time between his arrest and his identification parade. Sometimes an accused person prior to his identification proceedings succeeds in securing bail on giving an undertaking that he would take precautions to keep himself concealed from the prosecution witnesses and that he would not raise the plea that he had seen him before the identification parade. Such an undertaking is good for nothing. *See* *Rev. J. in Ganga Singh v. State*,¹ never acts as an estoppel and hence is worthless.

In order to escape punishment a criminal may get himself released on such undertaking and then go and show himself to the witnesses. If he does so he commits no criminal offence whereas any identification of him made subsequently becomes perfectly useless. Consequently, Magistrates and Courts of appeal should be careful not to enlarge arrested persons on bail whose test identification is desired, though it is their duty to see that no undue delay in holding it is permitted. The question of bail should be considered only after the test has been accomplished.

(27) *Identification parade and Article 20(3) of the Constitution of India* A test identification does not violate a fundamental right of the accused. It is not his voluntary and positive evidentiary act. It is not the accused who is called upon to testify against himself but somebody else on seeing him. The accused does not produce any evidence or perform any evidentiary act.²

(28) *Meaning of identification as a record of evidence* A memo of identification to be regarded as a record of evidence of a witness must satisfy a double test, namely—

1. that it is a statement made by a witness in a judicial proceeding, or before an officer authorised by law to take such evidence, and

2. that it is a statement which was made on oath or affirmation by a witness.

An identification memo, since it does not satisfy the above test, is not a record of evidence of a witness within the meaning of Section 80 of this Act.³ Also see cases under Note 5 (n) (7) ante.

(29) *Delay in identification, etc., its effect on identification, effect of* Unexplained delay in holding a parade, renders the corroborative evidence worthless, the prosecution should by positive evidence prove that there was no unreasonable delay

1. A. I. R. 1956 All. 122; 1968 All. W. R. H. C. 588; (1958) 2 A. N. W. R. (S.C.) 113.

2. *Piare Lal v. The State*, A. I. R. 1961 C. 531, relying on *M. P. Sharma v. Satish Chandra*, 1954 S. C. A. 419; A. I. R. 1954 S.C.

300; 56 Punj. L. R. 366; 1954 Mad. W. N. 566; (1954) 1 Mad. L. J. 680; 1954 Cr. L. J. 865.

3. *Ram Sanchi v. State*, A. I. R. 1963 A. 308; 1963 A. L. J. 61; *Gope v. State of Rajasthan*, 1973 W. L. N. 78; 1974 Raj. L. W. 142.

in holding the parade.⁴ An identification parade held *eleven days* after the arrest of the accused loses its importance unless the inordinate delay is convincingly explained.⁵ But in an earlier case from the same High Court, delay in identification amounting to some months from the date of commission of the offence (dacoity) was held not by itself justification for the rejection of the identification evidence irrespective of the facts and circumstances of the case.⁶ It is decided that identification parades must be held at the earliest opportunity so as to minimise the chance of the memory of the witnesses fading away.⁷ Recognition of a human face depends on detailed observation and clarity of image. Power to retain and recall the image depends on quality of memory, and *elapse of time* is certainly a relevant factor, affecting such power, but it is not possible to fix a universal measure of time after which evidence would be disbelieved.⁸ However, the Court must be cautious in examining the evidence of identification in cases of delay.⁹

When accused was put up for identification after *ten months*¹⁰ or 15 months¹¹ after the occurrence according to circumstances of the case, it was not considered safe to act upon such evidence. Delay, however, is immaterial, when prosecution does not rely on test identification evidence.¹²

When the Accused was conducted the parade and the Investigation Officer have not been cross-examined, the validity of the test identification parade cannot be questioned on the ground of irregularity or delay.¹³

If witnesses in a case (of dacoity) omit to give a description of the offenders during investigation and the police officers fail to discharge their duty of ascertaining such description but eventually the offenders were identified both at the identification parade and in court, the value of the identification is not affected.¹⁴

Irregularity in not ascertaining the distinctive marks of the accused, on which point there was no cross-examination, is not substantial enough to detract from the value of the identification evidence.¹⁵

If the prosecution witnesses, who actually knew the accused before the occurrence, were not cross-examined on the point, and the accused made an

4. *Public Prosecutor v. Kandiyani*, 1971 Mad. L. W. (Cri.) 220; 1973 Cut. L. R. (Cri.) 413.

5. *Pritam Singh v. State of Rajasthan*, I. L. R. (1970) 20 Raj. 439; A. I. R. 1971 Raj. 184.

6. *Prabhati v. State*, I. L. R. (1966) 16 Raj. 44; 1966 Cr. L. J. 1332; A. I. R. 1966 Raj. 241, 244.

7. *Hasib v. State of Bihar*, 1971 Cri. Ap. R. 410 (S.C.); (1971) 2 S.C. W. R. 446; 1971 U. J. (S.C.) 830; 1972 Cri. L. J. 233; A. I. R. 1972 S.C. 283.

8. *State of Rajasthan v. Rama*, 1973 W. L. N. 934 (Raj.).

9. *Delhi Administration v. Hukum Singh*, A. I. R. 1972 S.C. 3.

10. *Nathu v. State*, 1973 All. Cr. R. 388; *Smt. Gaujabai v. Bhurilal*, 1973 W. L. N. 688; 1973 Raj. L. W. 469.

11. *Shitla v. State of U. P.*, 1972 All.

W. R. (H. C) 822; 1972 All. Cri. R. 526.

12. *Raj Kishore Singh v. State of Bihar*, I S. C. D. 67; 1971 Cr. L. J. 921; (1971) 2 S.C. Cri. R. 356; (1970) 3 S. C. C. 467; A. I. R. 1971 S.C. 1058.

13. *Bharat Singh v. State of U. P.*, 1972 S. C. D. 1119; (1973) 3 S. C. C. 896; 1973 Mad. L. J. (Cri.) 222; (1973) 1 S. C. J. 533; 1973 S. C. G. (Cri.) 574; 1973 All. W. R. (H.C.) 377; 1973 All. Cri. R. 228; 1973 Cri. L. R. (S.C.) 317; 1972 Cri. L. J. 1704; A. I. R. 1972 S.C. 2478; *Mangalia v. State of Rajasthan*, 1975 W. L. N. 688; 1975 Raj. L. W. 469.

14. *Parbhati v. State*, I L R. (1966) 16 Raj. 44; 1966 Cr. L. J. 1332; A. I. R. 1965 Raj. 241, 244.

15. *Ibid.*

application for identification proceedings served 1 day after recording to the Magistrate, no adverse inference can be drawn from the omission of the prosecution to conduct an identification parade.¹⁶

Where an identification parade was held and only one of the accused and the witness were present, no inference can be attached to the omission of the prosecution to identify the accused, even if the accused was so well known to the witness that he could identify him without the company of the complainant.¹⁷

The failure of the prosecution to put up the accused in the spot for identification when he is present and not commit it, is not a fatal weakness in the prosecution case.¹⁸

(30) *Identification parade held long after arrest.* The rule that the results of test identification parades separated by the long lapse of time should not be considered reliable, ought to apply only to exclude later test identification parades and not earlier ones when the memory is fresher.¹⁹

Where an accused was not included in the first identification parade and there were several parades, two of which were held on the same day within half an hour at both of which the witness was present, the procedure gives rise to grave suspicions about the investigating agency. At the earlier of the two parades, it was suspected that the witness did not identify the accused. Further, the possibility of the witness having seen the accused in court could not be ruled out. In such a case no value could be attached to the identification evidence.²⁰

(31) *Joint identification parades.* The results of test identification parades held jointly in respect of the accused persons on different dates could be discarded as futile.²¹

(32) *Accused not put up for identification, effect of.* The absence of test identification in all cases is not fatal. If the accused person is well known by sight it would be waste of time to put him for identification. Though there is no express provision in the Criminal Procedure Code enabling an accused to insist on an identification parade, yet if the accused does make an application and that application is turned down and it transpires that the witness did not know the accused previously, the prosecution will, unless there is some other evidence run the risk of losing the case on this point.²² An identifying witness will not be treated as unreliable nor his evidence discarded merely because the accused in a particular case was not put up for identification. In

16. *Ram Raj v. State*, 1967 A. L. J. 252; 1967 Cr. L. J. 1579; A. I. R. 1967 All. 543, 545.

17. *Sheoraj Singh v. State*, 1967 A. W. R. (H.C.) 153; 1967 Cr. L. J. 1465; A. I. R. 1967 All. 528 at pp. 529, 530.

18. *State of U.P. v. N. K. Singh*, 1967 Cr. L. J. 1244; A. I. R. 1967 All. 447, 449.

19. *Pirithi v. State*, 1966 Cr. L. J. 1369; A. I. R. 1966 All. 607, 609.

20. *Sheik Habib v. State of Bihar*, 1971 Cr. A. R. 410 (judgment of High Court reversed).

21. *Harun Tirkey v. State*, 34 Cut. L.

T. 215 at pp. 221, 222; 1968 Cr. L. J. 1251.

22. *Jadunath Singh v. State of U. P.*, (1971) 1 S. C. W. R. 151; A. I. R. 1971 S. C. 363, 368 (in this case trial not vitiated by denial of identification to accused); *Shri Ram Singh v. State of U. P.*, 1974 Cr. App. R. 342; 1975 Cr. L. J. 240; 1975 S.C. (Cri.) R. 9; 1975 B. B. C. J. 39; 1975 S.C.C. (Cri.) 87; (1974) 2 S. C. W. R. 619; (1975) 3 S. C. C. 495; 1974 Cr. L. R. (S.C.) 715; A. I. R. 1975 S.C. 175.

such a case a robust attack on the evidence given in court will not be available and the court will therefore examine the evidence a little more carefully.²³ Failure to put up the accused for identification, where the accused themselves do not claim identification, is not fatal to the prosecution case.²⁴ Similarly where accused refuse to be put up for identification evidence in court can be safely relied upon.²⁵ From the refusal of accused to appear in a test identification parade a presumption arises against him under Section 114 of this Act, but it is not such a presumption which can be conclusively relied upon to infer guilt of the accused.¹

(33) *Identification evidence doubtful or unreliable.* Test identification parade is hardly of any use when there was a counter charge of some of the witnesses having been won over and the accused was also apparently known to the identifying witnesses. For instance, identifying witnesses died a violent death before he could identify his assassin in the case. His test identification which was not a substance, but only corroborative evidence, could not be of much evidentiary value. In these circumstances the identification parades were of little value and there was no question of the accused having been prejudiced by the late identification parades.² If a case hinges on identification and the witnesses who identified the accused on the first occasion failed to do so on the second occasion, it is a doubtful case of identification on which a conviction cannot be based.³ If the witness states that in all probability or according to his guess the accused was the person who participated in the offence, he cannot be said to have identified the accused as culprit.⁴

(34) *Testimony based on personal impressions.* The evidence of identification based on personal impressions requires corroboration because it is apt to be unreliable. As an illustration, see *State v. Prithi*.⁵

6. Facts fixing time or place. It is sometimes of the highest importance to fix exactly the exact time of the occurrence of an event, and a difference of even a few minutes may be of vital moment. This frequently happens in cases where the defence is that of an alibi. On a charge of murder, where the defence was of that nature, and it was essential to fix the precise times at which the person had been seen by the several witnesses, soon after the fatal event which was the subject of investigation, the object was satisfactorily effected by a witness examined by intelligent witnesses on the same day, at the various times, as requested by the several witnesses, with a public clock, thus affording a means of fixing the times as indicated by them to a common standard.⁷

Particulars of great importance in fixing disputed dates: but the defective manner, in which they are impressed, frequently renders

23. *Budhoo v. State*, 1968 All Cr. R. 489; 1963 A. W. R. (H.C.) 788, 790.

24. *State of U. P. v. Ramji Lal*, 1968 All Cr. R. 224; 1968 A. W. R. (H.C.) 856; *State of U. P. v. Nand Kanth*, A. I. R. 1967 All. 147.

25. I. L. R. (1970) 2 Delhi 854.

1. *State v. Lavinder Singh*, (1972) 2 Sim. L. J. 349; 1973 Cr. L. J. 1023 (H.P.).

2. *Bharvad Bhikha Valu v. State of Gujarat*, 1971 S. C. D. 62; A. I. R. 1971 S. C. 1058, 1064.

3. *Beni Sabni v. State of Bihar*, 1970 B. L. J. R. 436, at pp. 438, 439.

4. *Jiwanprakash v. State of Maharashtra*, 1973 Mah. L. J. 855; I. L. R. 1975 Bom. 337.

5. *Prithi v. State*, 1966 Cr. L. J. 1369; A. I. R. 1966 All. 607, 611.

7. *Rex v. Thomson*, 1 Lew. 49.

them useless and this has been, from time to time, the subject of judicial *obli-vi-scence*.⁸

Scientific testimony grounded on the state of wounds and injuries to the human body or on its condition of decay, is frequently employed indirectly in the solution of questions of time, but cases of this nature belong to the department of medical jurisprudence.⁹ Where the medical officer is not cross-examined as to decomposition, the fact that he could give opinion as to cause of death would indicate that decomposition was not advanced.¹⁰

On the question whether a deed, purporting to have been made in the reign of Philip and Mary, and enumerating King Philip's titles was forged, the fact that, at the alleged date of the deed, Acts of State and other records were drawn with a different set of titles is relevant.¹¹

A plaintiff, who claims under the Hindu Succession Act, 1956, a share in the self-acquired property of her father (he was last seen in December, 1955), must prove that her father died after the said Act came into force.¹²

7. Facts showing relation of parties. Where A's will was alleged to have been made under undue influence, his way of life, and relation with the persons alleged to have unduly influenced him, are relevant.¹³ Where, in a case, one of the questions in issue, as to the pedigree of a certain family, being, whether one GS was son of BS or of one MS (belonging to a totally different family from that of BS in a tested copy of *rubkar* or order-sheet), in some proceedings long anterior to the suit was tendered in evidence, in which *rubkar* GS was described as the son of BS, it was held that the *rubkar* was admissible in evidence under this section.¹⁴

10. Things said or done by conspiracy in reference to common design. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them is a relevant fact as against each of the persons believed to be so conspiring as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Government of India.¹⁵

8. By Lord Campbell, L. C. J. in *Reg. v. Palmer and T. G. Ford*. *Justice Clerk in Reg. v. Madeleine Smith*. See *Wills Circumstantial Evidence*, 6th Ed., p. 248.

9. *Wills Circumstantial Evidence*, 6th Ed., pp. 247, 248.

10. *Handal v. State of T. P. & T. R.* 1976 S. C. 2055; 1976 Cr. L. J. 1578; 1976 S.C.C. (Cr.) 317; (1976) 2 S.C.C. 812.

11. *Lady Ivy's Case*, 10 St. Tr. 617;

Steph. Dig. 7th Ed., p. 14.

12. *J. Pruthi v. P. Pruthi v. Kant* 1970 Andh. Pra. 246, 253.

13. *Boye v. Roosbarough*, (1857) 6 H. L. C. 42. *Steph. Dig.* 7th Ed., p. 14.

14. *Reg. v. Smith & Keble*, *Dickin* 1 L. R. 18 All. 98; (1895) A. W. N. 236.

15. Subs. by the A. O. 1950 for "Queen".

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H in an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

s. 3 ("Relevant").

s. 3 ("Fact.")

s. 136 (Fact proposed to be proved only
admissible on proof of some other fact).

Steph. Dig. Art. 4, and Note III, Taylor, Ev. Sections 590-597, Best, Ev. Section 28, Russell on Crime, 12th Ed., Vol. II, pp. 149-151, Norman, Ev., 120, Riddell, Cr. Ev., 15th Ed., 157-162, Mevius' P. & C. Cases, 107-121 A, Wills, Ev., 3rd Ed., 171-172; Wigmore, Ev. Section 1079.

SYNOPSIS

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1. General. Where—

- (1) there is reasonable ground to believe,
- (2) that two or more persons have conspired together,
- (3) to commit—
 - (a) an offence, or
 - (b) an actionable wrong.

then—

- (i) anything said, done or written,
- (ii) by any one of such persons,
- (iii) in reference to their common intention,
- (iv) after the time when such intention was first entertained by any one of them,

is a relevant fact—

- 1) as against each of the persons believed to be so conspiring, and
- (2) for the purpose
 - (a) of proving the existence of the conspiracy and
 - (b) of showing that any such person was a party to it.

There is no difference between the mode of proof of the offence of conspiracy and that of any other offence. It can be established by—

- (a) direct evidence, or
- (b) by circumstantial evidence.

But this section introduces the doctrine of agency and if the conditions laid down in it are satisfied the act done by one is admissible against the co-conspirator.

This section as the opening words indicate, comes into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong. This means that there should be *prima facie* evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once it is established that reasonable ground exists, anything said, done or written by one of the conspirators in reference to their common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it.¹⁷

The evidentiary value of the said acts is limited by two circumstances, namely—

- (1) That the act shall be in reference to their common intention, and
- (2) in respect of a period after such intention was first entertained by any one of them.¹⁸

The expression "in reference to their common intention" is very comprehensive and appears to give it a wider scope than the words "in furtherance of" in the English law with the result that anything said, done or written by a co-conspirator after the conspiracy was formed, will be evidence against the others before they entered the field of conspiracy or after they left it.¹⁹

Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.²⁰

16. Bhagwan Swarup v. State of Maharashtra, 1964 S.C.R. 58 (1964) 2 S.C.J. 771; A.I.R. 1965 S.C. 682; 1965 (1) Cr. L.J. 608

17. Ibid.

18. Ibid.

19. Bhagwan Swarup v. State of Maharashtra, 1964 S.C.R. 58 (1964) 2 S.C.J. 771; A.I.R. 1965 S.C. 682; 1965 (1) Cr. L.J. 608

20. Ibid.

Anything said, done or written can only be used for the purpose of proving the existence of the conspiracy, or for the purpose of showing that the other person was a party to it. It cannot be used in favour of the other party, or for the purpose of showing that such a person was not a party to the conspiracy.²¹

The section may be analysed as follows:

(1) there must be *prima facie* evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy to commit an offence or an actionable wrong;

(2) anything said, done or written by any one of them should have been said, done or written by him after the intention was formed by any one of them;

(3) if the said conditions are fulfilled anything said, done or written, by any one of them in reference to their common intention will be evidence against the others;

(4) it would be relevant for the purposes mentioned in the section against the others, whether it was said, done or written before he entered into the conspiracy or after he left it; but

(5) it can only be read against the co-conspirator and not in his favour.²²

Initially, a question arises as to the effect of this section where a charge of conspiracy has been laid. The illustration attached to the section shows that once a reasonable ground, to believe that several persons have conspired to commit an offence, exists, the acts and declarations of a particular person, in reference to their common intention, after the time when such intention was first entertained by any one of them, are relevant facts. Although that person may not have known of the existence of many others engaged in the conspiracy. This reasonable ground for belief will depend upon the proof of facts. Such belief may be initially entertained and may later be discarded. A trial Judge may admit evidence under this section, if he has a reasonable ground to believe as is postulated, yet he may reject it, at a later stage of the trial if that ground of belief is displaced by further evidence.²³ The evidence properly admitted, in this case, will be evidence touching not only the person directly affected by it but also his co-conspirators.²⁴

2. Principle. The rule which says that a man shall be chargeable with the acts and declarations of his agent or fellow conspirator is not a rule of evidence. A conspiracy makes each conspirator liable under the Criminal Law for the acts of every other conspirator done in pursuance of the conspiracy. Consequently, the admissions of a co-conspirator may be used to affect the proof against the others, on the same conditions, as his acts when used to create their legal liability. The inclusion of tortfeasors enact the same rule.

21. *Bhagwan Swarup v. State of Maharashtra*, (1964) 2 S.C.R. 378; (1964) 2 S.C.J. 771; A.I.R. 1965 S.C. 682; (1965) 1 Cr.L.J. 608.

22. *Ibid.* 1 I.R. 1974, 1 Cr.L.J. 539.

23. *Samunder Singh v. State*, A.I.R. 1965 C. 598, relying on *Gill v. King*, A.I.R. 1948 P.C. 128.

24. *Ibid.*

25. *Ibid.*

1. Prof. Thayer in *American Law Review*, XV, 80. As to procedure, see *Alford v. R.* (1921) 35 C.L.J. 279; 69 I.C. 145; A.I.R. 1922 C. 107.

in its object, or to civil liability for torts. The tests, therefore, are the same, whether that which is offered is the act or the admission of a co-conspirator or that of a joint tortfeasor; in other words, the question is one of substantive law, and its solution is not to be sought in any principle of evidence.⁴

The section lays down not only the rule applicable in this country, so far as leading evidence in cases of conspiracy is concerned, but it is to be treated as a part of the statute law, in the matter of proof of existence of a conspiracy and of its objects.⁵ The principle is substantially the same, as that which regulates the relation of agent and principal. When various persons conspire to commit an offence or actionable wrong (e.g., co-trespassers), each of them makes the rest his agents to carry the plan into execution. The acts done by anyone in reference to the common intention of a party, are considered to be the acts of all. These acts are, themselves, evidence of the *actus reus*, the conspiracy to be established; they are relevant "for the purpose of proving the conspiracy," as well as the part which each conspirator took in it.⁷ Section 10 based on the principle of agency can well be treated as laying down an exception to the general rule that a person cannot be made responsible for the acts done by others unless he is an agent.

3. Scope and object. This section is comprehensive enough, and renders admissible, in cases of conspiracy, evidence which is not, ordinarily, admissible under the English law, or under the Indian law.⁸

Before the provisions of this section can be invoked, it has to be established, from independent evidence, that there is reasonable ground to believe that two or more persons conspired together to commit an offence or an actionable wrong.

When this is shown, anything said, anything done and anything written by any one of such persons would be a relevant fact as against each of the other conspirators, provided that it is in reference to their common intention. Such things said, done or written would be relevant, (1) for the purpose of proving the existence of the conspiracy, and also, (2) for showing that any such person was a party to it.⁹ The object of the section is merely to ensure, that no person can be made responsible for the acts or deeds of another, until (1) some bond, in the nature of agency, has been established between

2-3. See *R. v. Hardwick*, (1809) 11 East. 578, 585.

4. *Wheeler v. Topple*, 1672.

5. *Bhola Nath Gupta v. King Emperor*, 1937 Cal. 99; 169 I.C. 977; 38 Cr. L.J. 818 (S.B.).

6. See *Indra Chandra v. Emperor*, 1929 Pat. 145; 116 I.C. 756 (F.B.); *Emperor v. Shafi Ahmad*, (1929) 31 Bom. L.R. 515; *Emperor v. G.V. Vaishampayan*, 1932 Bom. 56; 1 L.R. 75 Bom. 879; 134 I.C. 1238; *Vishandas Lachmandas v. Emperor*, 1944 Sind 1; 1 L.R. 1943 Kar. 449; 212 I.C. 56 (F.B.).

7. Steph. Dig., Note III, p. 160; Nor. Cr. Ev., s. 590; 3 Russ. Cr. 143, 144; Bist. Ev., Sec. 508; *R. v. Amir Khan* (1871)

9 B. L. R. 36; 17 W. R. Cr. 15; *R. v. Amceroddin*, (1871) 7 B. L. R. 63; 17 W. R. Cr. 25. The cases mentioned in the text books (*supra*) cited.

8. *Mohd. Yunus v. The Stat. of Bihar*, 1977 Cr. L.J. 1243 (Pat.).

9. *Bhola Nath v. Emperor*, 1939 All. 567 at 574; 1 L. R. 1939 All. 756; 181 I.C. 191; *Ram Prasad v. Emperor*, 1927 Oudh 369 (2); 1 L. R. 2 Luck. 631; 106 I.C. 721.

10. *S. H. Jhabwala v. Emperor*, 1933 All. 690; 145 I.C. 481; 1934 A.L.J. 799; *Badr Rai v. S. v. Emperor*, 1935 C. 100; 145 I.C. 481; 1934 A.L.J. 799; 1938 A.L.J. 900; 1938 B.L.R. 50; 1939 Mad. L.J. Ch. 20; 1939 All. W. R. (H.C.) 861.

them, and (2) the acts, words or writing, which it is proposed to attribute upon the person charged are in furtherance of the common design, and (3) some person or writing after such design was entertained.¹¹ The rule excluding hearsay evidence is not applicable to statements admissible under this section. Thus, a document written by a woman, since deceased, in which she stated that a certain third person said that he had told her that another person named X was the accused, is admissible under this section as the statement by the writer, if proved, is itself a relevant fact by virtue of the fact that it is connected to the fact that X is the report of a conversation of a third person much evidentiary value can be attached to it.¹²

Where evidence is attempted to be made admissible under this section, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together.¹³

4. English law of criminal conspiracy. Conspiracy in common law started its career primarily as a civil injury (28 Edward I. c. 10) but was later made punishable on an indictment (33 Edward I. c. 2). In its earliest meaning, conspiracy was the agreement of persons, who combined to carry on illegal proceedings in a vexatious or improper way. The Star Chamber developed the criminal aspect of agreements of this nature into a substantive offence and widened its scope. Hence this established the new offence eventually penetrated into the common criminal law, but in its gradual evolution into a crime at common law, a direct application there can be discerned a close association with the law of principal and accessory.¹⁴

15. English law of two or more persons agree together to do something contrary to the law or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons, who so act, commit the crime of conspiracy.¹⁵

In *R. v. P. & J. Ltd.*,¹⁶ it is stated: "Conspiracy has been aptly described as a violation of the law where the end to be attained is in itself a crime; where the means are lawful but the means to be resorted to are unlawful; and where the object is to do injury to a third party or to a class, though, if the wrong were directed only against an individual, it would be a wrong but not a crime." The House of Lords in *McGee v. S. S. Company v. McGregor*¹⁷ has explained that an agreement which is immoral or against public policy, or in restraint of trade or otherwise contrary to public interest, that the courts will not enforce it, is not necessarily a conspiracy. An agreement to constitute a conspiracy is not enforceable where it is contrary to or forbidden by law, as for instance to violate a prohibition or to make use of fraud or violence, or to do what is criminal.

11. *Indra Chandra v. Emperor*, 1929 Pat. 145 : 116 I.C. 756 (F.B.).

12. *Emperor v. Surjya Kumar Sen*, 1 Cal. 221 : 117 I.C. 72 (S.B.).
See also *Shriam Kumar Singh v. Emperor*, 1911 O. 130 : 191 I.C. 166.

13. *Amritlal Hazra v. Emperor*, 1916 Cal. 188 : 1 I.L.R. 42 Cal. 957 : 29

I.C. 519.

14. *Russell on Crime*, 12th Ed., Vol. 1, p. 201.

15. *Halsbury's Laws of England*, 3rd Ed., Vol. 10, page 310.

16. (1881) 14 Cox C.C. 508 at page 513.

17. (1892) A.C. 25.

The term 'conspiracy' includes all combinations involving violation of private rights which, if done by a single person, would give a civil though not a criminal, remedy against the wrong-doer.¹⁸

5. English and Indian law. Difference between. The provisions of the section are wider than those of the English law according to which the act of acceleration must have been done or made in the execution or furtherance of the common purpose.¹⁹ Thus, in the narratives and admissions of past events must be confined to be admissible in such cases as those of co-conspirators, except those by whom, or in whose presence, such statements were made.²⁰ Under this section, anything said or done, in reference to the common intention, is admissible, thus the contents of a letter written by a co-conspirator giving an account of the conspiracy, is relevant against the others even though not written in support of or in furtherance of it.²¹

6. "Where there is reasonable ground to believe". The operation of this section is strictly conditional upon there being reasonable ground to be held that two or more persons have conspired together to commit an offence or an actionable wrong.²² It is only in cases of existence of a conspiracy that Section 10 applies. The application of the section follows and does not precede the finding that there is reasonable ground to believe that a conspiracy exists and certain persons are conspirators.²³ There must be (1) an issue to the existence of the conspiracy, and (2) 'reasonable ground' for belief in the existence of the conspiracy must be shown, before evidence can be given of the acts, statements or writings of persons who but for such conspiracy, would be strangers to one another.

The words 'reasonable ground to believe' are not equivalent to proof. It is enough if the prosecution have produced *prima facie* proof of conspiracy. But although, in the preliminary stage, there need not be definite proof, there must be reasonable ground to show the connection of each of the persons implicated. It is not enough to find simply that there must have been a conspiracy, without coming to a *prima facie* conclusion as to who were the members of it.²⁴ "Sometimes, for the sake of convenience, the acts or declarations of one

18. *R. v. Parnell*, (1759) 2 Burr. 806.
19. Steph. Dig., Art. 4, and text-book cited ante.

20. *R. v. Hardy*, (1794) 24 How. St. Tr. 451-453. Where an account given by one of the conspirators in a letter to a friend of his own proceedings in the matter not intended to further the common object and not brought to A's notice was held not to be relevant as against A; see also *R. v. Blake*, (1844) 6 Q.B. 126; Steph. Dig. Art. 4, illustrations, (a), (b); Taylor Ev., ss. 593, 594.

21. See Illustration to Section 10 and Cunningham, *Loc. cit.* 100; Whitley Stokes, 527; *Balmokand v. Emperor*, 1915 Lah. 16; 28 I.C. 738, 742, 774; *Bhola Nath v. Emperor*, 1939 All. 191; 41 I.C. 191.

22. *Emperor v. K. G. S. v. Emperor*, 1937 Cal. 99; 169 I.C.

977; 38 Cr. L. J. 818 (S.B.); *S. H. Jhabwala v. Emperor*, 1935 All. 690; 145 I.C. 481; I.L.R. (1972) 1 Delhi 536.

23. *Seth Chandrattan Moondra v. Emperor*, 1945 S. 188; I.L.R. 1945 Kar. 129; *Emperor v. Shafi Ahmad Nabi Ahmad*, 51 Bom. L.R. 515.

24. *Kadambini v. Kumudani*, (1903) 30 C. 983 s.c.; 7 C.W.N. 808; *Shahebar v. R.*, (1913) 18 C.L.J. 590; 21 I. C. 378; *Mahomed Ismail v. Emperor*, 1936 Nag. 97; I.L.R. 1936 Nag. 152; 38 Cr. L. J. 106; *Bhola Nath v. Emperor*, I.L.R. 1939 All. 786; 1939 A. L. J. 785; 1939 All. 567; *Seth Chandrattan Moondra v. Emperor*, I.L.R. 1945 Kar. 129; 1945 Sind 188.

25. *Balmokand v. Emperor*, 1915 Lah.

1. *Mahomed Ismail v. Emperor*, 1935 Nag. 152; I.L.R. 1936 Nag. 152; 165 I.C. 913.

are admitted in evidence before proof of the conspiracy has been given, the prosecutor must wait until such proof in a subsequent stage of the case. But this mode of proceeding rests in the discretion of the Judge, and in seditious or other general conspiracies is seldom permitted, except under particular and urgent circumstances.* Section 130, post, also allows a similar course to be followed in appropriate cases.

7. That two or more persons have conspired together. For the existence of a conspiracy two or more persons must have conspired together to commit an offence or actionable wrong. There must have been some pre-concert. A conspiracy within the terms of this section contemplates something more than the joint action of two or more persons to commit an offence. If that were not so, the section would be applicable to any offence committed by two or more persons jointly with deliberation and this would import, into a trial, a mass of hearsay evidence which the accused persons would find it impossible to meet.²

The conspiracy may be to commit an offence, in which case it would be a criminal conspiracy, or to commit an actionable wrong in which case the conspiracy would be a tort.

Under the section when there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, any statement or writing by any one of such persons, or reference to their common intention after the time when such intention is first entertained by any one of them, is relevant against each person believed to be a conspirator for the purpose, or both, proving the existence of the conspiracy and showing that such person was a party to it.³ Once the section is applied then whatever is said or done by parties to the conspiracy becomes relevant evidence as against the co-conspirators also for the purpose of proving the conspiracy itself.⁴

8. Conspiracy to commit an offence. Criminal conspiracy is an offence under the Indian Penal Code, and is defined as follows:

"When two or more persons agree to do, or cause to be done

(1) an illegal act, or

(2) an act which is not illegal by illegal means,

such an agreement is called a criminal conspiracy."

Provided that no agreement is criminal if the object is to commit an offence which is not a criminal offence, unless some act in pursuance of the agreement is done by one or more persons.⁵

2. Taylor, *Fey*, §. 591.

3. *Nogendrabala v. R.*, (1900) 4 C. W. N. 528, 530. As to evidence of conspiracy, see *Kidd v. R.*, (1901) 28 C. 797; *Templeton v. Lamic* (1901) 25 B. 230 (conspiracy to obtain conviction of accused person and as to what amounts to evidence of conspiracy); See *Abdul v. R.*, 1922 Cal. 107; 1 L.R. 49 Cal. 573; 60

1. C. 145.

4. *Baburao Bajirao Patil v. State of Maharashtra*, (1971) 2 S.C. Cr. R. 165; 1971 S.C.C. (C.R.) 680; *Noor Mohammad v. State of Maharashtra*, 1971 Mah L.J. 792, 799 (S.C.).

5. *Baburao Bajirao Patil v. State of Maharashtra*, *Ibid.*

which one of the conspirators could not singly commit. See an English case where a woman who erroneously believed herself to be conspired with another to procure abortion, she was held liable to be convicted of conspiracy to procure abortion although, if she had merely done the act herself with like intent, she could not have been convicted.¹⁴

(b) *Act illegal*. To amount to the offence of criminal conspiracy, an agreement must be to do that which is contrary to the law. Being a highly technical offence, the ingredients of the crime must be strictly proved.¹⁵ An agreement, which is in restraint of trade or public policy or in restraint of trade or otherwise of such a character that the Courts will not enforce it, is not necessarily illegal.¹⁶ But, since an act may be illegal without being criminal, it follows that an agreement to do an act may amount to criminal conspiracy though it may not be punishable as such.¹⁷ It may be an offence to conspire with another to do an act which, if done alone, would not be criminal, e.g. procuring a woman to become a prostitute, or to have illicit connection with a man.¹⁸

(c) *Means illegal*. The end does not justify the means in criminal law. If therefore, one conspires with another to employ illegal means to achieve a legal purpose, one may be convicted of conspiracy. In some of the earlier cases of such cases, for instance, it is not illegal to use force to recover a debt, but it would be illegal for the latter to combine to resist the law in recovering his debt by inducing a witness to a bankruptcy to give false evidence to the detriment of him.¹⁹

10. *Conspiracy to commit an actionable wrong*. A combination of persons to do some act, the object of which is to do an act which is wrongful and actionable, so too is a combination of persons to do an act by unlawful means which will have the effect of infringing some person's right. Every person has a right to a free course of trade and to the use of his business upon his own line, even though it results in an interference with the business of another person to his detriment. If a person, or a combination of persons, unlawfully procures a breach of contract, the matter is treated as if the third person sues therefrom. Malice in the sense of spite or ill-will is not the gist of the offence. An act that is both in itself and in its consequences unlawful because it is prompted by an indirect or sinister motive, if it is the dominating motive in a certain course of action, may be treated as an interference with one's business or one's interest, one is not entitled to interfere with another man's methods of earning his living by illegal means. These means may either be means that are illegal in themselves or that may become illegal by reason of conspiracy where they would not have been treated as such by an individual. An unlawful interference with the business of another person is an

14. *R. v. Whitechurch*, (1734) 94 E. R. 610.

15. *Amritlal Hazra v. Emperor*, 42 C. 957; 29 I C. 513; A I.R., 1916 C. 188.

16. *O'Connell v. R.* (1844) 11 Cl. & Fin. 155.

17. *R. v. Whitechurch*, (1734) 94 E. R. 610.

18. *R. v. Howell*, (1861) 4 F. & F. 160.

19. *Deleval* (1763) 3 Bur. 1131; *Grev*

(Lord), 9 St. Tr. 127; *R. v. Mears and Chack*, (1851) 2 Den. 79.

20. *Esdaile* (1682) 1 F. & F. 213; s.c. sub. nom. *Brown*, (1858) 7 Cox. 442.

21. *Ware & De Freville Ltd. v. Motor Trade Association*, (1921) 3 K.B. 40; See also *Croftes Handwoven Harris Tweed Co., Ltd. v. Veitch* 1912 A.C. 435.

tent to hurt that person, is actionable, provided that damage results from such interference. A lawful interference by unlawful methods, with the same object and producing similar results, is equally actionable.²² A mere conspiracy to injure a man, without an overt act resulting in injury, does not furnish any cause of action. A conspiracy is not illegal unless it results in an act done, which, by itself, would give a cause of action.²³

11. General principles of evidence in conspiracy. To sum up, the following general principles of evidence in conspiracy cases may be usefully borne in mind :

(1) The existence of the fact of conspiracy must be proved. For that, there should be at least two persons. One person alone cannot conspire.²⁴ There should be *prima facie* evidence of the existence of the conspiracy.

(2) A *prima facie* case cannot be made out by mere proof of intention of two or more persons to do an unlawful act or a lawful act by unlawful means. An agreement is to be proved. Intention has to be proved. Joint evil intent is necessary to constitute the offence. Culpability arises not at the stage of design but only when it ripens into intention. This agreement to act in concert is shown by joint acts which are the result of concert and agreement. The evidence offered may be direct or circumstantial.

(3) After the existence of the conspiracy has been established, the particular accused person's participation is sought to be let in under this section must be proved to have been a party to the conspiracy. This must be done by proving that each of the accused connected with the conspiracy, was actuated by the unity of will and purpose for which the conspiracy has been hatched.

(4) After the existence of a conspiracy among several persons has been established, if it has been further established that the person against whom evidence is set under Section 30 was one of the conspirators, then, and then only, should evidence be given against any accused of the acts and declarations and writings of any one of them in reference to their common intention.²⁵ Hearsay is not excluded. The acts, declarations and writings by any one of such persons, even if they may be in furtherance of their common intention. They must be in reference to their common intention. This section is intended to admit in evidence all communications between the different conspirators, while the conspiracy was going on with reference to the carrying out of the conspiracy. The statements made or acts done by others, before the accused joined the conspiracy are equally relevant and admissible, and any statement made by one conspirator to another, indicating in any way the complicity of a third conspirator is a relevant fact and such statement can be admitted. Whether it should be believed or not is another question. Similarly, documents in the possession of a conspirator are admissible against co-conspirators in the following circumstances, viz., if after the arrest of a conspirator papers are found on the person or at the lodgings of a co-conspirator, they will be admissible against the former, if there is evidence that they existed previously to the arrest of the former. The existence of a secret code is in itself, evidence for supposing that the persons named therein have conspired to commit an

22. *Bhola Nath v. Lachmi Narain*, I. L. R. 53 All 316; 1931 All. 83 at 89; 1931 A.L.J. 84.

23. *Templeton v. Laurie*, (1900) 1 L. R. 25 B. 270.

24. *Topandas v. State of Bombay*, A.I.

R. 155 SC. 588, 1956 I.R. 511, 1956 B.L.J.R. 1956 CC. L.J. 178, 1956 N. 1 J. 101, 1956 A.L.J. 161.

25. *Shamsher v. State of Bihar*, A.I.R. 1956 Pat. 404.

offence. The evidentiary value of the facts which are admissible under this section are well illustrated by the illustrations given under this section: In regard to the period, within which limits such evidence can be adduced, it may be taken that anything said, done or written by any one of such persons must be after the time when such intention was first entertained by any one of them and before the common intention ceased to exist.²

(5) This section is subject to the restrictions imposed by this Act or the Criminal Procedure Code regarding statements made to the police.

(6) The evidence of accomplices or approvers in such cases is subject to the general rule of evidence laid down in Section 30, that where more persons than one are tried jointly for the same offence and a confession made by one of them affecting himself and others jointly tried with him is proved, the court may take into consideration such confessions both against the person making it as also against those who are implicated by it. The restriction is significant and its effect is that the court can only treat a confession as lending assurance to other evidence against the co-accused. So also, even in conspiracy cases, a court cannot, as a rule of ordinary prudence, act solely on the evidence of an accomplice, unless it is corroborated. On this, the necessary corollary follows, namely, that a statement by one of the two accused, jointly tried, if it was made self-exculpatory, is not admissible against the other accused under Section 30 of this Act. Similarly, non-confessional statements, made by a co-conspirator before trial but after arrest, are admissible as against himself but not against the other co-conspirators. So also, a written statement of one conspirator, handed in at the trial, unless it is a full confession, cannot be taken into evidence against a co-conspirator under Section 30 of this Act.

(7) Evidence of similar acts can be tendered but they must be of the same specific kind as that in question and must also have been proximate in time to that in question. Sections 14 and 15 of the Act appear to be the only sections dealing with this question in relation to conspiracy cases.

(8) Offences, alleged to have been proved in pursuance of a conspiracy, may be proved to support the charge of conspiracy even if the accused were not charged with them.

(9) Criminality of conspiracy is distinct from and independent of the criminality of the overt acts.⁸

(10) For establishment of conspiracy, two or more conspirators are required and evidence once admitted is liable to rejection if belief in conspiracy is subsequently displaced. Evidence under this section is admissible only upon footing of a reasonable belief, that two or more persons have conspired to commit an offence, being entertained by the court. It is not correct that, in a conspiracy charge, evidence once admitted remains a part of the evidence with ever new aspects the case may bear, whether in the original or appellate court.

Ranganatha Naidu and others v. State of Madras. C. Appellate No. 100, 1958. 11 Cr. 100, decided 10-1-58. (Ramaswami, J.): A. I. R. 1958 Mad. 268. 1958 Cr. L. 1, 686.

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1. J. ... Mal. I. J.
2. ... AD W. R. Sep.
3. ... A. I. R. 1957
4. Rom. 226: 1957 Cr. L. J. 110
5. Russell on Crime (12th Ed. Vol.
6. p. 200; Habbury, 3rd Ed. Vol.

11. When more than two persons are charged of conspiracy, it does not follow that all of them must be convicted, or all must be acquitted. But, if all are tried jointly, one cannot be convicted if the other or all the others are acquitted. In *Bharat Pradhan v. State of Bombay*,⁴ one person was convicted of conspiracy, while the other enjoyed immunity on his turning approver.⁵

12. The section applies to criminal offences as well as to actionable wrongs etc. The acts and declarations of co-trespassers in civil actions, and indeed of all persons combined and having a common object, whether civil or criminal, are governed by the same rules. The admissions of one joint tort-feasor are receivable against others on the same principle, and with the same limitations as those of conspirators.⁶ In short, although, in criminal cases, it is the agreement which is the essential element, and in civil ones, the resultant damages to the victims are all receivable on the same principle and with the same limitations as those of conspirators.⁷

13. If the charge of conspiracy is made, and all the evidence is that the accused wrote some letters and took them to the complainant without making any reference to the fact induced the complainant to part with money, the evidence is not relevant under this section.⁸

The law of evidence, in conspiracy cases, has led judges to insist upon careful scrutiny of the evidence. Fitzgerald, J. in the Irish State Trials of 1897, said: "The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously guarded and never to be pressed beyond its true limits." Similarly, as Dr. Keir points out, owing to the two peculiarities in the circumstances to which those principles of admission of evidence, which are just the same as for other crimes, are applied in conspiracy cases, "often seen, as it were, as if there were an unusual laxity in the modes of giving proof in a case of conspiracy. For, it rarely happens that the actual fact of the conspiring can be proved by direct evidence, since such agreements are usually entered into both swiftly and secretly. Hence, they ordinarily can be proved only by an inference from the subsequent conduct of the parties, in committing the overt acts which tend so obviously towards the alleged unlawful result as to suggest that they must have arisen from an agreement to bring it about. Upon each seven isolated, longings a conjectural interpretation is put; and from the aggregate of these interpretations, an inference is drawn. The circumstantial evidence thus rendered necessary, will often embrace a wide range of acts committed at widely different times and in widely different places. The range of admissible evidence is still further widened by the fact, that each of the parties to the conspiracy, adopting all his confederates as his agents, is liable in carrying it out. Consequently, by the general construction of principal and agent, any act done, subsequently for that purpose, by any of them, will be admissible as evidence against him: unless, of course, it was proved he had given them notice that he withdrew from the

4. A. I. R. 1956 S. C. 469; 1956 All W. L. R. 811; 1956 Cr. L. J. 831; 22 Cut. L. T. 276; (1956) 2 Mad. L. J. S.C. 13.

5. See *State of Bombay v. Narayan*, 1950 Cr. L. J. 111; 1950 R. v. Sharpe, (1938) 1 All. Eng. Rep. 48.

6. Wigmore s. 1079.

7. *Queen v. Leatham*, 1901 A. C. 495 at 542.

8. *Madanlal Ramchandra Daga v. State of Maharashtra*, (1968) 2 S. C. W. R. 568; 1968 Cr. L. J. 1469; A. I. R. 1968 S. C. 1267, 1269.

and it follows that reasonable ground must be shown to believe that the persons whose statements or actions are to be used had conspired together.¹⁸

"It is necessary to prove the existence of a conspiracy and to connect the prisoner with it in the first instance when you seek to give in evidence against him the declaration of a conspirator, and having done so you are then at liberty to give in evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy; but when a party's own declarations are to be given in evidence such preliminary proof is not requisite, and you may at once, in your opening, prove the whole case against him by his own admission."¹⁹ A conspiracy need not be established by proof which actually brings the parties together but may be shown, like any other fact, by circumstantial evidence.²⁰

13. Rejection of evidence when ground of belief is displaced. As the trial Judge may admit evidence under this section, when he has such a reasonable ground of belief as is postulated, he must reject it if at a later stage of trial, the reasonable ground of belief is displaced by further evidence. So also, the appellate Court, which has from the outset refused that belief, must refuse to admit evidence which was admissible only upon the footing of the belief being entertained. It is not the true view that, in a conspiracy charge, evidence once admitted remains admissible, whatever new aspect the case may bear, whether in the original or in the appellate court.²¹

14. "Anything said, done or written, by any one of such persons." When it is shown that there is reasonable ground to believe that two or more persons have conspired to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention becomes a relevant fact. "Anything said" would include the statements made, speeches delivered, or declarations made. "Anything done" must be some act done in furtherance of the intention or knowledge of the persons. Anything written would include (i) a manuscript whether signed or unsigned, written by the person, and (ii) matter transcribed by him on a type writer. But the document of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents, as against the other accused. The fact of possession would be evidence to show that the conspirator, in whose possession it is found, had received and preserved it.²² The possession of a document creates an inference that the possessor was aware of its contents.²³ Evi-

18. *Mohammed Ismail v. Emperor*, 1936 Nag. 152; 1936 Nag. 152; 1936 Nag. 152; *Amritlal Hazara v. Emperor*, 1939 Cr. L. J. 609; 16 C. W. N. 1105.

19. *Peri v. Emperor*, 1939 Cr. L. J. 609; 16 C. W. N. 1105; cited in 9th Ed., *Taylor, Ev.*, 382.

20. *Peri v. Emperor*, 1939 Cr. L. J. 609; 16 C. W. N. 1105; cited in 9th Ed., *Taylor, Ev.*, 382. "It is per-

fectly true that the dark overtness of crime cannot often be laid open, that conspiracies like other crimes must occasionally be supported by circumstantial proof," per Sir Lawrence Peel, C. J. in *R. v. Hedger*, (1853) P. 131.

21. *H. H. B. Galla v. The King*, 1948 P. C. 128; 75 I. A. 41; (1948) 2 M. L. J. 6 (P.C.).

22. *S. H. Jadhwa v. Emperor*, 1933 A. L. J. 680; 145 I. C. 481; *Jitendra Nath Gupta v. King Emperor*, 1937 Cal. 99; 169 I. C. 977 (S.B.).

23. *Manipur State v. Manipal State*, 1952 Manipur 4; *Jitendra Nath Gupta v. Emperor* supra.

dence of acts and statements of co-conspirators in pursuance of conspiracy can be relied upon because in cases of conspiracy better evidence is hardly ever available.²⁴

In a case of criminal conspiracy, the original letters written by the conspirators were suppressed by them but the photographs only of these letters were available at the trial. These photographs were proved to be genuine photographs of the letters. If the court is satisfied that there is no trick photography and the photograph of the document is above suspicion, it can be received in evidence. It is always admissible to prove the contents of the document but subject to the safeguards indicated to prove the authorship. This is all the more so in India under this section to prove participation in a conspiracy. But evidence of photographs to prove writing or handwriting can only be received if the original cannot be obtained and the photographic reproduction is faithful and not faked.

In the instant case before the Supreme Court no such suggestion existed and the originals having been suppressed by the accused, it was held that the evidence of photographs as to the contents and as to handwriting was receivable.²⁵

Any statement made by one conspirator to another reflecting in any way the complicity of a third conspirator is a relevant fact and as such may be admitted. Whether it should be believed or not is another question. If an accused has given evidence to the effect, it would be relevant evidence in respect of communications between the conspirators during the conspiracy, the implementation of conspiracy and participation by the other accused in the conspiracy. It is quite admissible and can be believed or not.

A Cipher Code cannot be treated as "the act, work or deed" of a particular person. But, the fact that it exists and that the names and addresses of a number of persons who are alleged to be parties to a conspiracy or charge, are mentioned in it, the fact that it is in a peculiar form, such as is not likely to be found in any Code, provided to be used for lawful purposes, taken along with other matters brought out in evidence may give rise to a legitimate inference that the Ciphers were prepared in connection with some unlawful purpose requiring secrecy and, in the absence of evidence that the matters appearing from the secret communication were associated with some legitimate or lawful purpose, the Cipher Codes in itself is good ground for supposing that the persons named in it had conspired to commit an offence and any other

24. *Bhagwan Das Keshwani v. State of Rajasthan*, 1974 Cri. L. J. 751; 1974 L. J. (S.C.) 1033.

59; (1974) 4 S.C.C. 611; (1974) 10 Cr. L. J. (Cri.) 266; 1974 Cri. L. J. (S.C.) 402; (1974) S.C. Cri. R. 186; 1974 Serv. L. C. 449; 1974 S. L. N. 532; 1974 S.C.C. (Cri.) 647; 1974 Cri. App. R. (S.C.) 188; A. I. R. 1974 S.C. 898.

25. *Laxmipati Chorasia v. State of Maharashtra*, (1968) 2 S. C. R. 621; (1968) 1 S. C. A. 682; 1968 Cr. L. J. 1124; 1968 M. L. J. 713; (1968) 2 S.C.J. 589; 1968 P. L. R. 595; 16 Law Rep. 107; 1968 Mad. L. J. (Cr.) 614; A.

I R. 1968 S.C. 938, 946 (Conflict between Phipson, 10th 7d., para. 1001 and Wigmore 3rd Ed., Vol. III, para. 797 noticed).

1. *Kr. Sham Kumar Singh v. Emperor*, 1941 O. 130; 191 I.C. 466; *Emperor v. Surjya Kumar Sen*, 1934 Cal. 221; 147 I. C. 32 (S.B.).
2. *Tribubhan Nath v. State of Maharashtra*, 1972 Cri. L. J. 1277; 1972 S. C. D. 571; 1972 Cri. App. R. 257 (S.C.); 1972 M. J. (S.C.) 826; 1972 S. C. Cri. R. 458; (1972) C.C. 611; A I R. 1973 S.C. 107.

acts or writings of individual conspirator in furtherance of the common design become admissible under this section.³

It is not necessary that the co-conspirator, whose act or declaration it is sought to prove, should be tried or indicted. The act or declaration of the co-conspirator may have been done or made by a stranger or occurred in the absence of, the party against whom it is offered, or without his knowledge, or before he joined the combination,⁴ or even after he left it. This last mentioned provision is contrary to the English rule according to which acts and declarations of others are not admissible against a conspirator, if done or made after his connection with the conspiracy has ceased.⁵

The section does not cease to apply to "anything said, done or written" by a conspirator simply because that conspirator gives evidence in an approved. The evidence of a conspirator becoming approver must be received subject to the rules of prudence and corroboration which apply to the evidence of approvers generally, but once the Court is satisfied that the approver is speaking the truth, his evidence can be accepted as to anything he has "said, done or written" as in the case of any other conspirator.⁶

Where, in order to prove a conspiracy, the prosecution produces the statement of an approver before the trying court, it is not necessary to prove a conspiracy, and a number of letters written by the conspirator, and other using code words, the statements and the letters are admissible in this connection.⁷

In this connection the decisions of the Supreme Court in *State of Sindh v. State of Bombay*,⁸ and *Raoji Rao v. State of Punjab* may be referred to.

In the former case, where the charge was that of conspiracy entered into between December 1, 1948 and January 1, 1950, to cause a certain breach of trust in respect of the fund of a company by causing the same to purchase the controlling block of shares of the company and thereafter to transfer the same to screen the utilisation of the funds by stock exchange, it was held that the funds had been advanced for legitimate purposes and invested as per the scheme and in fact utilising the same for payment to the owners of the controlling block of shares. It was held that all evidence which would go to show that the transaction during the period of conspiracy were bona fide and not intended to furthering that such evidence may not be taken into consideration and the period of the conspirators beyond the period of conspiracy, but within the period, but limits. The conduct in regard of each individual conspirator was considered at the time to which it related, and was held to be by the prosecution to show the criminality of the intention of the individual accused with reference to the proved

3. *Indra Chandra Narang v. Emperor*, 1929 Pat. 145; 116 I. C. 756 (F.B.); *Jitendra Nath Gupta v. King Emperor*, 1931 Cal. 1001; 116 I. C. 977 (S.B.); see also *Mahendra Singh v. Manipur State*, 1952 Manipur 4.
4. *Roscoe, Cr. Ev.*, 16th Ed., 486.
5. See Illustration ante., *R. v. Brandreth*, 32 How. St. Tr. 857, 858; *R. v. Murphy*, 9 C. & P. 311; *Taylor, Ev.* 2, 592.
6. See Illustration ante.
7. *R. v. Hardy*, (1794), 24 How. St. Tr. 718, 731; *Taylor Ev.*, 2, 595.

8. *Vishindas Lachmandas v. Emperor*, 1944 Sind 1; I.L.R. 1943 K. 449, 212 I.C. 56 (F.B.).

9. *Indra Chandra Narang v. Emperor*, 1929 Pat. 145; 116 I. C. 756; 116 I. C. 977 (S.B.); 1931 Cal. 1001; 116 I. C. 977 (S.B.).

10. A. I. R., 1957 S.C. 747; 1957 S. C. J. 780; 1957 Cr. L. J. 1325; (1957) 1 Mad. L. J. (Cr.) 739; 1958 All. W. R. (Sup.) 1.

11. A. I. R., 1958 S. C. 953; 1959 S. C. J. 117; 1958 Cr. L. J. 1434; (1959) Mad. L. J. (Cr.) 25; 1958 All L.J. 909; 1959 B. L. J. R. 50; 1958 All W. R. (H.C.) 861.

participation in the alleged conspiracy, that is, to rebut a probable defence that the participation though proved, was innocent. It is well settled that the evidence in rebuttal of a very likely and probable defence on the question of intention can be led by the prosecution as part of its case. To anticipate a likely defence in such a case and to give evidence in rebuttal of such defence is in substance nothing more than the letting in of evidence by the prosecution of the requisite criminal intention beyond reasonable doubt. That the reference to the acts and conduct of a co-conspirator beyond the period of conspiracy may conceivably be capable of being wrongly relied on by the jury in respect of issues on which they are not admissible by itself, without showing that serious prejudice would in all likelihood have occurred in the particular case would not be enough to vitiate the conviction. The court cannot normally compel the prosecution to examine a witness where it does not choose to and the duty of a fair prosecutor extends only to examine such of the witnesses who are necessary for the purpose of unfolding the prosecution story in its essentials. All that can be said normally in a case of non-examination of any witness is that the defence is entitled to comment upon it and to ask the jury to draw an adverse inference in respect of that portion of the case to which the evidence of the witness relates. It is open to the prosecution to rely both on direct evidence and on circumstantial evidence and to maintain that even if the direct evidence is not acceptable, the circumstantial evidence is enough for the proof of its version. The alternatives which arise on the reliance of the prosecution both on the direct evidence and on the circumstantial evidence are not in any sense the presentation of any inconsistent cases. The prosecution cannot be permitted to lead evidence relating to inconsistent cases. Evidence of the conduct of a deceased conspirator would not be inadmissible under Section 8, Evidence Act, as the evidence of conduct admissible under Section 8 is of conduct of a person who is a party to the action.

This section must be construed in accordance with the principle that the thing done, written, or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. In criminal trials, in a charge of conspiracy evidence not admissible under this section as proof of the two issues to which it relates, viz., of the existence of conspiracy and of the fact of any particular person being a party to that conspiracy, is not admissible at all. In civil cases, it is well settled that a principal is bound by the acts of his agent, if the latter has in express or implied authority from the former and the acts are within the scope of his authority. Therefore, acts of an agent are admissible in evidence as against the principal. An analogous principle is recognised in criminal matters in so far as it can be brought in under this section. The principle underlying the reception of evidence under this section of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. The rule in this section confines that principle of agency in criminal matters to the acts of the co-conspirators within the period during which it can be said that the acts were "in reference to their common intention", that is to say, "things said, done or written, while the conspiracy was on foot" and "in carrying out the conspiracy". The act or deed sought to be admitted as evidence against his co-conspirator must be something said, done or written by him when he conspires to be a conspirator and still retains the character of a conspirator. It must have some relation to the common intention of the conspiracy which is the binding force not only between

the conspiracy itself but also between them and the conspiracy.¹² Where, the doing of the period of conspiracy, evidence of acts of co-conspirators outside the conspiracy is admissible in evidence. But in a conspiracy to commit criminal offence, not all evidence which would go to show that certain transactions are done is certainly admissible. The conduct in general of each conspirator, however, by his acts, writings and statements is evidence of the conspiracy. There is no doubt that such conduct irrespective of the time when it is done, is admissible by the prosecution to show the criminality of the conspiracy. The conduct of the accused with reference to his proved participation in the conspiracy is admissible to rebut a probable defence which may be put forward in a case viz. that the participation, though proved, was not done in the course of the conspiracy would come under Section 14 of the Act. The conduct of a conspirator, during the period of the conspiracy, may conceivably be capable of being relevant in respect of issues on which they are not directly concerned. The possibility of producing some prejudice, this is a possibility which may be avoided. As a general rule, it is always to be kept in mind when dealing with such complicated cases. But, that, by the admission of such evidence serious prejudice would in all likelihood, have been caused, would not be enough to vitiate the conviction.¹³

In the well known case of the Judicial Committee observed that the words, 'in the course of the conspiracy' accompanying the word 'and indicating' the quality of the act as being an act in the course of conspiracy; or the words, 'written or spoken, may, in themselves, be acts done in the course of the conspiracy'. This being the principle, the words of this section must be construed in accordance with it, and are not capable of being widely construed, so as to include a statement made by one conspirator, in the absence of the other, with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. The words 'common intention' signify common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once it has been shown to believe in its existence. But, it would be a very different matter to hold that any narrative, or statement or confession made by a third party after the common intention or conspiracy was no longer on foot and has ceased to exist is admissible against the other party. Therefore, no common intention of the conspirators to which the statement can have reference. The section embodies this principle.

The well mentioned¹⁴ was a case where Blake was an officer, employed in the Customs House, and Tye an agent of the importers. Tye made false entries in the Customs House to have some goods passed without paying full duty. These entries were made in the counterfoil of his cheque book showing that money was

12. *Sathaveerappa Awadhya, In re*, 8 Law Rep. 110, 123: 1967 M. L. J. (Cr.) 72 (Mysore).

13. *State of Bombay v. A. I. R.*, 1940 P. C. 176; 190 I. C. 233; (1940) 2 M. L. J. 811 and (1894) A. C. 57 and A. I. R. 1949 P. C. 103, relied on in *Sardul Singh v. State of Bombay*, A. I. R. 1957 P. C. 133; 1957 M. L. J. 133; 1957 S. C. 739; 1957 S. C. 739; 1957 S. C. 739.

J. 780: 1958 M. W. N. S. C. Cr. 73; *Badri Rai v. State of Bihar*, 1958 S. C. 953; (1958) M. W. N. S. C. Cr. 103; 1958 S. C. J. 117; 1958 Cr. I. J. 1434; (1959) Mad. L. J. (Cr.) 25; 1958 All. L. J. 909; 1959 B. L. J. R. 50; 1958 All. W. R. (H. C.) 861.

14. *Mirza Akbar v. King-Emperor*, 67 I. A. 80; A. I. R. 1940 P. C. 176.

15. *R. v. Blase*, 1814 6 Q. B. 126.

paid to Blake were tendered in evidence by the prosecution in the trial of the two accused for the offence of conspiracy to perjure themselves in the trial of Blake. It was held, that the entries in the daybook were admissible against Blake, for they were necessary to execute their common object, and the statement of the witness was irrelevant, being a mere statement to show that the perjury had been committed, after the object of the conspiracy had been achieved.

15. Statement made to police. The section does not affect the admissibility of statements made by accused to the police in the course of the investigation, whether they incriminate themselves or others, and as the special provisions of Section 27 let in part of a confession to a police officer. The present section is not intended to remove those restrictions which the Act, Section 27, and the Criminal Procedure Code, Section 162 have placed upon the admissibility of statements made to the police.¹⁶

16. Confession made to Magistrate. (a) *General.* A confession by a conspirator made to a Magistrate after arrest disclosing the existence of a conspiracy, its object and the names of its members, is not admissible in evidence against the co-conspirators, jointly tried with him, by virtue of Section 27, not 30, post. This section is intended to make, as evidence, communications between different conspirators where the conspiracy is going on, or in furtherance to the carrying out of the conspiracy. The confession of a co-accused was not intended to be put on the same footing as a communication between two co-conspirators or between conspirators and other persons who were not in the conspiracy.¹⁷ A retracted confession has always been considered to be of weak evidence and where it was not relied upon by the prosecution as such, it is held that it has no value against his co-accused.¹⁸

(b) *Intercepted correspondence in divorce case.* Any intercepted correspondence between the respondents in divorce cases cannot be admitted as evidence against the persons to whom it is addressed for any purpose whatever. But a letter written by a respondent to a co-respondent is evidence against the respondent.¹⁹

(c) *Other cases.* In other cases, copies of letters from the accused to his co-conspirators which were intercepted and re-posted are admissible in evidence.²¹

17. "By any one of such persons." The words "any one of such persons" refer to the "two or more persons" in the previous clause. It is not sufficient to say that it is only "anything said or done or written by any one of such persons" whom

16. Pritam Hariomal v. Emperor, 1939 Sind 185; 1 L. R. 1939 Kar. 449; 184 I. C. 145.

17. Emperor v. Abani Bhushan, 11 L. R. 38 Cal. 169; 8 I. C. 770; 15 C. W. N. 25; see also Emperor v. Vaishampayan, 1932 B. 56; 1 L.R. 55 B. 839; 134 I.C. 1238; Pritam Hariomal v. Emperor, supra; see also Bali Ram Singh v. Emperor, 1939 Nag. 295; 184 I.C. 274; 1939 N.L.J. 442. But see Kunjalal Ghosh v. Emperor, 1935 Cal. 26; 155 I.C. 261; 38 C.W.N. 1015.

18. Babu Rao Bajirao Patil v. State of Maharashtra, 1971 S.C.C. (Cr.) 155; (1971) 2 S.C. Cri. R. 162;

1971 Cri. L. J. 4.

19. Varsapillai Gabriel v. A. S. Elliamy, 1925 P.C. 229; 52 I.A. 372.

20. Frederick Dugan Slade v. Mrs. Doris Slade, 1916 O. 78, 1945 O.W. N. 331, [relying on Robinson v. Robinson, (1860) 29 L. J. P. Mat. & A. 178]; 32 L.T. (O.S.) 96; 164 C.P.D. 101; Williams v. Williams, 1887 L. R. 1 P. & D. 29; 35 L. J. P. 8; 13 L.T. 610.

21. Manavenchi Nath Roy v. Emperor, 1933 All. 498.

22. Mohammad Ismail v. Emperor, 1936 N. 97; 11 L.R. 1936 Nag. 152; 165 I. C. 913.

there is reasonable ground to believe that they conspired together to commit an offence or actionable wrong.²³

A statement written by a woman, since deceased, in which, describing her conversations with a person, she said that he told her that among his revolutionary friends was the accused to whom he was accustomed to turn for guidance was held to be admissible under this section as evidence against all the conspirators including the accused.²⁴

18. "In reference to their common intention." The word "intention" implies that the act intended is in the future, and this section makes relevant statements made by a conspirator with reference to the future. The words "in reference to their common intention" mean in reference to what, at the time of statement, was intended in the future. Narratives coming from the conspirators as to their past acts cannot be said to have a reference to their common intention.²⁵

As already noticed under the heading "English and Indian Law", difference between "anything said, done or written" by any of the conspirators is admissible under this section, if it is in reference to their common intention, even though it is not in furtherance of their common design.¹ Accordingly anything said, done or written by a conspirator after the conspiracy was formed will be evidence against other conspirators whether it was said, done or written before, during or after the other conspirators participated in the conspiracy.² When specific acts done by each of the accused have been established, showing their connection with their common intention, they are also admissible against the other accused.³

19. After the time when such intention was first entertained. The words of this section are not confined to acts done in accordance with it and are not capable of being taken as a conspiracy so as to require a statement made by one conspirator, in the absence of the others, with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. The words "common intention" signify a common intention existing at the time when the thing was said, done or written by any one of them. Things said, done or written while the conspiracy was on foot are relevant evidence of the common intention, once reasonable ground has been shown to believe in its existence. But, it would be a very different matter to hold that any narrative or statement or confession made to a third party, after the common intention or conspiracy was no longer operating and had ceased to exist, is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference.⁴ Where the object of the conspiracy had been carried out and the

23. See Mohammad Ismail v. Emperor, supra; Amit Lal Hazara v. Emperor, 1916 Cal. 188; I.L.R. 42 Cal. 957; 29 F.C. 513; Pullin Bihari Das v. Emperor, 16 I.C. 257; 13 Cr. L.J. 609; 16 C.W.N. 1105.

24. Emperor v. Surjya Kumar Sen, 1934 Cal. 221; 147 I.C. 32; 35 Cr. L.J. 334 (S.B.).

25. Emperor v. G. V. Vaishampayan, 1932 Bom. 56; I.L.R. 55 Bom. 839; 134 I.C. 1238; See also Emperor v. Abani Bhushan Chuckerbutty, I.L.R. 38 Cal. 169; 8 I.C. 770; 11 Cr. L.J. 100; State v. ... v. ... I.L.R. 46 Cal. 700; 54 I.C. 53;

21 Cr.L.J. 5; A. I. R. 1920 C. 300.

1. Bholanath v. Emperor, 1939 All. 567 at 574; see also Balmokand v. Emperor, 1915 Lah. 16; 28 I.C. 738.

2. I. L. R. (1974) 2 Delhi 706.

3. Kunwar Sen v. Emperor, 1933 Oudh 86; I.L.R. 8 Luck. 286; 141 I.C. 192; 34 Cr. L.J. 124; 9 O.W.N. 1136.

4. Mirza Akbar v. King-Emperor, 1940 P.C. 176; 67 I.A. 336; I.L.R. 1940 Lah. 612; 190 I.C. 233; State v. ... A.I.R. 1957 Bom. 220; 39 Bom. L.R. 244.

conspiracy had come to an end in subsequent statement⁵ or confession, made to a Magistrate by the accused after arrest cannot be said to have reference to the common intention of the conspirators. The confession may, however, be taken into consideration against co-accused under Section 30. Any statement, made by the accused persons during the trial, can only be regarded as a statement made by him in a confidential reference to the common intention of the persons who were members of the conspiracy. The statements of co-accused, made under Section 342, Cr. P. C., in the course of the trial, are not admissible against the other.⁷

The statement of an accused made after arrest and not amounting to a confession is not admissible as evidence against a co-accused either under this section or Section 30 of the Cr. P. C. Act. It is only a confession.⁸ The admission does not however, effect the conviction where the stress was laid on such statement by the Trial and Appellate Courts.⁹

Evidence that one of the accused ran cocaine and gambling dens long before the existence of the conspiracy which was the subject of the charge, was held admissible, the prosecution case being that one of the accused were first thrown together, afterwards got on running such dens, and that they continued to meet at such place for the purposes of conspiracy entered. The evidence of the existence of such dens at the den was held admissible as leading up to the admission made to him.¹⁰

If, after an apprehension, papers be found on the person or at the lodgings of a co-accused, they will be admissible as evidence of conspiracy, if they existed previously to the arrest of the prisoner who is on his trial. If there be no such evidence, they will be rejected as a prisoner cannot be responsible for acts or writings which possibly may not have existed until after the common enterprise was, so far as he was concerned, at an end, but which previous existence be established, either by direct proof, or by strong presumptive evidence, no objection to their admissibility can prevail.¹¹

Indorsements, books, etc. in furtherance of a conspiracy are admissible, but meta-indorsements of payments made after the fraud by one conspirator to another are not.¹²

The possession of various literature and other things by one member of an association is admissible against the other members for the purpose of ascertaining the character of the association, even if the literature was obtained and the things had been written by the member before the association was formed, or before some of the other members joined the association.¹³

20. Relevancy of statements and acts. If *prima facie* evidence of the existence of a conspiracy is given and accepted by the jury, oral or written

5. *In re N. Ramratnam*, 1914 Mad. 302; (1944) 1 M.L.J. 91; 1914 M.W. 57; *Balabhadra Misra v. Smt. Nirmala Sundra Devi*, 1951 Orissa 23.
6. *Bali Ram Singh v. Emperor*, 1939 Nag. 295; 184 I.C. 274; 1939 N. L. 1, 442; see also cases cited therein.
7. *Kunwar Sen v. Emperor*, 1933 Oudh L.R. 8 Luck. 286; 111 I.C. 92.
8. *Id.* R., 1920 Cal. 300; 1 I.L.R.

46 Cal. 700; 54 I.C. 532.

9. *Ibid.*

10. *Taylor, Ev.*, s. 595.

11. *Taylor, Ev.*, s. 594. See also *Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy*, 35 I.C. 939; 17 Cr. L.J. 439; A.I.R. 1916 C. 912.

12. *Monindra Mohan Sanyal v. Emperor*, 1919 Cal. 702; 1 L. R. 46 Cal. 215; 46 I.C. 152.

by any one of the conspirators in reference to their common intention is admissible in evidence against all of them, not only for the purpose of proving the existence of the conspiracy but also for the purpose of showing that any such person was a party to the conspiracy¹³

As the wide provisions of this section apply to acts done in connection with a conspiracy, an act done by third person may possibly, under certain circumstances, be treated as evidence of the existence of the conspiracy. Mere statements of third parties however, made in the absence of the person implicated, form a class by themselves of no probative value whatever standing alone. The mere statements of this kind made in absence of the accused, and the independent evidence required as corroboration of such a statement must be something very much more than the evidence which may ordinarily be regarded as corroborating the evidence of an accomplice. It may be circumstantial evidence or direct evidence. It must be evidence which, standing alone, would be properly treated as evidence for a jury, of proved intention, so that there would be evidence for the jury, apart from the statement of the alleged fellow conspirator, incriminating the person charged. The evidence must be proof of intention, and not merely proof of a possible motive for the intention.¹⁴

21. **Illustration.** In *Balmokand v Emperor*,¹⁵ Johnston, J., referring to the illustration to this section observed¹⁶ as follows:

"The way that the words 'and to prove A's complicity in it' come into the illustration is not quite in accordance with commonsense or with the section as I read it. I am unable to see how what B did in Europe and C in Calcutta and so forth can *per se* possibly touch the question of A's complicity. A's complicity can, from the nature of things, only be shown by A's acts, or, A, being otherwise shown to be a member of the conspiracy, by acts of B, C, and so forth implicating him. Other acts of B, C, and rest seem to me capable as regards A only of adding proof of the existence and nature of the conspiracy. At the risk of being tedious I must give an illustration to explain my view. In the case given in the illustration, if B, in ordering arms in Europe tells the manufacturers to send the bill to A, or to consign the arms to him, this, if A is otherwise *prima facie* shown to be a member of the conspiracy, would be relevant both as to the nature of the conspiracy and as to A's complicity; but if B does not mention A and A's name in no way comes into the business of ordering arms in Europe, how can it be said that B's ordering of arms there can produce in the mind of the Judge any added conviction that A was a member of the conspiracy? Of course, in framing a law the Legislature can lay it down that any given thing is 'relevant' for the purpose of proving such as such, but I think I am justified in rejecting the idea that the Legislature intended by a provision of the law of evidence, to create a barren, useless and merely nominal relevancy. Anyhow one sees, after an analysis of this kind, that the question is not very important, it seems not to matter much whether a thing is technically 'relevant' against A or not, if, as a matter of fact, from the nature of things, it cannot of its own force help towards the conviction of A."

11. *When facts not otherwise relevant become relevant.* Facts not otherwise relevant are relevant,—

13. *Balmokand v Emperor*, 1915 Lah. 16; 28 I.C. 738; *Lal Chand v. State*, 1972 Raj. L. W. 675.

14. *Mahabir Prasad Das v Emperor*, 1938 Pat. 497; 178 I.C. 324.

15. A I R. 1915 Lah. 16 at 20; 28 I.C. 738.

- (1) if they are inconsistent with any fact in issue or relevant fact ;
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

- (a) The question is whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

- (b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C, or D, is relevant.

s. 3 ("Fact")

s. 3 ("Relevant")

s. 13 (Transaction inconsistent with existence of right or custom)

s. 3 ("Fact in issue")

Steph. Dig., Art. 3; Steph. Introd., 160, 161; Norton, Ev., 124; Whitley Stokes 11, 8, 9; Cunningham, Ev., 102; Taylor, Ev., Sections 322, 325.; Wills' Crim. Ev. Passim, Roscoe N. P. Ev. 85, 86, 931, 934; Wigmore, Ev., Sections 135—144.

SYNOPSIS

1. Principle.
2. Scope.
3. Facts not otherwise relevant".
4. Clause (1).
 - (a) Consistency.
 - (b) Alibi.
 - (c) General features of alibi evidence.
 - (d) Facts not truly inconsistent.
 - (e) Non-existence of Entry in Account Books may be relevant under this section, if inconsistent with the receipt of the amount.

5. Clause (2).
 - (a) Probability.
 - (b) Recitals in Documents not *inter partes*.
 - (i) General.
 - (ii) Documents between party to the suit and a stranger.
 - (iii) Judgments.
 - (c) Cases.
 - (d) Admissions.
 - (e) Judgments.
 - (f) Recitals in documents.
 - (g) Maps.
 - (h) Title, question of.
6. Illustrations.

1. **Principle.** The object of a trial being the establishment or disproof by evidence of a particular claim of charge, it is obvious that any fact which either disproves or tends to disprove, or tends to prove that claim or charge is relevant.

2. **Scope.** This section attempts to state in popular language the general theory of relevancy and may therefore be described as the residuary section dealing with the relevancy of facts¹⁷. While the seventh section defines the meaning of the term 'relevancy' in quasi-scientific language, the present

17. Rangayyan v. Innasimuthu, A. I. R. 1956 Mad. 226, 230; (1955) 2 M.

L. J. 687.

section contains a statement in popular language of what in the former section is attempted to be stated in scientific language. The practical effect of those two sections is to make every relevant fact admissible as evidence¹⁸

The section applies when the question is whether a fact is relevant and not when the question is whether a particular method of proof is admissible under any provisions of the Evidence Act¹⁹. The sort of facts which the section was intended to include are facts which either exclude or imply, more or less distinctly, the existence of the facts sought to be proved²⁰. The words 'highly probable' point out that the connection between the facts in issue and the collateral facts sought to be proved must be so immediate as to render the co-existence of the two *highly probable*.²¹

In the words of West, J., this section "is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connection with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various, and so far-reaching, that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties. One of the objects of a Law of Evidence, is to restrict the investigations made by Court within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission on all occasions of every circumstance on either side having some remote and conjectural probative force the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless succession as the enquiry proceeded. That such an extensive meaning was not in the mind of the Legislature seems to be shown by several indications in the Act itself. The illustrations to the eleventh section do not go beyond familiar cases in the English Law of Evidence"²². All evidence which would be held to be admissible by English Law would be properly admitted under this section²³. The only two limitations are:

- (1) The Court must exercise a sound discretion and see that the connection between the fact to be proved and the fact sought to be given under this Section to prove it must be so immediate as to render the co-existence of the two *highly probable*. The section makes admissible only those facts which, all of great weight in themselves, the Court to a conclusion one way or the other as regards the existence or the non-existence of the fact in question. The admissibility under this section must in each case depend on how near is the connection of the facts sought to be proved with facts in issue and to what degree do they render facts in issue probable or improbable when taken with the other facts in the case. There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition

18. Markby, Ev., 17, 18.

19. *Soney Tall v. Darbdeo*, 1935 Pat. 167; 1 I. R., 14 Pat. 461; 16 P. L. T., 199 (F. B.).

20. *Ibid.*

21. *Per Mitter, J., R. v. Vyapory*, (1881) 6 C. 655, 662.

22. *R. v. Parbhudas*, (1874) 11 B. H. C. R., 90, 91; *R. v. Vajiram*, (1892) 16 B. 414, 425; see notes to s. 14, post.

23. *R. v. Vajiram*, *supra* at p. 430, per Telang, J.

highly probable, and, with the facts before the Court, the Court ought not to interfere.²⁴

- (2) This section is also controlled by some more specific provisions of the Act, viz. Sections 17 to 39.²⁵ As to the admissibility of statements made by a person since deceased, it has been held that such statements are admissible under Sections 32 and 33, the provisions of which do not avail to make them evidence.¹

In *Sherkh Katab Uddee v. Nagurchand Puttok*,² it was held that where the executants of a document containing recitals of boundaries of land are alive and do not give their evidence, such documents are not admissible under this section.

In *Ambikacharan v. Kamul Mohan*,³ Calcutta and Madras High Courts held that as a general rule, Section 11 is controlled by Section 32. If the evidence consists of statements of persons who are dead, and the statement is relevant under Section 11, though not relevant and admissible under Section 32, it is admissible under Section 11 when it is not otherwise immaterial whether what was said was true or false, but false evidence is not it was said.

In order that a collateral fact may be admissible as relevant under this section, the requirements of the law are :

- that the collateral fact must itself be established by directly conclusive evidence, and
- that it must, when established, afford a reasonable presumption or inference as to the matter in dispute.⁴

Any fact material to the issue which has been proved by the one side may be disproved by the other, whether the contradiction is complete, i.e. inconsistent with a relevant fact under the first clause of this section, or such as only to render the existence of the alleged fact highly improbable under the second clause.⁵

The court cannot merely because there was evidence of previous similar actions on the part of the accused, infer that the offence under inquiry must have been committed by the accused and to do it extends him with advantage restrict the operation of this section. Facts which are merely of probative force cannot be offered in evidence under Section 11.⁶

24. *R. v. Parbhudas*, (1874) 11 B.H.C. R. 90 at 94, per West, J.

25. *Rangayyan v. Innasimuthu*, 1956 Mad. 226; (1955) 2 M. L. J. 687; see also the cases cited therein.

1. *Bela Rani v. Mahabir*, (1912) 34 A. 341; 14 I.C. 116; 9 A.L.J. 361; *Latafat Hussain v. Onkarmal*, 1935 Oudh 41; 11 I.R. 10 Luck. 425; 152 I.C. 1042; 11 O.W.N. 1589; *Munna Lal v. Kameshwari Fat.*, 1929 Oudh 113; *Mst. Naima Khatun v. Rasant Singh*, 1934 All. 496 at 499; 1 I.L.R. 56 All. 766; 149 I.C. 781; 1934 A.L.J. 318 (F.B.); *Sevugan v. Raghunatha*, 1940 Mad. 273; 1939 M.W.N. 811.

2. A.I.R. 1927 Cal. 236; 99 I.C. 907; 44 C.L.J. 582.

3. A.I.R. 1928 Cal. 893; 110 I.C. 521; referring to *Sethna v. Mahomed Shirazi* (1907) 9 Bom. L. R. 1047; see also *Thakurji v. Parameshwar Dayal*, A.I.R. 1960 All. 339.

4. *Bibi Khayer v. Bibi Rukha*, (1904) 6 B.L.R. 983.

5. Sec. 9 is very similar to the present section as to rebutting an inference; *Norton, Ev.*, 115, v. ante.

6. *State v. Lakshmandas*, 69 Bom. L. R. 808, 828; 1968 Cr. L. J. 1581 A.I.R. 1968 Bom. 400, 422.

3. **"Facts not otherwise relevant".** The section says "facts not otherwise relevant" (i.e. under Sections 6-10, 12 and subsequent sections) are relevant, if they fall within Clause (1) or (2). It may possibly be argued that the effect of the second paragraph of this section would be to admit proof of facts of the irrelevant character mentioned in the Introduction, ante. "It may, for instance, be said: A not called as a witness was heard to declare that he had seen B commit a crime. This makes it highly probable that B did commit that crime. Therefore, A's declaration is a relevant fact under Section 11, clause (2)." This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of Chapter II (Sections 12-39) as to particular classes of statements, which are regarded as relevant facts, either because the circumstances under which they are made invest them with importance or because no better evidence can be got. "Some degree of latitude was designedly left in the wording of the section in compliance with a suggestion from the Madras Government, on account of the variety of matters to which it might apply."

The meaning of the section would have been more fully expressed, if words to the following effect had been added to it: "No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is located to be a relevant fact under some other section of this Act."

"If an unduly wide scope be given to the section, the latter might seem to contain in itself and to supersede all the other provisions of the Act as to relevancy."⁷

Records in a document are not facts within the meaning of this Section and are, therefore, not admissible under it.⁸ A statement made in a document can be used as admission against the maker whether or not it was communicated to any other person.¹⁰

The section applies only when the question is whether a fact is relevant and not when it is whether a method of proof is admissible under any provision of the Act.¹¹ "Fact" includes a statement.¹² Obviously there is a difference between the existence of a fact and a statement as to its existence. Section 11 makes the existence of facts admissible, and not statements as to such existence, unless of course the fact of making that statement is itself a matter in issue.¹³ A letter written by tenant to the landlord which makes probable the existence or non-existence of the fact of landlord having sent a notice to him is relevant and admissible under this section.¹⁴

4. **Clause (1) — Co-existence.** The usual logic of the argument from essential co-existence is that "certain fact cannot co-exist with the doing of the act in question" and therefore, that if that fact is true of a person of whom

7. Steph. Introd. 160, 161.

8. Cunningham, Ev., 103.

9. Kalappa v. Bhima, A. I. R. 1961 Mys. 160.

10. Veerabasa Varadhva v. Devotees of Luncadagudi Mutt, A. I. R. 1973 Mys. 280 (A. I. R. 1959 S.C. 356 relied on).

11. Soney Lal v. Darbdeo, 1935 Pat. 167; I.I.R. 14 Pat. 461; 165 I.C. 470 (F.B.).

12. Ram Bhatose v. Rameshwar Prasad Singh, 1938 Oudh 26, 29; I. L. R. 13 Luck. 697; 171 I.C. 481.

13. Mst. Naima Khatun v. Basant Singh, 1934 All. 406 at 409; I.L.R. 56 All. 766; 149 I.C. 781; 1934 A. L. J. 318.

14. M/s. B. Ram Narayan v. Smt Raina Bibi, (1972) 76 Cal. W. N 99n I. L. R. (1973) 1 Cal. 469.

the act is alleged, it is impossible that he should have done the act. According to Professor Wigmore there are five common cases of this form of argument:

- (1) the absence of the person charged in another place *alibi*;
- (2) the absence of the husband (non-access), a variety of the preceding;
- (3) the survival of an alleged deceased person after supposed time of death;
- (4) the doing of a crime by a third person;
- (5) the self-infliction of the harm alleged.¹⁵

More cases are conceivable. Thus, to disprove a rape, evidence is admissible that the prisoner had for many years been afflicted with a rupture which rendered sexual intercourse impossible.¹⁶

(b) *Alibi*. Of all kinds of exculpation, the defence of an *alibi*, if clearly established by unsuspected testimony, is the most satisfactory and conclusive. "It must be admitted", says Sir Michael Foster, "that mere *alibi* evidence lieth under a great and general prejudice, and ought to be heard with uncommon caution; but, if it appears to be founded on truth, it is the best negative evidence that can be offered; it is really positive evidence which in the nature of things necessarily imputeth a negative; and in many cases it is the only evidence an innocent man can offer."¹⁷

The theory of an *alibi* is that the fact of presence elsewhere is essentially inconsistent with presence at the place and time alleged, and therefore with **personal participation in the act.**¹⁸

It is obviously essential to the proof of an *alibi* that it should cover and account for the whole of the time of the transaction in question, or at least for so much of it as to render it impossible that the prisoner could have committed the imputed act; it is not enough that it renders his guilt improbable merely, and if the time is not exactly fixed and the place at which the accused is alleged by the defence to have been is not far off, the question then becomes one of **opposing probabilities.**¹⁹

The credibility of an *alibi* is greatly strengthened, if it be set up at the moment when the accusation is first made, and be consistently maintained throughout the subsequent proceedings. On the other hand it is a material circumstance to lessen the weight of this defence, if it be not resorted to until some time after charge has been made. An *alibi* not set up at the very earliest stage is, in most cases, unconvincing, but that is no reason why the courts should fail to give due weight to public documents filed before them, and afford reasonable facilities for the accused to call this evidence. **Usually,**

15. Wigmore, s. 135.

16. 1 Hale, P.C. 835; Best Ev., s. 450.

17. Foster's Pleas, in the Crown Law, p. 368; and see the observations of George B. in Rex v. Brennan, 30 State Trials, 58, 79; H. Garland v. State, 1 I. R. (1922) Cr. 1181; 1922 Cr. I. R. (Cri.) 526; (1972) 38 Cut. L. T. 1044 (A fool proof alibi is the

most effective answer to a charge).

18. Wigmore, s. 136.

19. Wicks v. Wicks, 10 I. R. 280; see also Jahangir Lal v. Emperor, 1935 L. 230; 150 I. C. 1056; 35 Cr. L. J. 1180.

20. Wicks v. Wicks, 10 I. R. 280. See also Dewar v. Dewar, 1936 Lah. 235; 163 I. C. 143.

... plea of an *alibi* witness at the very end is vexatious and dilatory, unless the defence has been indicated at the earlier stage.²¹

When a person establishes anything in the nature of an *alibi* ought to be called by the prosecution, and it takes that line of defence. Unless evidence of that nature is brought in for cross-examination on behalf of the Crown, it is very difficult for anyone to say what value should be attached to it.²² Whenever a defence of an *alibi* is set up and that defence utterly breaks down, it is a strong inference that if the person was not in fact where he says he was, then, in all probability, he was where the prosecution says he was.²³ But, though the onus of disproving the plea of *alibi* set up by the accused is upon them, no presumption of their complicity in the crime arises from their failure to establish the plea. To say the party that such a presumption arises amounts to misdirection.²⁴ Where, however, the accused fails to establish his plea of *alibi* he has taken the case at an early stage of the investigation and from the evidence the probability of the occurrence is doubtful, he is entitled to the benefit of doubt.²⁵ But where the accused sets up a plea of *alibi* that he was on duty at another town on the date of occurrence, the burden of proof lies on him under Section 106 to establish the plea. It is not for the prosecution to prove the fact.²⁶

The weakness or falsity of an *alibi* is not a sufficient ground for holding that the case for the prosecution is thereby improved.²⁷ It is of course easy to give evidence of *alibi*, but where the case for the prosecution depends entirely on the identification in somewhat doubtful circumstances of the accused, the evidence of an *alibi* cannot be lightly brushed aside.²⁸ But where there is satisfactory evidence that a man committed a crime at a certain place and at a certain time, a Court will never find any difficulty in rejecting an *alibi* he may seek to establish, even if the *alibi* is supported by what, on the surface, would appear to be satisfactory evidence.²⁹

(c) General features of alibi evidence. *Alibi*, Latin for 'elsewhere', is the defence resorted to in criminal prosecutions, where the person charged alleges that he was so far distant at the time from the place where the crime was committed that he could not have been guilty.

The presence of the accused at the scene of the crime at the time it was committed, is an essential factor in the proof of his guilt. The burden is upon the prosecution to prove such an act. If the defendant raises an *alibi*, he, in effect, is denying the claim of the prosecution that he was at the scene of the crime at the time the crime was committed. Therefore, while it is the burden of the prosecution to prove beyond reasonable doubt that the accused was present at the scene of the crime at the time of its commission, the burden of

21. *State v. State* (of Andhra Pradesh, 1954 V., P. 6.

22. *Pratt v. State* (Nagpur), *Pratt v. Ghose*, 1955 Cal. 513 at 520; 1 L.R. 62 Cal. 238; 157 I.C. 387. (S.B.).

23. *Sarat Chandra Dhupi v. Emperor*, 1934 Cal. 719 at 720; 151 I.C. 473; 35 Cr. L. J. 1335 (S.B.); *Mahinder Singh v. State of Punjab*, 1971 Cr. L. J. 1764; *Hadibandhu v. State*, 1972 Cal. L. R. (Cr.) 329; 1 L.R. (1972) Cr. 1181.

24. *Krishna Rao v. State*, 1921 Cal. 252; 60 I.C. 189; 25 Cr. W.N. 600.

25. *Pratt v. State* (Nagpur), 1956 L.R. 473; 163 I.C. 135; See also *Nga Tin Hui v. Emperor*, 1933 Rang. 423; 147 I.C. 440.

1. *Salva Vir v. State*, A.I.R. 1958 All. 746; 1958 Cr. L.J. 1266.

2. *Nga Zaw Gyi Aung v. Emperor*, 1937 Rang. 10; 166 I.C. 605; 38 Cr. L.J. 279.

3. *Nga Ye Gyan v. Emperor*, 1937 Rang. 25; 170 I.C. 273; 38 Cr. L.J. 890.

4. *State v. Bakshi* (Oudh), 1933 Oudh 369; 145 I.C. 817.

going forward with the evidence in regard to a fact which is specially within his knowledge, the accused has to show that he was elsewhere at the moment of the crime and that he remained there for such a period of time as will reasonably exclude the probability that he was in the place of the crime when it was committed. The prosecution cannot be legitimately saddled with the **burden of proving this negative.**

It is now well settled law that, in regard to this burden of going forward with the evidence to be discharged by the accused, if he raises a reasonable doubt of his presence at the scene of the crime at the time that it was committed, it is not incumbent upon the accused to prove his *alibi* beyond a reasonable doubt or by a preponderance of evidence. An accused is entitled to an acquittal, if the judge has a reasonable doubt upon consideration of the evidence, viz., that offered by the prosecution to show the accused's presence and participation in the alleged crime and that offered by the accused to prove his presence elsewhere. Both aspects should be considered together. The judge must not weigh merely that relating to the *alibi* and determine from that alone whether he has reasonable doubt of guilt. On the other hand, he must acquit, even though the evidence to prove *alibi* be insufficient of itself to establish the same affirmatively, as a separate factor, if when considered with all the other evidence it raises a reasonable doubt. Conversely, the judge cannot also acquit the accused on the ground that the *alibi* evidence considered by itself, raises a doubt. The defence of *alibi* is a legitimate defence, and, in fact, is often the only evidence of an innocent man. Plea of self defence may be **taken in alternative to the plea of *alibi***⁵

In *Bluebon Salve v. The King*,⁶ their Lordships pointed out :

An Indian village, if he is charged with having taken part in a crime on a particular night when he was in fact asleep in his hut or guarding his crops, can only rely as a rule on the evidence of his wife, members of his family or friends to support his story. He is seldom in a position to produce more cogent and disinterested evidence of *alibi*. But unfortunately, on account of defence of *alibi* being put up as the first line of defence in most criminal cases, it has fallen into disrepute and is often characterised as a well worn defence. Courts have generally not considered evidence of an *alibi* as convincing because of the ease with which persons may be mistaken in dates long after the occurrence of a particular event, the ease with which an *alibi* may be constructed and the **difficulty of proving the contrary."**

In fact a learned English lawyer with 40 years' experience at the Criminal Bar, Mr. Purcell, writes in his book 'Forty Years in the Criminal Bar' :

The defence of an *alibi* may endanger an innocent man, it often convicts the guilty. It always raises suspicion that it is a fraud. An innocent man can rarely prove conclusively where he was on a particular day at a particular time; most men are constantly at the same place about the same time and often with the same people. These people have to admit it was not the only occasion they saw an accused, they even have no reason, or some reason which appears unsatisfactory, for fixing the particular day. If the witnesses are relations their very relationship throws doubt on their testimony. If they are cross-examined as to incidental details they incur from defective memory or from inattention or from excessive zeal in perfect good faith, hardly

5. *Karnail Singh v. State of Rajasthan*
1977 Cr. L.J. 1729 (Raj).

6. A.I.R. 1942 P.C. 257; 50 Cr. L.J.
872.

contradict each other. Above all, the weakness of the *alibi* will draw attention from the weakness of the prosecution. The *alibis* that are usually successful are those that are false and constructed by acute and intelligent men."

One form of this is where the whole story is true but events did not happen on the date of the commission of the offence. The maker of the *alibi* simply shifts the events to another date and, therefore, cross examination will make little dent upon the *alibi*. This *alibi* is known as the *Kerry alibi* where the story is true in every respect except the date. This is one of the types of *alibi* prevalent in Ireland where the defence of *alibi* is as extensive as in India. (See for description of the various types of *alibis* in Ireland in Maurice Healy, *The Old Munster Circuit*, p. 168 and Edward Maydonbinks, *Life of Lord Carson*, Vol. I).

The requisites of a satisfactory *alibi* are :

- (1) that it should be pleaded at the earliest opportunity and
- (2) that it should cover the time of the alleged offence.

The first requisite is laid down in the following decisions⁷

It is interesting to note that a number of States in the United States of America as well as Scotland have adopted statutes and practices requiring the accused to give notice or written notice to the prosecution of his intention to present *alibi* evidence at the trial. Such statutes have been incidentally held to be constitutional in the United States, as they merely make a procedural regulation which is reasonable in the interests of unfair surprise.

In regard to the second requisite, in proving his *alibi*, the accused should not be required to prove the exact time or every moment of time involved in order to sustain his defence. On the other hand, it is sufficient for him to raise a reasonable doubt of his presence at the scene of the crime at the time that it was committed. But, it must cover the time when the offence is shown to have been committed, so as to preclude the possibility of the person's presence at the place of the crime at the relevant time. For, if it be possible that he could have been at both places, the proof of the *alibi* is absolutely valueless. The failure to establish a plea of *alibi* does not give rise to a presumption as to his complicity in the crime. But, when all is said against an adverse inference, Judges and Juries being after all human, it is difficult to ignore the subtle effect of a plea of *alibi* which has utterly broken down and debilitated the function of evidence which is always a circumstance pointing though never conclusively, to the guilt of the accused.⁸

The onus of proving a plea of *alibi* is on the accused.⁹ A statement by

7. *Thiagaraja Bhagavathar v. Emperor*, A.I.R. 1946 Mad. 271; 47 Cr. L.J. 785; 225 I.C. 593; *Emperor v. Sheo Janak Parde*, A.I.R. 1934 All. 27; 35 Cr. L.J. 364; 147 I.C. 238; *Dilwar v. Emperor*, A.I.R. 1936 Lah. 293; 37 Cr. L.J. 751; 163 I.C. 143; *Ramadhin v. Emperor*, A.I.R. 1929 Nag. 36;

Chhoga v. Rex, A.I.R. 1950 Ajmer 18; 51 Cr. L.J. 877.
8. *Sarat Chandra v. Emperor*, A. I. R. 1934 Cal 719; 35 Cr. L.J. 1335; 151 I.C. 473.
9. *Gurcharan Singh v. State of Punjab*, 1956 Cr. L.J. 827; A.I.R. 1956 S. C. 460, 462.

the accused that he was away from his place for a period of nine days attending a cattle fair is not sufficient to sustain a plea of *alibi*.

(d) *Facts not truly inconsistent.* Facts not truly inconsistent with any fact in issue or relevant fact are not relevant. To determine only the sole question whether a deed has been executed with the intention of Section 35 of the Indian Registration Act, questions like *bona fide*, absence of necessity for sale, etc., cannot be relevant under this clause. They cannot be said to be truly inconsistent with the fact in issue, within the meaning of Sections 35 and 37 of the Registration Act.¹¹

(e) *Non-existence of Entry in Account Books may be relevant under this section if inconsistent with the receipt of the amount.* The section provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact. Where therefore, the fact in issue is whether payment of a certain sum of money was made to a certain person, the absence of entries in the account books of the person, to whom the payment is alleged to have been made, would be inconsistent with the receipt of the amount, and would thus be a relevant fact which can be proved under this section.¹²

Absence of an entry of mutation in the revenue records may be relevant under this section, but the value of such absence would depend on other evidence, because it may be due to the fact that public servant was not required to make entry in respect of every land or that he did deliberately or negligently failed to make some entries.¹³

Puck register and documents relating to prosecution of truck drivers are admissible in evidence to show corrupt practice.¹⁴

5. **Clause (2):** (a) *Probability.* Facts which, as a matter of ordinary logic or experience, tend to render the existence or non-existence of the main fact highly probable or improbable are relevant and admissible under this clause. By "probability" is meant likelihood of anything to be true, deduced from its conformity to our knowledge, observation and experience. When a supposed fact is so repugnant to the Laws of Nature, assumed for this purpose to be fixed and immutable, that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible, or physically impossible. There is likewise moral impossibility, which however, is nothing more than a high degree of improbability. As the knowledge, observation and experience of men vary in every imaginable degree, their notions of possibility and probability might naturally be expected to differ.¹⁵ The clause does not make all facts, which make the existence or non-existence of a relevant fact probable or improbable, relevant. The expression "highly probable or improbable" in it

10. *Dinker Bandhu Deshmukh v. State*, 72 Bom. L.R. 405; 1970 Mah. L. J. 634; 1970 Cr. L.J. 1622; A.I.R. 1970 Bom. 498, 447.

11. *Rajender Singh v. Rajender Singh*, 1954 Pat. 556.

12. *State of Andhra Pradesh v. Ganeswara Rao*, A.I.R. 1963 S.C. 1850; (1963) 2 Cr. L.J. 671.

13. *Hetram v. Bhader Ram*, 1973 W.L.N. 981 (Raj.).

14. *Pratap Singh v. Rajender Singh*, A.I.R. 1975 S.C. 1045.

15. The judicial proceedings of modern times are conducted on the assumption that the Laws of Nature are fixed and immutable; not from any metaphysical or dogmatic position, but because such interposition is unquestionably rare, and it would be dangerous in the highest degree if tribunals were allowed to adopt its supposed occurrence as a principle of decision.

16. *Best, Ev.*, ss. 24-25.

is significant. It indicates that the connection between the facts in issue and the collateral facts sought to be proved must be so immediate as to render the co-existence of the two highly probable or improbable.¹⁷ The facts sought to be proved must be so closely connected with the fact in issue or the relevant fact that a Court will not be in a position to determine it without taking them into consideration.¹⁸

Salient omission of very important facts from the F. I. R. which constitute an important link of the prosecution story would go to affect the probabilities of the case and are relevant under this section.¹⁹

One particular instance of bad faith and *mala fides* in a transaction cannot render the issue of bad faith and *mala fides* in a totally different transaction highly probable. The words 'highly probable' indicate a state of more than normal standard of probability.²⁰

A Court is not precluded from allowing its decision to be affected by a consideration of probabilities, even where there is positive evidence to the contrary,²¹ but, in order to prevail against such evidence, the improbability must be clear and cogent; it must approach very nearly to, if it does not altogether constitute, an impossibility.²²

Where the parties to a suit are at issue on a vital question and the evidence is conflicting, the safest principle for the Court is to consider which story fits best with the admitted circumstances and the resulting probabilities.²³

If the statement in a document executed before the controversy in the suit had raised its head renders a fact in issue (the issue of being joint) improbable, the statement is admissible under section 11 (2).²⁴

(b) *Recitals in documents not inter partes: in General.* Recitals in documents, not *inter partes*, are not "facts" within the meaning of the section unless the existence of those recitals is itself a matter in issue.²⁵ If a statement does not fall within section 32, it cannot be admitted under this section.²⁶ There is

17. *S.H. Jhabwalla v. Emperor*, 1933 All 690 at 705; 145 I.C. 481; 1933 A.L.J. 799; *Bhuriva v. Ram Kali*, A.I.R., 1971 Punj. 9 at pp. 11, 12; see also *R. v. Vvapoory*, 6 Cal.

18. *K. S. Singh v. Ramprasad Singh*, 1971 Cr. L.J. 556 at 559 per Banerji, J.

19. *R. K. Pande v. State of M.P.*, 1975 Cr. L.J. 870 (A.I.R. 1975 S.C. 1026; *Pate Mian and others v. The State of Rajasthan*, 1976 Raj. Cri. C. 243).

20. *Babulal v. Western India Theatres*, A.I.R., 1957 Cal. 709.

21. *Surendra Krishna Mandal v. Rance Dasee*, 1921 Cal. 677; 59 I.C. 814; 33 C.L.J. 34.

22. *Chottey Narain v. Ratan Koer*, (1894) I.L.R. 22 Cal. 419, 431; 22 I.A. 12 (P.C.) per Lord Watson.

23. *Davis v. Maung Shwe Goh*, (1911) 38 I.A. 155, I.L.R. 38 Cal. 805.

24. *Jagaband Singh v. Bij Bahadur Singh*, A.I.R., 1966 Pat. 168, distinguishing *Sonevhi Jha v. D. Chandra*

Narain Singh, A.I.R., 1935 Pat. 167 (F.B.) and *Nihar Bewa v. Kadar Bakas Mohamed*, A.I.R., 1923 Cal. 290.

25. *Raviappa v. Nilakanta Rao*, A. I. R., 1962 Mys. see also *Radha Krishna v. Subeswar*, 86 I.C. 674; A. I. R., 1925 C. 684 (2); *Sonevhi v. Databdeo Narain Singh*, I. L. R. 14 Pat. 461; A. I. R., 1935 Pat. 167 (F.B.); *Mst. Naima Khatun v. Basant Singh*, I. L. R. 56 A. 766; A. I. R., 1934 A. 406; *Lal Chand v. State*, 1972 Raj. L. W. 675; *V. A. A. Mainar v. A. Chettiar*, A. I. R., 1972 Mad. 154; *Pachhakhan v. Gopalakrishna*, (1975) 1 Kant. L.J. 105; A.I.R., 1975 Kant. 179 (unless they amount to admission against interest of such party).

26. *Mst. Naima Khatun v. Basant Singh* supra; *R. G. R. Institute v. State*, A.I.R., 1976 Kant. 75; *Lal Chand v. State*, 1972 Raj. L. W. 675.

distinction between the existence of a fact and a statement as to its existence. It is the former which makes the existence of facts admissible and not statements as to such existence. It is the fact of making that statement is itself a matter in issue. If the words recitals in a document are not 'facts' as mentioned in this section, the existence of those recitals is itself a matter in issue.² The clause does not cover a recital by a third party relating to the ownership of a house in which he has admittedly no interest. The clause does not apply to recitals of such a type whether made by persons living at the time of the conveyance or not. If the person making the recital is dead, it does not fall under section 32 (3).⁴

(ii) *Documents between party to the suit and a stranger.* In a suit in which the plaintiff claims a certain title to property, the recitals in a document between him and a third party, which tend to support his title, are not admissible in evidence under sub-section (2) of the section³ unless it amounts to admission against the interest of such party.⁴ A fact to become admissible under this section should be such as to make the existence of a fact in issue or relevant fact highly probable or improbable and not merely probable or improbable.⁵

(iii) *Judgments.* A judgment not *inter partem* as for instance in a land acquisition reference and relating to land situate near the land in question, is not admissible in evidence, either as an instance or one from which the market value of the land in question can be inferred or deduced. Such a judgment cannot fall under sections 40 to 48 or under this section. Although this section is expressed in wide terms, yet it is not open to any wide construction. The sort of facts the section is intended to include, are those which either expressly or impliedly state or less distinctly, the existence of facts sought to be proved. As already stated, there is a distinction between the existence of a fact and a statement as to its existence. It is the former only that is relevant under this section. The words 'highly probable' in this section point out that the connection between the fact in issue and the collateral fact sought to be proved must be so immediate as to render the co-existence of the two highly probable. The admissibility of a particular piece of evidence offered must be only so connected with and in fact must depend on the weight to be attached to that particular evidence, if it is taken into consideration.⁶

2. *Mst. Nanna Khatun v. Basant Singh*, I L R. 56 A 766; A. I. R. 1934 A. 406; *Lal Chand v. State*, 1972 Raj. L. W. 675.

3. *Bhuriya v. Ram Kali*, A. I. R. 1971 Punj. 9 at pp. 11, 12; *Abdulla v. Kunj Behary Lal*, (1913) 14 C.L.J. 467 (decision of Mookerjee and Cunliffe, JJ.) followed in *Seroj Kumar Acharji Chowdhuri v. Umed Ali Hawaldar*, 25 C. W. N. 1022; A. I. R. 1922 Cal. 251; *Choni Lal Kesariwani v. Nil Madhub Barik*, A. I. R. 1925 Cal. 1034; *Lajpat Rai v. Faiz Ahmad*, A. I. R. 1927 Lah. 448 followed in *Ghulam Mohammad v. Kalim Ullah*, A. I. R.

1928 Lah. 428; *Prem Nath Choudhuri v. Chandra Bhattacharjee*, 28 C. W. N. 1002; A. I. R. 1924 Cal. 1067.

4. *Bhuriya v. Ram Kali*, supra.
4-1. *V. A. A. Mannar v. A. Chettiar*, A. I. R. 1972 Mad. 154.

4-2. *Pachakhan v. H. D. Gopal Krishna Rao* (1975) 1 Kant. L. J. 105; A. I. R. 1975 Kant. 179; I. L. R. 1975 Kant. 25.

5. *Kalappa v. Rhima*, A. I. R. 1961 Mys. 160.

6. *Special Land Acquisition Officer v. Lakhmei*, A. I. R. 1960 B. 78; 61 Bom. L. R. 1032.

conduct of the parties was to make these leases perpetual would make it hardly probable that the same was the intention with regard to the leases in dispute, and the facts relating to these leases would, therefore, have been relevant facts under the second subsection of this section. But such a fact being a fact of instances were not proved, and the instances so far as they were proved had been explained as being either insufficient or as being the result of particularities in the circumstances of the leases to which they belonged.¹ Where an oral lease was denied and the sale-deed in favour of the person suing as landlord was alleged to be bogus, evidence as to the nature of the sale-deed was held to be relevant on the question of existence or non-existence of the oral lease.² When the question was whether a deceased person had married a lady and a draft of a will, not written by the testator himself, and containing no mention of the lady, was tendered in evidence under this section, it was held to be inadmissible inasmuch as it was not a written statement made by the deceased testator.³

A statement in an application for probate as to the date of the death of the last holder of the property is admissible.⁴ In a suit for rent of land from defendant, plaintiff alleged that he bought the land from the defendant and thereafter leased it to him year by year, and the defendant totally denied the sale and the lease; it was held that the fact in issue was the lease alone, but that evidence might be given for the fact of the sale also as a relevant fact corroborative of the fact of the lease.⁵ When the question is, whether the accused is an habitual thief, the fact, that he was a member of an organization formed for the purpose of habitually cheating, is relevant under this section, and the facts of such membership and such cheating may be proved against any of the members of the organization.⁶ An intercepted letter, written by the accused referring to a theft signed with a different name but sent from his address, is relevant against him under this section as *prima facie* evidence that he had sent the letter.⁷ In an embezzled case, A and B were charged with theft committed in 1917 in the house of a prostitute and evidence was brought forward to show that C and D committed a theft in the house of another prostitute in 1918 in somewhat similar circumstances. It was held (C. J. dissenting) that the evidence was not admissible either under Section 9 or under this section to prove that A and B were the same persons as C and D.⁸ Where the question was whether a fire at a factory in 1940 was intentional and evidence was tendered of another fire in 1952 in another mill owned by the same proprietor, it was held inadmissible under this section.⁹

An entry made in a register of indoor patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date.¹⁰ In the undernoted case, the accused was charged with having caused grievous hurt to one of his wives and killed another. The wounded woman on the day of occurrence, on her arrival in hospital, made a statement to a Magistrate to the effect that it was accused who had attacked

1. **Narsingh v. Ram Narsin**, 30 C.

2. **Sh. Rashid v. Hussain Bakash**, 1943 Nag. 111 K. Nag. 849; 207 I. C. 472; 1943 N. L. J. 318.

3. **Haji S. M. v. Ayesha**, (1963) 7 C. W. N. 665; 27 B. 485 (P.C.).

4. **Jadav v. J. K. Narayan**, 1931 Pat. 12 Pat. L. T. 891; 131 I.C. 788.

5. **Kaung v. San**, 3 L.B.R. 90.

6. **Kalu v. R.**, (1909) 37 C. 91.

7. **Booth v. Tupper**, 1914, 41 C. 545; A. I. R. 1914 C. 649.

8. **R. v. Pandu Day**, (1960) Cal. 100; I. L. R. 47 C. 671; 58 I.C. 929; 21 Cr. L. J. 849; 14 C.W.N. 501; 31 C. L. J. 402 (F.B.).

9. **A. H. G. v. P. K. G.**, 1941 Rang. 141 Rang. I. R. 1941.

10. **Amolak v. R.**, 19 Cr. L. J. 141.

herself and co-wife. This statement was admitted and placed before the jury. It was held that the mere fact that the woman made a statement had no bearing on the main fact in issue and this section does not justify the admission of the contents of the statement.¹¹

When the market value of land for acquisition is determined on the basis of sales of similar property at or about the same time, what is relevant under Section 9 of this section is not whether there was a valid transfer of title but the price actually paid for the property.¹²

(d) *Admissions*. Admissions are relevant and may be proved as against the person who makes them, but they cannot be proved by or on behalf of the person who makes them except in the three cases mentioned in Section 21, *post*. But even self-serving statements are admissible under this section where they make relevant facts highly probable or improbable or where they are *res gestae*.¹³

(e) *Judgments*. This section only refers to certain facts and not to opinions of certain persons in regard to those facts. It does not make such opinions to be relevant, and judgments after all of whatever authority are nothing but opinions as to the existence or non-existence of certain facts. These judgments cannot be regarded to be such facts as would fall within the meaning of Section 11 of the Act unless the existence of these opinions is a fact in issue or a relevant fact which is of course a different matter. Previous judgments of the courts are not therefore admissible, except in certain circumstances for evidentiary purposes. The provisions of this section and Section 13 read with Section 13 do not make the judgment of the Sessions Court respecting one of the accused who were absconding and whose case was separated and dismissed an exception to a revision by the other accused convicted for offence relating to the same transaction. For further discussion as to the admissibility of judgments see note under sub-head (b), sub-sub-head (ii), *supra* and section 13, *post*.

(f) *Recitals in documents*. Recitals of boundaries in documents not introduced are relevant and admissible under Sections 157, 32(2), 13 and 11 of this Act, the particular circumstances of the case determining the particular

11. *R. v. Abdul*, 23 C. W. N. 933; 54 I.C. 887; 21 Cr. L. J. 183; A. I. R. 1920 C. 90.

12. *State of Kerala v. Mariamma Abraham*, 1969 Cr. L. J. 269, 1 I.L.R. 471 A. I. R. 1969 Ker. 265, 269.

13. *Chandrasekhar Singh v. Maharaja Kesri Lal Singh*, 1975 Pat. 68; 5 P. L. T. Sup. 1, per Dawson Miller, C. J. and Foster, J. See also *Sawaridhan Akotia v. Samir Khan Akotia*, 1974 Cal. 368, 72 I.C. 985; *Inderdeo Rai v. Deo Karan Rai*, 1955 Pat. 292; *Ram Bharose v. Diwan Rameshwar Prasad*, 1938 Oudh. 26; I. L. R. 13 Luck. 697; 171 I. C. 481; 1937 O. W. N. 1058; *Jwala Singh v. State of Punjab*, 1972 Delhi 221.

14. *B. N. Kashyap v. Emperor*, 1945 Lah. 23 at 26; I. L. R. 1944 Lah.

408; 217 I.C. 284 (F.B.); In re Antonius Raab, 1950 Bom. 101; I. L. R. 1949 Bom. 557; 51 Cr. L. J. 558; 51 Bom. L. R. 852.

15. *Hem Chandra v. Purna Chandra*, 1934 Cal. 788; 153 I.C. 154; 59 C. L. J. 830; *Gopal Rao v. Sita Ram*, 1927 Nag. 19, 97 I.C. 694, 9 N. L. J. 215; *Vednath Singh v. Mahomed*, 1934 Rang. 212; 154 I.C. 123; *Dharamshaw Rattanji Karan v. Bombay Municipality*, 1945 Bom. 320; I. L. R. 1945 Bom. 547; 47 Bom. L. R. 304; see also *Kalicharan v. Emperor*, 1927 All. 654 (2); 104 I.C. 225; *M. Misbahuddin v. Vidya Sagar*, 1935 Lah. 64; 156 I.C. 268; 36 P. L. R. 106.

16. *Bhagigata Mosgaon*, In re, (1971) 1 Andh. W. R. 316; 1971 M. L. J. (Cr.) 361, 364.

24. Steph. Dig. Art. 3; Jones v. Williams, (1837) 2 M. & W., 326 (see note to s. 13, post); followed in Naro Vinayak v. Narhari, (1891) 16 B. 125.
25. ib., Doe v. Kemp., (1835) 7 Bing 332; 2 Bing. N. C. 102; Taylor, Ev., ss. 320—325.
1. Naro Vinayak v. Narhari, (1891) 16 B. 125, 128.
2. See Whitley Stokes, 861, note (5); Cunningham, Ev., 103; Norton, Ev., 124.

2. **Suits for damages.** Damages, which are the pecuniary satisfaction which a plaintiff may obtain by success in an action, are unless expressly admitted deemed to be a fact in issue.³ Damages may be claimed either in an action on contract⁴ or tort.⁵ The question, as to when damages may be recovered, and the amount of damages recoverable in particular suits as well as the defence pleadable in such suits, is a portion of the particular branch of the substantive law under the provisions of which these suits are brought,⁶ and, therefore, the present section does not specify how the facts made relevant by it are to be related with the injured property, person or reputation, but lays down generally that evidence tending to determine, i.e., to increase or diminish the damages, is admissible.⁷

In determining the amount payable as compensation for the acquisition of land by a person, who had made an offer for the purchase of that land, himself gives evidence of such evidence is relevant in that it is his opinion that the land was of a certain value.⁸

3. **Evidence in mitigation or aggravation of damages.** (a) *Libel.* In an action for libel, other libellous expressions by the defendant, whether used before or after the commencement of the suit, are sometimes admissible, for the plaintiff to show the malevolence of the defendant, and so to enhance damages. On the other hand, evidence of circumstances, which, according to the law of libel, have the effect of mitigating damages, is admissible in evidence for the defendant.⁹

Where the defamatory statement, complained of is an imputation of bad conduct towards a woman and truth is pleaded in defence, evidence that the woman herself made statements to that effect to a number of persons is relevant under this section in order to assist the court in assessing the damages to be awarded.¹⁰ Where the complainant prosecutes the defendant for defamation in a criminal Court where his reputation is vindicated by the conviction of the defendant, his subsequent action in launching an action for damages cannot be regarded as, in any sense, other than vindictive, and this circumstance can be properly taken into account in deciding the amount of damages to be awarded.¹¹

(b) *Seclusion, etc.* Evidence in mitigation or aggravation of damages may be further illustrated by the cases on actions for seclusion, assault, false imprisonment, trespass, trover, etc. Thus, where the defendant had given the plaintiff in charge of a constable for felony, he was allowed to show reasonable ground of suspicion in mitigation of damages.¹² So also, in actions for assault

3. See Roscoe, N. P. Ev., 864, 878.

4. See Contract Act (IX of 1872), ss. 73-75, 125, 150-152, 154, 180, 181, 205, 206, 211, 212, 225, 235 and Sale of Goods Act (III of 1930), ss., 56-61.

5. See Alexander's "Indian Case Law on Torts" (1918) Draft Indian Civil Wrongs Bill, ib., p. 517.

6. See Damages and Compensation, 1970, Roscoe, N. P. Ev., sub voc "Damages".

7. Norton, Ev., 124; Roscoe, N. P. Ev., 86.

8. Raghobars Nath Singh v. The U. P. Government, (1967) 1 S. C. R. 489; (1967) 2 S. C. J. 214; (1967) 1 S. C. W. R. 1005; I. L. R. (1967) 1 All. 204; A. I. R. 1967 S.C. 465, 467.

9. Roscoe, N. P. Ev., 864, 878.

10. M. S. J. In v. U. Kayaw Maung 1936 Rang. 332; 164 I.C. 385.

11. ibid.

12. Chinn v. Morris (1825) 10 M. 424; Roscoe, N. P. Ev. passim sub voc, "damages", Norton, Ev. 126.

the provocation offered by the plaintiff would be relevant under this section and in action against Railway Companies for injuries received, the position, circumstances and earning of the plaintiff, the precautions taken by the Company, and the contributory negligence, if any, of the plaintiff¹³ would be similarly relevant.

In an action for breach of promise of marriage, the plaintiff may give evidence of the defendant's fortune, for it obviously tends to prove the loss sustained by the plaintiff, but not in an action for adultery¹⁴ nor for seduction,¹⁵ nor for the malicious prosecution, for it is nothing to the purpose in an action on tort "whether the damages come out of a deep pocket or not."¹⁶

(c) *Adultery* In an action for adultery, the conduct of the husband must be looked to. The facts that the husband and wife had been leading an unhappy life before they parted, that he knew she had no means of living and made no earnest inquiry after her and that in the ordinary course of things she yielded to the temptation of securing support of some other man have to be taken into consideration in assessing the damages.¹⁷

4. Injury to feelings, relevancy of. Injury to the feelings is irrelevant in an action on contract as an element of damage, but in actions on tort, heavy damages may be given on this score. In *Hunt v. Great Northern Railway Company*,¹⁸ it was said:

"The case of a contract to marry has always been considered as a sort of exception in which not merely the loss of an establishment in life, but, to a certain extent, the injury to a person's feelings in respect to that particular species of contract may be taken into account; but generally speaking, the rule is this, in the case of a wrong, the damages are entirely with the jury, and they are at liberty to take into consideration the injury to the party's feelings and the pain he has experienced, as, for instance, the extent of violence in an action of assault, and many topics, and many elements of damage, find place in an action for tort, or wrong of any kind, which certainly have no place whatever in an ordinary action of contract."¹⁹

This principle is well illustrated in actions for libel where the injury to the feeling is always an element of consideration.²⁰ The circumstances of time and place, when and where the insult was given require different damages; thus, it is a greater insult to be beaten upon the Royal Exchange than in a private room,²¹ and, in trespass, the jury may consider not only the pecuniary

13. See *Cunningham, Ev.*, 105.

14. *James v. Macgregor* (1841) 6 C. & P. 189; *Keyse v. Keys* and *Maxwell*, (1886) L. R. 11 P. D. 100, followed in *Thomas v. Mes Thomas*, 1925 Cal. 185; 1 L. R. 52 Cal. 379; 86 L. C. 1018; 29 C. W. N. 350 (F. B.).

15. *Hodell v. Taylor* 1 L. R. 9 Q. B. 79; *Roscoe, N. P. Ev.*, (1873) 86 and p. 911 as to evidence in aggravation.

16. Per Blackburn, J. in *Hodell v. Taylor*, *supra*, quoting Lord Mansfield.

L. E. 61

17. *Keyse v. Keys* (1886) 1 L. R. 11 P. D. 100.

18. (1887) 26 L. J. Ex. 20; 1 H. and N. 408; per Pollock, C.B. (this was an action for damages for breach of contract. See *Williams v. Curtis*, (1845) 1 C.B. 841.

19. See *Williams v. Curtis* (1845) 1 C.B. 841; *Seay v. Tynes* (1818) 2 Starkie 317.

20. *Norton, Ev.*, 126.

21. Per Bathurst, J., *Tullidge v. Wade*, (1769) 3 Will. 15; *Roscoe, N. P. Ev.*, 913.

damage sustained but also the intention with which the act has been done, whether for insult or injury.²² The leading case on the subject of damages in the case of breach of contract *Hadley v. Baxendale*²³—is the foundation of the rule contained in Section 73 of the Indian Contract Act, according to which rule, the damages which the plaintiff ought to receive should be such as naturally arose in the usual course of things from the breach,²⁴ or such as the parties knew, when they made the contract to be likely to result from the breach of it. All facts showing the amount of such damages are relevant under this section; but no damages can be, ordinarily, recovered by an action of contract that are not capable of being specifically stated and appreciated²⁵. Neither in actions on contract nor on tort must the damage be too remote,¹ and evidence of damage of such a character will not be admissible, nor, in general, will evidence of facts tending to show damage, or of facts in aggravation or mitigation of damages, be relevant under this section, unless the damage or aggravating or mitigating facts are of the kind and character which the substantive law recognizes.

5. Character. Evidence of. The question when, and under what circumstances, evidence of character may be given in civil actions with a view to damages is dealt with by Section 55 *post*, and in the notes thereto. But good faith, honesty of purpose and absence of malice are relevant in mitigation of damages.² The rule as regards the duty of plaintiff to mitigate damages was stated in *Edley v. Kett*.³ It will be an aggravating circumstance that a seduction was effected under the cloak of honourable overtures.⁴ The high rank of the parties may be an aggravation of the wrong for which damages are claimed.⁵ In actions for malicious arrest the injury suffered or expenses incurred by plaintiff may be taken into account.⁶

6. Statements made "without prejudice". The section lays down that in suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant. But the section does not enable the Court to admit in evidence documents marked "without prejudice" since, the rule which excludes documents marked "without prejudice" is a wholesome rule, adopted to enable the disputants to engage in discussion for the purpose of arriving at terms of peace. Without this protective rule, it would often be difficult to take steps towards amicable

22. *Per. Ashott v. Scott v. Lyons*, (1818) 3 Stark. 318. Roscoe, N. P. Ev., 937.

23. (1854) 23 L. J. Ex. 179, 182; 9 Ex. 816; see Act IX of 1872 (Contract) S. 73; Cunningham and Shephard's Indian Contract Act, (1915), 11th Ed.

24. *Jagadechavan v. The Leo Films Co.*, 1948 Mad. 442; 1 I. R. 1948 Mad. 841; 1948 1 M. L. J. 229; *Bissham Prasad Lalit v. Saranm Debva*, 1944 C. J. 106; 1 I. R. 333; 1 Cal. 578; 212 I. C. 483; *Pratap v. Rajeshwar*, 1937 Nag. 243; 109 I. C. 88; *Domination of India v. All India Reporter Ltd.*, 1942 Nag. 32.
25. *Per. P. Lock C. B. in Freeman v. G. N. Ry. Co.* (1856) 26 L. J. Ex. 20 at p. 23.

1. Act IX of 1872, S. 73. *Alexander op. cit.* 9 M. S. B. R. *Herman v. Asiatic Steam Navigation Co. Ltd.*, 1941 Sind 146; 196 I. C. 529.

2. *Pearson v. Lemaitre* (1843) M. & G. 700.

3. (1929) 1 K. B. 400; see also *Jamal v. Moola Dawood*, 1915 P. C. 48; 11 R. 43 Cal. 493; 43 I. A. 6; *Harland v. Goshio Kabushaki Kaisha Ltd.* 1925 Bom. 28; 1 I. R. 49 Bom. 25; 86 I. C. 521.

4. *Ludidge v. Wade* (1769) 3 Wills 18.

5. *Andrews v. Askey* (1837) 8 C. & P. 7.

6. *Jennings v. Florence* (1857) 26 L. J. C. P. 277; *Churchill v. Siggers*, (1854) 3 E. & B. 929.

settlement. Every facility should be given to persons who are in litigation or anticipate litigation, to come together fully and frankly with a view to come to some arrangement. Statements made "without prejudice" should not be treated as admissions against the maker or as binding between the parties. They are merely tentative statements, the object of which is to put an end to litigation. Offers and propositions between the litigating parties are generally excluded on the principle of public policy.⁷

Thus, statements made without prejudice cannot justify a decree straight-away, without proof of actual loss and *quantum* of damages, as the same cannot be treated as an admission of liability. It might be that the loss sustained is incapable of proof with the certainty of mathematical demonstration; but where absolute certainty is impossible though damages are not uncertain, the amount of damages should be ascertained by rules of evidence to a reasonable degree of certainty.⁸

13. *Facts relevant when right or custom is in question.* Where the question is as to the existence of any right or custom, the following facts are relevant :

- (a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence then ;
- (b) particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration

The question is whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

s. 3. ("Relevant.")

s. 32 (c) (i) Public right or custom (opinion of person not called as witness).

s. 32 (b) (i) Illustration of "Public right").

s. 32 (d) Statement in Document relating to "transaction.")

s. 42 and Illust. Judgments relating to matters of a public nature).

s. 48, and Illust. (General custom or right (opinion of witnesses on))

s. 48 Explanation Meaning of "general custom or right").

s. 49 Illust. Illustration of "general custom or right.")

s. 49 Opinions as to usage, etc.)

s. 51. (Grounds of opinion.)

s. 52 Prov. 5 Usage and custom imported into contract).

The following Acts refer to custom, Acts XXI of 1950 (Non forfeiture of right by loss of caste), XV of 1856 (Remarriage of Hindu Widows), IV of 1872, Sections 5 (a), 7 (Punjab Laws), IX of 1872, Section 1 (Contract), III of 1873, Section 16 (b) (Civil Courts, Madras); XX of 1875, Section 5, Central Provinces Laws, XVIII of 1876, Sections 3 (b) (1), 4, 8 (Oudh

7. *Kurtz & Company v. Spence & Sons*, 57 L. J. Ch. 258, (241) cited in *Union of India v. Shro Bux*, A.I.R.

1967 C. 686, 638. See Philipson (11th Edn.) para. 679, page 307.

8. *Union of India v. Shro Bux*, *supra*,

Laws), IX of 1908 (Act 10 Limitation) (see now XXXVI of 1963, Art. 97); II of 1882 (Section 1, Transfer of Property), III of 1930 (Sale of Goods), Section 62. See also Act XLV of 1920 (Religious Trusts), V of 1882, Sections 18, 20 (Easements), Section 100, Article 5, Taylor, IV, Sections 1683-609, 320, Starkie, IV, Sections 1, 129, Roper, N. P. Ev. 24, 25, 55, 51, 934, Plapson, IV, 11th Ed. 51, 160, IV, Sections 506, 509, 499, Wills IV, 3rd Ed. 62, 63.

SYNOPSIS

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1. Principle. The general rule as to relevancy is that a party may prove all facts that are relevant to the facts in issue and no others.⁹ The rule is well illustrated by cases of possession, and especially by the possession of real rights, whether incorporeal, as an ancient watercourse, or corporeal, as a field or road strip. In such cases, every act of enjoyment or possession is a relevant fact. For the right claim is constituted by an indefinite number of acts of user exercised *animo domini*.¹⁰ Ownership may be proved by proof of possession, and the latter may be shown by particular acts of enjoyment,¹¹ these

9. Wright v. Doe, (1837) 7 A. & E. 313, 384.

10. Wills, Ev., 3rd Ed. 62.

11. Jones v. Williams, (1837) 2 M. & W. 326, followed in Sabran v. Odoy, 1922 Pat. 488; I. L. R. 1 Pat. 375; 70 I.C. 18.

acts being fractions of that sum total of enjoyment which characterises dominium¹². This also is the best evidence, with the exception of that afforded by judicial recognition, which is only admissible in proof of matters of a public nature that is public or of the rights and customs¹³. Opinion also is admissible in proof of such rights and customs¹⁴. But the most cogent evidence of rights and customs is not that which is afforded by the expression of opinion as to their existence, but by the examination of actual instances and transactions in which the alleged custom or right has been acted upon, or not acted upon, or of acts done or not done, involving a recognition or denial of their existence¹⁵. In the absence of direct title deeds, acts of ownership are the best proofs of title¹⁶. Acts of ownership, when submitted to, are analogous to admissions or declarations by the party submitting to them that the party exercising them has a right to do so, and that he is, therefore, the owner of the property upon which they are exercised. But such acts are also admissible of themselves¹⁷, for they tend to prove that he who does them is the owner of the soil.¹⁸

2. Scope and object. The purpose of this section is to enable a right, which may be continued by a number of acts by the exercise of the right itself *anno domini*, or numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied but by evidence otherwise admissible¹⁹. The section consists of two parts. The first part deals with transactions and the second part with instances, so that facts constituting instances may be relevant under this section, even if they do not constitute a transaction²⁰. The section does not contemplate evidence of any incident or right in the sense of evidence of any grant creating these incidents or rights. It contemplates only certain transactions and instances as evidence of facts relevant to the facts in issue in any particular case, and it makes these transactions and instances relevant for the purpose of establishing any right or incident, thus making such transactions or instances evidence of the fact in issue²¹. The section only makes certain facts relevant. It does not say how these relevant facts are to be proved; for that one has to look to other provisions of the Act, e.g., Sections 64 and 65²².

3. Right. This section applies to all kinds of rights, whether

12. Wills, Ev., 3rd Ed. 63.

13. V. S. 47, post. See remarks of Edge, C.J. and Tyrrell, J. in *Gurdayal v. Jhanda*, 1888 (1885-1890), 8 A. W. N. 242.

14. V. S. 32, cl. (48).

15. See remarks of Turner, J., in *Luchman v. Akbar*, (1877) 1 A. 440 and *Gopalayyan v. Raghupatiayyan*, 7 Mad. H. C. Rep. 250, 254 and remarks of Westrop, C.J. in *Bhagwandas v. Rapnal*, (1873) 10 Bom. H. C. R. 241, 261; Steph. Dig. Arts. 5 and 6 and case there cited; *Taylor Ev.*, s. 1683; *Ranchhoddas v. Bapu*, 10 B. 439, v. Commentary, post and note to Ss. 32, cl. (4), and 42, 48. As to long usage being the best exponent of right, see *Nilakandhen v. Padmanabha*,

(1895) 18 M. 1.

16. Per Jackson, J., in *Collector v. Doorga*, (1865) 2 W. R. 210.

17. See *Ev.* 479 note F. *Jones v. Williams*, (1837) 2 M. & W. 326 v. post.

18. *Tahil Ram Tackchand v. Mst. Minal*, 1938 Sind 132; 1 L.R. 1939 Kar. 18; 176 I.C. 549.

19. *Secretary of State v. District Board, Rangpur*, 1939 Cal. 758; 485 I. C. 454; 70 C. L. J. 126.

20. *Mulharaja Shrish Chandra Nandi v. Kala Chand Roy*, 1942 Cal. 445; 1 L. R. (1942) 1 Cal. 510; 202 I.C. 570.

21. *U. P. Government v. C. M. T. Association*, 1948 Oudh 54; 1 L. R. 42 Luck. 97; 229 I.C. 42.

rights of full ownership or falling short of ownership, e.g., rights of easements, etc.²²

The right mentioned in this section is not a public right only, the illustration shows this is not so, the right there mentioned being a private one.²³ Three kinds of rights are thus included in the Act: (a) private e.g., a private right of way, (b) general, which is defined to include rights common to any considerable class of persons e.g., the right of the villagers of a particular village to use the water of a particular well,²⁴ and (c) public.²⁵ The latter class of right is nowhere defined in the Act. Every public right, in the sense of the previous definition, is a general one, though (if the distinction made in English law between the terms "general" and "public" be accepted) every general right is not a public one.

There was at one time a conflict of decisions as to whether the term is to be understood as comprehending all legal rights (including a right of ownership) or only incorporeal rights. In the leading case, *Gujju Lall v. Fattch Lall*, Jackson J. and Garth, C. J. were of opinion that the rights referred to in the section were incorporeal rights. "What is referred to in the section cited is evidently a right which attaches either to some property or to status" in short, incorporeal rights, which though transmissible, are not tangible or objects of the bodily senses.¹ "It may be difficult perhaps to define precisely the scope of the word 'right', but I think it was here intended to include those properties only of an incorporeal nature, which in legal phraseology are generally called 'rights' more especially as it is used in conjunction with the word 'custom'. It is certainly used in that sense in subsequent parts of the Act (v. the forty-eighth section, and the fourth subsection of the thirty-third section) which deal with matters of public or general 'right' or custom."² On the contrary, it has been held by Mitter, J., that the contention that the section in question refers only to incorporeal rights, whether of a public or private nature, is not warranted by any general principle, it being difficult to suggest a reason which would justify the existence of a distinction between the rules applicable to the proof of corporeal and incorporeal rights, respectively, whether of a public or private nature.³ Also Banerjee, J., observed as follows: "It has been said

22 *Rangayyan v. Innasimuthu*, 1956 Mad. 226; (1955) 2 M. L. J. 687.

23 *Scorpio Narain v. Bissambhar*, 1877) 23 W. R. 811, see *Gujju Lall v. Fattch Lall* (1880) 6 C. 171 (F. B.) per Garth, C. J. *Rangayyan v. Innasimuthu*, 1956 Mad. 226; (1955) 2 M. L. J. 687; *Mahabir v. Semmati*, A. I. R. 1964 Pat. 66.

24 See 48 and illustration.

25 See 82, I. 4, illust. (d) and illustration to S. 42 which last section also deals with the subject of public rights.

1 Per Jackson J. *Gujju Lall v. Fattch Lall*, (1880) 6 C. 171 (F. B.) (Mitter, J., dissenting).

2 Garth, C. J., *ibid.* Mitter, J. dissenting and see *Kaladhan v. ...* (1880) 6 C. 483 (F. B.). The undermentioned cases decided prior to *Gujju Lall v. Fattch Lall*, (1880) 6 C. 171, (F. B.) may be consulted on this point: *Koondo v.*

Dheer, 1873) 20 W. R. 445 (right of succession to office), *Neamut v. Gooroo*, 1874) 22 W. R. 365 (H. mahse right to land), *Guttee v. Bhukut*, 22 W. R. 467 (1), *Dattaraj v. Jogo*, 1874) 23 W. R. 295 followed in *Sabran v. Oday*, 1922 Pat. 488; I. L. R. 1 Pat. 375; *Hansa v. Shoo*, 24 W. R. 431 (suit for lands); *Moresh v. Dino*, 24 W. R. 266; *Lachmeedhur v. Rughoobur*, 24 W. R. 284; *Omer v. Burn*, 24 W. R. 470 (suits for rent); *Narain v. Dopa*, 1883) 3 B. 3 (suit for Chirda allowance).

3 *Gujju Lall v. Fattch Lall*, (1880) 6 C. 171 (F. B.) Pontifex, J. expressed no opinion upon this particular point and Morris, J. merely agreed with Garth, C. J. in holding that the former judgment was inadmissible.

4 In *Dopa v. Rajan*, (1898) 2 C. W. N. 501, 504 25 Cal. 522

that the right spoken of in this section is an incorporeal right. I do not think that there is any sufficient reason for putting this limitation on the meaning of the term as used by the section." So also in Bombay, it has been held that the words "rights and customs" should be understood as comprehending all rights and customs recognized by law and therefore as including a right of ownership⁵ and in Adalatabad that the word "right" both in classes (a) and (b) includes a right of ownership, and is not confined, as held by the majority (*sed quare* majority) in *Gurju Lall v. Fateh Lall*, to incorporeal rights⁶. It would seem now to be generally held that the term "right" includes all rights and is not limited to incorporeal rights.⁷

As to antiquity, in the case of a right no less than of a custom, usage for a number of years certainly raises a presumption that such right or custom has existed beyond the time of legal memory.⁸ The relationship between persons does not raise a question of a right or custom.⁹

4. Custom. (a) Essentials. "Custom", as used in the sense of a rule which, in a particular district, class, or family, has, from long usage, obtained the force of law,¹⁰ must be (a) ancient¹¹ (b) continued, unaltered, uninterrupted, uniform, constant,¹² (c) peaceable and acquiesced in,¹³ (d) reason-

⁵ *Ranchhoddas v. Bapu*, (1886) 10 B. 439, per Sargent, C. J.

⁶ *Collector v. Palakdhari*, 12 A. 1 (F.B.) and see *Ramasami v. Appavu*, (1887) 12 M. 9; Suit for money claimed under alleged right, *Venkatasami v. Venkatreddi*, (1891) 15 M. 12, suit for declaration of title *Vythilinga v. Venkatachala*, (1892) 16 M. 194, suit for possession of land, followed in *Sabran v. Odoy*, 1922 Pat. 488.

⁷ *Rangayyan v. Innasimuthu*, 1956 Mad. 226; (1955) 2 M. L. J. 687; *Raghupat Tewari v. Pt. Namasdeshwar Prasad Tewari*, 1938 Pat. 103; 166 I. C. 664; *Mahabir v. Sonmati*, A. I. R. 1964 Pat. 66.

⁸ *Ramasami v. Appavu*, (1887) 12 M. 9 at 14.

⁹ *Ajmer Singh v. Gangir Singh*, 1952 Pepsu 76, 7 D. I. R. Pepsu 54.

¹⁰ *Hurpurshad v. Sheo*, (1876) 3 I. A. 259, 26 W. R. 55; *Sivananjan v. Muttu Ramlinga*, (1866) 3 M.H.C. R. 75; *Subramanian v. Kumarappa*, 1955 Mad. 144; (1955) 1 M. L. J. 555; 68 L. W. 280.

¹¹ *Hurpurshad v. Sheo*, (1876) 3 I. A. 259; *Lala v. Hira*, (1878) 2 A. 49; *Doed Jugomohan v. Nimu*, Mont-tiou's cases of Hindu Law, 596 (length of time necessary); *Joy v. Doorga*, (1860) 11 W. R. 348; *Juggomohan v. Manikchand*, (1859) 7 M. I. A. 263, S. C.; 4 W. R. P.C. 8; *Amrit v. Gouri*, (1870) 6 B. L. R. 232 P.C.; 15 W. R. P.C.

10; *Naggendur v. Rughoonath*, (1864) W. R. 20; *Ramalakshmi v. Sivananantha*, (1872) 17 W. R. 553; *Perumal v. Ramalinga*, (1866) 3 M. H. C. R. 75; *Gopalayyan v. Raghupattaiyyan*, (1873) 7 Mad. H. C. R. 250 (usage must also be public). See *Ramasami v. Appavu*, (1887) 12 M. 9, 14 and *Bhau v. Sundarbal*, 11 Bom. H. C. R. 249, post; *Durga v. Raghunath*, (1913) 18 C. I. J. 559, 18 C. W. N. 55; *Subramanian v. Kumarappa*, supra; *Mumtaz Begum v. Usaulah Khan*, 1972 J. & K. L. R. 565.

¹² *Lala v. Hira*, 2 A. 49; *Jameela v. Pagul*, (1864) 1 W. R. 250; *Beni v. Jankrishna*, (1869) 7 B. L. R. 152; 12 W. R. 495; *Juggomohan v. Manikchand*, 7 M. I. A. 263; *Amrit v. Gouri*, 6 B. L. R. 232; *Naggendur v. Rughoonath*, (1864) W. R. 20; *Ram Lakshmi v. Sivananantha*, (1872) 17 W. R. 553; *Patel v. Patel*, (1891) 16 B. 470; *Perumal v. M. Ramalinga*, 3 Mad. H. C. R. 77; *Soorendranath v. Heeranmonee*, (1868) 12 M. I. A. 81; *Tara v. Reeb*, (1866) 3 M. H. C. R. 177 (acts must also be plural); *Rajkishan v. Ramjoy*, (1872) 1 C. 186 P.C. (discontinued); *Juggomohan v. Mangaldas*, (1886) 10 B. 528 (the consensus utentium, which is the basis of all legal custom must be uniform and constant); *Mumtaz Begum v. Usaulah Khan*, supra; *Lala v. Hira*, 2 A. 49.

able,¹⁴ (e) certain and definite,¹⁵ (f) compulsory and not optional to every person to follow or not,¹⁶ The acts required for the establishment of customary law must have been performed with the consciousness that they spring from a legal necessity,¹⁷ and (g) must not be immoral¹⁸ It must not be opposed to morality or public policy and it must not be expressly forbidden by the Legislature¹⁹ A custom or a practice cannot be allowed to prevail over a statutory rule.²⁰

In *Mahamaya v. Haridas*,²¹ it was said that a custom must be proved to be immemorial, reasonable, uninterrupted and also certain as regards its nature in the locality, and persons affected by it. In this case it was said that a custom is void at law if there is proof that it originated within the time of memory but proof of its existence for a longer period will put the onus on those who assail it.

But the English rule, stated in Blackstone's commentaries, that "a custom in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary, so that if anyone can show the beginning of it it is no good custom," is not applicable to India. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period, and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.²² Where

14. *Hurpurush v. Sheo*, 3 I. A. 259; *Lala v. Hira*, 2 A. 49; *Lachmeput v. Sudaulla*, 1887, 9 C. 638; *Ramsondas v. Kesurabhai*, 1863, 1 B. H. C. R. 229; *Arlapa v. Narsi*, 1871, 8 B. H. C. R. 150; *De Souza v. Pereira*, 1884, 8 B. 498; *Vallab v. Ravi Varmah*, 1877, 1 M. 235 P. C.; *Nyamutoolah v. Ghind*, (1866) 6 W. R. (Act X) R. 140; *Kato v. Mammun*, (1895) 17 A. S. 57; *Shad v. Muhammad*, (1910) 33 A. 257; *Subramanian v. Kumarappa*, 1955 Mad. 144.
15. *Hurpurush v. Sheo*, 3 I. A. 259; *Rajkumar v. Ramay*, (1872) 1 C. 186 at p. 196; *Lala v. Hira*, 2 A. 49; *Lachman v. Akbar*, 1887, 1 A. 440; *Bhagwan Das v. Balgobind*, 1 B. I. R. S. 9; *Gov. Lokact v. Lokact*, 1873, 20 W. R. 154; *Raja Lakshmi v. Sivaramuth*, 17 W. R. 133; *Subramanian v. Kumarappa*; *Kommu Venkata v. Chandrakota Subbaramiah*, 1951 Andh. 54; (1954) 2 Mad. L. J. (Andh.) 24; 1954 Andh. L. J. 83.
16. *Ishan v. Nilmar*, (1908) 35 C. 854 (r riparian owner's right to irri-

- gate); *Parbat v. Chandrapal*, (1909) 8 O. C. 41, 36 I. A. 117, 31 A. 457.
17. *Lala v. Reeh*, 1 Mad. H. C. R. 171; *Gopalayyan v. Raghupatayyan*, (1873) 7 Mad. H. C. R. 250.
18. *Channa v. Tegard*, 1976, 1 M. 168. See also *Sarkaralagun v. Subhan*, (1844) 1 M. 479; *Ghasin v. Utrao*, (1893) 20 I. A. 193; 21 Cal. 149 (P.C.).
19. *Subramanian Chetty v. Kumarappa Chetty*, 1957 Mad. 144 at 140 (1955) 1 M. L. J. 355; 68 L. W. 28.
20. *Kamal Nain v. Sup. of Hyvina*, 1954 Rev. 1 R. 439 (Punjab).
21. 1955 Cal. 161; 1955 I. L. R. 32 C. 47; 27 I. C. 496; 20 C. L. J. 183; 19 G. W. N. 208.
22. *Mst. Seehard v. Nawab*, 1941 P. C. 21; 68 I. A. 111; 1 I. R. 141; *Lah. 174*; 193 I. C. 436; overruling *Bahadar v. Mst. Nihal Kaur*, 1937 Lah. 451; 1 I. R. 18; *Lah. 394*; 164 I. C. 969; see also *Gopal Chaud v. Parvin Kumar*, 1952 S. C. 231; 1952 S. C. J. 331; 65 Mad. L. W. 616; 90 Cal. I. J. 73; 1 I. R. (1953) Punjab 1.

The Privy Council had held that it is permissible to adduce evidence of a family custom which varies the strict Mohammedan Law.⁹ But the effect of these decisions has been nullified by subsequent legislation. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937¹⁰ now provides:

"2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special powers of marriage, including personal property inherited or obtained under contract or gift, or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula*, and *mubarat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions, and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law" (*Shariat*).

The rule mentioned in the section being a public or private right, the 'custom' must, on proper principles of construction, include a private custom.¹¹

(b) *Private custom*. The word "custom" as used in the section is not, however, limited to ancient custom, but includes all customs and usages. So it has been held under Section 48, which deals with general customs and rights, that evidence of usage is admissible.¹²

(c) *Usage*. The word 'usage' would include what the people do, now or recently, or the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a very long time. It may be one which is regularly and ordinarily practised there as such.¹³ So a business usage as distinguished from a common law custom need not be long established or strictly uniform, nor need an agricultural custom have existed from time immemorial.¹⁴ The word is used in this and other sections of the Act in its widest sense, including all customs, ancient or otherwise, and usages.¹⁵ Three classes of custom or usage are thus dealt with in the Act: (i) private,¹⁶ (ii) general,¹⁷ and (iii) public.¹⁸ Instances of the first class are family customs and usages termed *kulachar*, or in Upper India, *Rasniwa-riwaj-i-khandan* (v. post).¹⁹

(d) *General custom*. The expression 'general custom' is deemed to include customs common to any considerable class of persons.²⁰ These are:

(i) *Local custom*. *Local custom*, in the Bhojpur and other Ganges districts *wakf* property, which is governed by Mohammedan law, may be by custom

9. *Mahomed Ali v. S. G. Ramiah Raj*, 15 Bom. L. R. 76; 1 C. W. N. 97; 17 C. L. J. 143; 18 I. C. 577; 18 M. W. N. 211 (P.C.). See also *Akbarally v. Mahomed Ally*, 1932 7 I. C. 185; 1 C. 81; 31 Bom. L. R. 10.

10. Act No. XXVI of 1937.

11. *Collector v. Palakdhari*, 12 All. 1.

12. *Dalgish v. Guzuffer*, (1896) 23 C. 427; *Sariatullah v. Prannath*, (1898) 26 C. 184.

13. *Idig v. S. G. Ramiah*, 1896 23 C. 247; *Sariatullah v. Prannath*, (1898)

26 C. 184. See also *Mahomed Ali Shah v. Mohammad Shah*, 1951 M. B. 92.

14. *Jogendra v. Mahomed*, 7 M. I. A. 263, 282.

15. *Indra v. Indra*, 1880 8 App. Cas. 508, in which case the local custom had grown up within the last 30 or 40 years.

16. v. S. 48 post.

17. v. S. 32, cl. (4), post.

18. v. Norton, Ev., 190.

19. v. S. 48, and *generations*, post.

of the district alienated.²⁰ In the same district, and more especially in parts of Eastern Bengal, the right of pre-emption which is based on Mohammedan law, is allowed and enforced by custom as between Hindus also.²¹

(ii) *Customs or usages* of which Khojahs' and Memns' cases²² and the right of divorce by usage of particular castes, and the customs of religious brotherhood attached to Hindu temples and the like afford examples. English Municipal Law, owing to historical development, limits custom to a particular locality only. Sir Luke Perry in the Khojahs' case has remarked that this peculiar Municipal view of English law can have no application to India, where customs are so common and are mostly personal or caste customs.

(iii) Trade customs or usages (v. post).

A general custom may be varied by a special local custom.²³

2. *Public custom.* Public custom is nowhere defined in the Act. It is not clear, if any and if so, what meaning is to be attached to the word "public" as distinguished from the word "general" in the Act. In speaking of matters of public and general interest the terms "public" and "general" are sometimes used as synonymous, meaning merely what concerns a multitude of persons.²⁴ But regarding the inadmissibility of hearsay testimony, a distinction as in English law has been made between them, the term "public" being the one attached to that which concerns every member of the State,²⁵ and the term "general" being confined to a lesser, though still a considerable portion of the community. In matters strictly public, reputation from anyone appears to be receivable. It is, however, the right in dispute being simply general, that is, if those only who live in a particular district, or adventure in a particular enterprise, are interested in it, hearsay from persons wholly unconnected with the place or business would be not only valueless, but probably a together inadmissible.²⁶ But, as the Evidence Act¹ makes no such distinction as to admissibility, merely requiring in all cases a probability of knowledge on the part of the deponent, the distinction ceases to be of importance in India.² Again, the expression "customs or rights" is explained to include "means and includes" customs or rights common to any considerable class of persons, in fact or in law, as would, according to the English law, be within the expression "matters of general interest". The expression "the law" would apply both to have its ordinary extended meaning, and to be restricted to those who are concerned with it in English law as "matters of public interest".

20. *Abdulla v. Ghulam Mahomed*, 10 C. R. 76.

21. *Kodrutoolah v. Mohurce*, 7 W. R. 537; *Inder v. Mahomed*, (1864) 1 W. R. 234.

22. *Karim v. Bano*, 11 C. R. 276.

23. *See* *Maya Devi*, 1955 S. C. 248 (S. C.): 57 Punj. L. R. 247; 1955 S. C. A. 382; 1. L. R. 1955 Punj. 167.

24. *Taylor, Ev.*, s. 609; *Gresley, Ev.*,

See notes to S. 32, cl. (4), *post*.

25. *Taylor, Ev.*, s. 609.

1. v. S. 32, cl. 4.

2. *See Norton, Ev.*, p. 186.

3. It does not therefore accepting the distinction between "public" and "general" exclude public custom: "When a definition is intended to be exclusive, it would seem the form of words is "means and includes" per *Jackson, J. R. v. Ashotoah*, (1878) 4 C. 483, (F.B.).

... is not a "legal rights."¹⁵ It is not confined to a dealing between parties
... it includes a testamentary dealing with property. — A litigation
also is a transaction.¹⁷

One cannot, however, document by which nothing really passes over to the transferee, then come within the meaning of this section. A transfer of title to goods would not, as such, come within the section.¹⁸ So this is not an *inter vivos* transaction within the meaning of this section.¹⁹

the following characteristics of transaction. The qualifying characteristics are those spoken of in the section 1. The section, however, does not mention (a) recognition, (c) a section, (d) Gen. 1. The following are also qualifying characteristics of the

[illegible]

Ranchhoddas v. Babu Narhar, (1886) 10 B. 439; **Rangayyan v. Katarayagopala v. Narayya,** 1915 M.L.J. 217, 1914 M.S.D.O. 217 as to judgments, post.

486: (1930) 1 M. L. J. 325: 63 L. W. 310.

ib.
Hickshir v. Sommat, 4 1 R 1964
Pat. 66.

C. W. N. 32

19. *Asadgar Ali Khan v. Province of Assam*, 1944 Cal. 57; I. L. R. (1914) 1 Cal. 203; 211 I.C. 460; see also *Gobinda Narayan Singh v. State of Sikkim*, 1961 P. C. 80-55 I. A. 125; I. L. R. 58 Cal. 1187; 131 I.C. 753; *Ranchhodas v. Bapu Narhar*, I. L. R. 10 Bom. 439.

20
Bhopendra K. P. *Indo-Asian Lib. Catalogue*,
dra, 1927 Cal. 1: 99 I.C. 189; 31
G. W. N. 32—per Guming and
Mukherjee. *J.* see also *Rev. of Ind. Lib.*
Mir Amir Ali, 11 C. W. N. 703;
Saptha. *Verkh. Trav. Sp. Ind. Lib.*
Nadkarni, 1925 Mal. 1: 11—*J.*
26 I. C. 747, but see Kameswar
Singha. *Indo-Asian Lib. Catalogue*,
Cal. 763; 67 C. L. J. 411; per
contra.

21. **Bansi Singh v. Mir Amir Ali**, 11 C. W. N. 203

22. **Narendra Nath v. Sannyasi Charan**, 192 Cal. 425, 171 C. 100 (C. L. J. 300, see also *Indrajendra Ashore v. Mohim Chandra*, *infra*; and *Kanta Mohan v. Basudev*, 39 C. W. N. 311, where a niskar right was asserted in a sale-deed.

23. Jogendra Krishna v. Subasni Dassi,
194 Cal. 2d 111, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925,

On account of the qualifying qualification "by which" in regard to any transaction, if it is a case which is sought to be made admissible on the ground of the right being created, claimed, modified, asserted or denied, then it must be shown to be not apart from the transaction by which it was created, claimed, etc. An instance of creation or modification of a right would be inconceivable apart from the transaction "by which" it was created or modified.²⁴ But there may be a transaction by which there has been a recognition of a right or the exercise of a right which can be proved by recitals in a document not *inter partes*. In other words, a transaction in which there is a recognition by mere assertion and a recognition of the exercise of a particular instance of the same, as distinct from a transaction by which the right or custom is created, claimed, modified or denied, has to be distinguished.

(c) "Claimed". The reason for this distinction is that the word "claimed" denotes a demand or assertion in relation to a thing or attribute, as against or from some person, showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. It may amount to a claim or be a mere statement of a claim.²⁵ A mere assertion of a right in a document to which the person against whom the right is asserted is not a party and of which he knows nothing, is not to claim the right.¹

(d) "Asserted". It will have been observed that the section distinguishes between a claim and an assertion. Under the second clause, however, instances are admissible in which the exercise of a right or custom was asserted. The word "assertion" includes both a statement and enforcement by Act. Ordinarily, the evidence tendered under this section will be evidence of acts done, but a verbal statement not amounting to, and not accompanied by any act would also be admissible if it amounted to a "claim".² A document between third parties in which mention is made of one of the parties or his predecessor as holding the land lying on the boundaries of the land belonging to the executant of the document is inadmissible.³

The section in Clause (c) speaks of a transaction being inconsistent with the existence of the right in dispute and is not confined to the assertion of such a right.⁴

A statement by a deceased person relating to the purchase of shops in the names of other persons is an assertion of right. It falls within Section 13(c) and is admissible under Section 32(7) *post*.⁵

24. Rangayya v. Jayaraman, 1950 Mad. 20; 2 Cal. 2d 111, 68.

25. *See* *Chand v. Kala Chand*, 1942 Cal. 445; 105 Cal. 2d 111, 129 I.C. 64, 29 C. W. N. 469.

1. Rangayya v. Jayaraman, *supra*; Rangayya v. Jayaraman, 1950 Mad. 20; 1927 Cal. 1; 99 I.C. 189; 31 C. W. N. 32; *Sush Chandra v. Kala Chand*, 1942 Cal. 445; 105 Cal. 2d 111, 129 I.C. 64, 29 C. W. N. 469; 202 I. C. 570; *Khemman v. Chottu*, 1938 Lah. 635; 179 I.C. 68; 40 P.L.R. 968; *Jyoti Prashad v. Bharat Shah*, 1936 Pat.

2. 105 Cal. 2d 111, 129 I.C. 64, 29 C. W. N. 469; *Chand v. Kala Chand*, 1942 Cal. 445; 105 Cal. 2d 111, 129 I.C. 64, 29 C. W. N. 469; *Chand v. Kala Chand*, 1942 Cal. 445; 105 Cal. 2d 111, 129 I.C. 64, 29 C. W. N. 469.

3. *Chooni v. Nilmadhub*, 1925 Cal. 1034; 86 I.C. 734.

4. *Mathra Singh v. Gurbachan Singh*, 69 Punj. L. R. 119, 124.

5. *Ibid*.

(c) *'Recital' and 'assertion', distinction between.* It is also well settled now that there is a fundamental distinction between a mere recital and an assertion. A right is not asserted simply because it is recited in a certain document. It is asserted only when the transaction concerned is itself entered into in exercise of the right. For example, if a tenancy is not transferable unless it is of a permanent character, a transfer of the tenancy would be an assertion of a permanent right, but if a tenancy is transferable whatever its nature may be, a transfer, accompanied by a statement in the deed that the tenancy was of a permanent character will not be an assertion of a permanent right.⁶

To be relevant under this clause the right or custom in question must be directly asserted and not merely cursorily referred to.⁷ It is not necessary that the right should be asserted successfully.⁸ But the assertion must be before the dispute arose.⁹

(d) *'Recognised'.* In *Karuppanna v. Rangaswami*,¹⁰ Jackson, J., held that a mere statement of tenancy as such cannot be classed with any of the verbs in Section 13. But in doing so with respect, the learned Judge went too far and did not care to refer to the verbs "recognised" and "exercised".

In the Concise Oxford Dictionary the word "recognised" is defined as "acknowledge validity or permanency or character or claims or existence of, accord notice or confirmation to, discover or realise nature of or, as acknowledge for, realise or submit to". Where, therefore, the existence of a right is in question it is permissible for the party relying on its existence to prove any transaction by which it was recognised, a particular instance in which it was exercised by means of recitals of boundaries in documents not *inter partes*.¹¹

7. *Admissibility of statements made in prior proceedings.* An admission of a person is admissible in evidence as against him, though it can be explained away by the maker thereof or the person against whom it is sought to be proved. The same principle applies to an admission made in pleading, or in an affidavit, or in any sworn deposition given by a party in a prior litigation though it is capable of rebuttal. The assertion or denial made in a pleading or other statement is relevant under this clause and is therefore legally admissible in evidence.¹²

Statements relating to the existence of the assertion of a right are relevant under this section. Such statements, even if not *inter partes* and not relating to the property in dispute, are relevant under this Section, though they are not binding on the opposite party who is not a party to the case.¹³ The words

6. *Kumud Kanta Pahari v. Province of Bengal*, 1947 Cal. 209 at 211; 81 C. L. J. 274.

7. *See* *11 B. & P. 100*; *1852 V. P. 36*.

8. *Wadhwa v. Har Naran Das*, 1926 Cal. 727; 92 I.C. 104.

9. *Motilal v. Babu Baldeo Das*, 1952 V. P. 36. See also *Dasondhi v. Milkhi Ram*, 1939 Lah. 152; 181 I. C. 703; 41 P.L.R. 670; *Jhingur Raut v. Emperor*, 1931 Pat. 386; 32

Cr. L. J. 1224; 134 I. C. 625; 12 P. L. T. 647.

10. 1928 Mad. 105 (2); 107 I.C. 295. *See* *Karuppanna v. Rangaswami*, 1956 Mad. 226; (1955) 2 M. L. J. 687.

11. *See* *11 B. & P. 100*; *1852 V. P. 36*; *1956 A. I. R. 1966 Pat. 110*; 1965 B. L. J. R. 800.

13. *Harihar v. Nabakishore*, 1. L. R. 1962 Cut. 422; A. I. R. 1963 Orissa 45.

used in this Section are not used in a narrow sense, and the claim need not necessarily be made in the presence and to the knowledge of the person to be affected thereby.¹⁴ Such documents are admissible, under this Section, as assertions of title. The principle has been clearly laid down that though the recital in the document cannot amount to admission of the party in whose favour the document has been executed, yet it is admissible and relevant under this Section. Where a document constitutes evidence of a person's assertion of the right, as, for instance, that he was adopted as a son by another person, that document is relevant under this Section, read with Section 12, if he is dead. So, where a landlord is described as adopted son of a particular person in the descriptive portion of a document, the description of landlord as adopted son, is not a superfluous recital but is made in assertion of a right and is admissible under this Section.¹⁵

But a statement as to relationship is not admissible when there is no question of a matter of custom within the meaning of this Section.¹⁶ But statements subsequent to the dispute have no evidentiary value at all.

8. **Clause (b).** "Instances". An 'instance' is that which is asserted or is affirmed, as an illustrative case, something cited in proof or as an example.¹⁷ The qualifying characters of an instance are: (i) spoken or by the action; (ii) claim, the recognition of a right, and (iii) 'instances' and 'transactions', and (iv) exercise (which is related to "the exercise of the right" and instances in which the exercise of the right was asserted, disputed, asserted or departed from).

This clause does not bring in the particular instance in which the right was asserted. The clause speaks of the particular instances in which the right was claimed or in which its exercise was asserted. The word 'exercise' imports a demand which involves the presence of the party against whom the demand is made. Consequently, where, in a suit for a right of a landlord, the tenant claims a right or right statements as to the exercise of the right in documents such as a decree, a mortgage deed or a deed to which the landlord was not a party are not admissible under this clause. Moreover, the clause does not bring in the statement itself, but only the instances in which the exercise of the right was asserted.¹⁸ The mere statement in a deed or in a plan that a particular right cannot be said to be an instance in which the exercise of the right was asserted.¹⁹ The illustration to section also shows that an instance claiming a right means something more than a mere statement of boundaries in a deed or in a plan.²⁰ A distinction has been drawn between a claim and a statement of it.²¹

14. *Ashafaque Ali Khan v. Asharfi Mahaseth*, A. I. R. 1951 Pat. 641.

15. *Harihar v. Nabakishore*, *supra*.

16. *Sevugan v. Raghunath*, 1936 A. 776; A. I. R. 1934 A. 406 (F.B.); *Sevugan v. Raghunath*, A. I. R. 1940 M. 275; 1939 M. W. N. 841; *Bhogal Paswan v. Bibi Nabihan*, A. I. R. 1963 Pat. 450.

17. *Adinarayanawamy v. Papamma*, A. I. R. 1963 A. P. 121.

18. *Webster's Dictionary* sub-nom,

"Instance."

19. *Joy Chand v. Shyama Charan*, 1942 Cal. 448; 199 I.C. 425.

20. *Bhagwan K. v. Narayan*, 1927 Cal. 1; 99 I.C. 189; 31 C. W. N. 32; *Jyoti Prasad Singh v. Bharat Shah*, 1936 Pat. 543.

21. *Kheman v. Chhorn*, 1938 Lah. 635; 179 I.C. 68; 40 P. L. R. 968.

22. *ib. Radha Krishna v. Sarveswar Nag*, 1925 Cal. 684 (2); 36 I. C. 674; 29 C. W. N. 469.

Instances 'in which the right or custom is claimed, recognised, exercised' etc. must be instances prior to the suit in question, because this clause is in the past tense throughout.²³

(b) *Illustrative cases.* (i) *Road cess papers.* Road cess papers²⁴ old records of rights²⁵ and deeds of sale were held to be evidence *quantum valebat* as transaction and instances in which rights were asserted and recognised. A transaction is something which has been concluded between two persons and a sale deed is one such.¹

(ii) *Sale deeds and mortgage-deeds.* An act of transfer by way of sale or mortgage of property necessarily involves an assertion that the transferor owns the interest transferred and is therefore a transaction by which such a right is claimed or asserted. It may be an assertion in one's favour. Sale deeds and mortgage deeds are therefore admissible under this section.² Where the question is as to the existence of a custom of transfer of houses by tenants, the fact that certain sale deeds or mortgage deeds were executed and were duly registered and each contained assertions of the existence of the right of transfer would be in itself admissible, quite independent of the fact whether the genuineness of the signatures on the originals of those documents has been proved or not.³ Right to land is a right referred to in this section. Therefore sale deeds of neighbouring lands is relevant as transaction recognising such right.⁴

(iii) *Sale certificates.* Sale certificates are not instruments of transfers, but they may be admissible as documents evidencing a transaction, e.g. a rent execution sale by which a right to receive and a custom to pay rent in cash only were recognised and asserted.⁵

(iv) *Documents showing recognition of rights by Government.* Documents showing recognition of alleged rights by Government have been admitted.⁶ An entry in a list of tenants prepared by a Tehsildar without any elaborate inquiry has no conclusive effect on the rights of a party for it raises only a rebuttable presumption. It is a piece of evidence to be taken into consideration when title to the property is in question.⁷

23. *Shanker Lal v. Kailash Chand*, 1939 Lah. 105; 183 I.C. 794; 41 P. L. R. 21.

24. *Dakari v. Jugo*, (1875) 23 W. R. 203. Followed in *Sahrai v. Odhy*, 1922 Pat. 488; I. L. R. 1 Pat. 375; 70 I.C. 18; 3 P.L.T. 792; *Mahabir v. Bhadoj*, 1937 Pat. 561; 172 I.C. 129.

25. *Ganesh Das v. Jagabannu Prusti* (1971) 37 Cut. L. T. 420.

1. *Chandoo v. Jog Bahadur*, A. I. R. 1957 Pat. 293.

2. *Lachmi Narain v. Manak Chand*, 1938 Lah. 846; *Ismail Fathi v. Ataul-Hah*, 1937 Lah. 698; 172 I. C. 769; 39 P. L. R. 389; *Monmotha v. Rajeshwar*, 1928 Cal. 315; I. L. R. 55 Cal. 355; 107 I. C. 81.

3. *Kallu Mal v. Ganesh Lal*, 1936 All. 119; 160 I. C. 1093; see also *Narain Singh v. Net Ram*, 1940 All. 535;

I. L. R. 1940 All. 726.

4. *Abdul Ali v. Harija Bibi*, 1972 Assam L. R. 148; A. I. R. 1972 Gauhati 52.

5. *Jesinta Kamini Dasi v. Jnanendra Nath*, 1940 Cal. 539; 191 I. C. 824; 71 C. L. J. 504; *Amar Nath v. Lilechao Das*, 1943 Cal. 565; 209 I.C. 292; 76 C. L. J. 251; *Kameswar Singh v. Him v. Nath*, 1938 Cal. 763; 67 C. L. J. 111; see also *Maharaja Bahadur Singh v. Barkatulla*, 1946 Cal. 450; 224 I.C. 55.

6. *Soorjo v. Bisambhur*, (1875) 23 W. R. 311 and see *Nitya Kahi v. Sarat Chandra*, 51 I.C. 866; A. I. R. 1919 C. 353.

7. *Hanutmal Asaram Mandha v. Nathu Venkoba* 55 Bom. I. R. 654; A. I. R. 1967 Bom. 654

alleged in the plaint, and a covenant to do nothing contrary to it. The deed was executed before action was brought by the present plaintiffs and also by a plaintiff who had died since the institution of the suit, and as the plaint averred, by a considerable majority of the family; but the defendant was not a party to it. The deed was held to be admissible as evidence on behalf of the plaintiffs.¹⁶ In an English case, the Crown claimed the salmon fishing above the falls of a certain river against A, who in proof of his right to the fishery gave evidence, *inter alia* of (a) occasionally fishing there, (b) having watchers during the spawning season, and (c) of binding his tenants in their leases, to protect the fishing and prevent all others from fishing.¹⁷ The evidence was held to be admissible.

On the question whether a person's work was deceptively similar to another's trade mark already registered, within the meaning of Section 12(1) of the Trade and Merchandise Marks Act, 1908, judgments in other cases where the parties, the subject-matter and the alleged infringing trade marks were all different, cannot be used either in fact or in law.¹⁸

(c) *Recitals in documents.* It has been held that a document is admissible in evidence, if it is a transaction by which a right is asserted or claimed but recitals in it are not admissible except when they amount to admissions and are otherwise relevant.¹⁹

The recitals of the boundaries of a land in dispute in the *kobala* executed by the tenant in favour of the transferee who came into occupation of the land as a tenant under the landlord and claims to be so, although the landlord is not a party to the *kobala*, are admissible in evidence against the landlord in a suit where the landlord seeks to eject the transferee from the land in dispute in which the transferee sets up his tenancy right under the landlord.²⁰ This is on the analogy of the decisions which hold that statement in a *kobala* executed by a tenant in favour of his transferee that his right in the land transferred was a permanent one is admissible in evidence against the landlord under this section in a suit by the landlord against the transferor for ejectment though the landlord was not a party to such a *kobala*.²¹

On the question whether certain lands are *bakaht* lands of the plaintiff, *Laluliyat* which indicate that lands were taken settlement of by different persons

16. *Hurronath v. Nittanund*, 10 B. L. R. 263 (1873); see S. 32, cl. (7).

17. *Long v. Alcock*, 10 L. J. 1047, (1880) L. R. 5 App. Cas. 273; in this case an ancient document was tendered to prove ancient possession and held to be admissible, the title being that such documents coming out of the proper custody and purporting on the face of them to certify ownership, such as a lease or licence, may be given in evidence as being of themselves a certificate of ownership and evidence of possession. See notes to S. 13, cl. (b).

See also *Malcolmson v. O'Dea*, 1863, 10 H. L. Cas. 593.

18. *Prem N. Mayor v. Raj Singh*, Trade Marks Act, 1907 Cal.

80, 86.

19. *U. P. Government v. C. M. T. Association*, 1 L. J. 1948, Oudh 54; L. R. 22 Luck. 93; 229 I. C. 41. See also the cases cited therein and also *Rahim Khan v. Fakir Muhammad*, S. C. 146 Nag. 401; 1 L. J. 1946 Nag. 528; 1946 N. L. J. 511.

20. *Aditya Roy v. Sushil Gopal*, East. L. W. N. 478 n pp. 479, 480.

21. *Jagadhe Neth Dutt v. Neta Das*, 89 C. L. J. 10, *Jogendra Krishna Feroze v. Son Subashini Dasi*, 45 C. W. N. 590; *Saltana Neth Bhandari v. Bijan Lal Choudhary*, 49 C. W. N. 138 A. L. R. 1945 Cal. 283.

from time to time and recognised the right of the plaintiff to settle those lands with them, are relevant under Clause (b) of this section.²²

Documents in which there is clear assertion of rights of the plaintiff regarding cultivation and enjoyment of the disputed lands are admissible under Section 13 (b) read with Section 21 (3) *post*.²³

(viii) *Recitals of boundaries.* The question, whether recitals in deeds between third parties are admissible, does not seem to have been finally settled. There have been attempts to admit such documents under Sections 11, 13 and 32 of this Act. Section 11 which lays down that facts not otherwise relevant are relevant, if they are inconsistent with any fact in issue or relevant fact can have nothing to do with this matter. Nor are the recitals, as regards the boundaries, admissible under Section 32 (2), as statement made by a person in the ordinary course of business. Section 32 does, however, make admissible or relevant a statement of relevant facts made by a person against his pecuniary or proprietary interest. To be admissible under that Section, a statement must be a statement of a relevant fact and must be against the pecuniary or proprietary interest of the person making it. The statement, relating to the boundaries in a document, would not be admissible, unless—

(1) it is a statement of a relevant fact, and

(2) it is a statement against the pecuniary or proprietary interest of the person making it.

The statement of a third party made in a document about the boundaries is inadmissible in law where such person has not been examined in the case nor proved to be dead.²⁴ It has, however, been held that recitals, of boundaries in documents not *inter partes* would be admissible under this section in fitting cases where the circumstances of the particular case permit such a course.²⁵ In *Rangayyan v. Innasimuthu*¹ Ramaswami, J., observed: "In many cases unimpeachable documents of neighbours who would be the best persons in our country where people are rooted for generations to the same place, about the possession and title of their adjoining properties would constitute the best evidence. There is no reason why, what the Americans would call the grass-root evidence should be excluded and now once more the reproach that the growth of the Evidence Act has been exercised under the influence of English precedents and Indian lawyers by so much restrictiveness that the law of evidence has become more remarkable for what it shuts out than what it lets in. The object of a judicial investigation seems to have become more the obscuring of the truth rather than the discovery of it. In this connection reference may be made to a brilliant exposition of this aspect by the late Mr. C. F. Arnold

22. *Balant Singh v. Hafiz S. S. Ahmad* 1968 B. L. J. R. 52, 63.

23. *A. Rajeswari Rao v. J. Patro*, 34 Guj. L. T. 1131, 1142.

24. See *Soney Lal v. Darbdeo* 1 I. R. 14 Pat. 461; *A. I. R.* 1935 Pat. 167 (F.B.); *Ramautar v. Sheonandan* A. I. R. 1962 Pat. 273; 1962 B. L. J. R. 11; *Pacha Khan v. H. D. Gopalakrishna* A. I. R. 1975 Kant. 179; *R. C. R. Institution v. State*, (1975) 2 Kant. L. J. 468; *V. A. A. Nainar v. A. Chettiar*, A. I. R. 1972 Mad. 154.

25. *Rangayyan v. Innasimuthu*, 1956 Mad. 226; see also *Ashfaq Ali Khan v. Ashraf Mahasethi*, 1951 Pat. 631; *Karnava Singh v. Bhagwat Singh*, 1954 Pat. 326, but see *S. K. Acharji v. Umed Ali*, 1922 Cal. 251; 25 C. W. N. 1022; 63 I. C. 954; *Ambakabaran v. Kumud Mohun*, 1928 Cal. 895; 110 I. C. 521; *Khemani v. Chottu*, 1938 Lah. 635; 179 I. C. 68; *Nand Chand v. Man Mohd. Shabbaz Khan*, 1936 Lah. 114.

1. 1956 Mad. 226.

I C S., in his *Psychology Applied to Legal Evidence and Other Constructions of Law*.² But a contrary view has been taken in *Madan Lal v. Durga Dutt*,³ *Kalappa Siddappa Udayar v. Bhima Gound Uppar*,⁴ *Sakaladeep Rai v. Sarjug Rai*⁵ and *V. A. A. Nainar v. A. Chettiar*.⁶

(ix) *Previous judgments and decrees*. Decisions are conflicting as to whether previous judgments and decrees, not *inter partes* are⁷ or are not,⁸ included in the term "transaction", or are⁹ or are not¹⁰ included in the words "particular instances" (*ex post*). In some cases, it has been held that judgments and decrees are not themselves "transactions" or "instances" but the suit in which they were passed and made is a "transaction," or "instance". In the under-mentioned case, Banerji, J., observed as follows:—

"If the existence of the judgment is not a transaction within the meaning of clause (a) of the thirteenth section, it proves that a litigation terminating in the judgment took place; and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So, again, litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (b) of the thirteenth section in which the right of possession now claimed by the defendants was claimed."¹¹

(a) A judgment in another suit not *inter partes* is not evidence to establish the truth of the matters decided in the judgment. The findings of fact arrived at on the evidence in one case, could not be the evidence of that fact in another case,¹² civil or criminal except in fitting cases. But judgments which are not *inter partes*, and

2 Thacker, Spink & Co., Calcutta, 1913.

3 A. I. R. 1958 Rajasthan 206; I. L. R. (1957) 7 Raj. 885.

4 A. I. R. 1961 Mysore 160.

5 A. I. R. 1961 Patna, 460.

6 A. I. R. 1972 Mad. 154.

7. *Seamut v. Gooro*, (1874) 22 W. R. 561; *Gujja Lal v. Fatch Lal*, (1880) 6 C. 171 (F. B.) 175; per Mitter, J., *con. dissent*. *Collector v. Palakdhari*, (1889) 1 I. L. R. 12 All. 1 (F. B.) at p. 43 per Mahmood, J., *con. dissent*; see *Radha Krishna v. Subeswar*, 1925 Cal. 684 (2) 29 C. W. N. 469, 80 I. C. 674.

8. *Gujja Lal v. Fatch Lal*, (1880) 6 C. 171 (F. B.) 175, 187 (F. B.) per Mitter, J., *dissent*. *Collector v. Palakdhari*, I. A. 1 (F. B.) at pp. 175, 187, see remarks of Sargent C. J. in *Ranchhodday v. Bapu*, (1886) 10 B. 439, 442. "Former judgments are not themselves transactions but the suit in which they were made is a transaction" per Straight, J., 12 A. I. supra. It was said by Ranade, J., "that the interpretation placed upon the words 'right and transaction' in *Gujja Lal v. Fatch Lal*, seems not to

have been accepted by the Privy Council and its correctness is questioned in the Full Bench judgment of the Allahabad High Court in *Collector v. Palakdhari*, in so far as the exclusion of such judgment from being received as evidence under any section is concerned. *Lakshman v. Amrit*, (1900) 24 B. 591.

9. *Kondo v. Dheer*, 1873 20 W. R. 345; *Jianutuban v. Romoni*, (1885) 15 C. 333; *Ramasami v. Appavu*, (1887) 12 M. 9 and see *Barthamma v. Avdia*, 1891 15 M. 19.

10. "Record and not the judgment alone admissible as an instance." *Collector v. Palakdhari*, 12 All. 1 at pp. 14, 28 per Edge C. J. and Farrell, J., "former judgment not used as instance but suit in which it was made is an instance" ibid. 20, per Straight, J. and see *Gujja v. Fatch Lal*, (1880) 6 C. 171.

11. *Tepu v. Romi*, (1875) 2 C. W. N. 50; *Arjan v. Hara*, S. A. 100 of 1902, Cal. H. C. 1st July, 1904 and see *Mahomed v. Hasan*, (1906) 31 B. 145.

12. *Kanki v. Manohar* 62 Bom. L. R. 322; A. I. R. 1961 Bom. 161.

therefore, not *res judicata*, have been held to be admissible in evidence under the provisions of this Act.¹³

- (b) In addition to the judgments which are admissible under Sections 40 to 42 of this Act Section 43 makes the existence of judgments relevant, if covered by any other provision of this Act. Judgments, which do not operate as *res judicata*, can be admitted in evidence to show the existence of a judgment in favour of a party.
- (c) The existence of a judgment may be of some probative value as for instance, in determining the question of possession.¹⁴ And it may create a paramount duty in appropriate cases to displace the finding.¹⁵
- (d) Judgments may be admitted as proof of the fact of litigation or its results and effects upon the parties, which make a certain course of conduct probable or improbable on the part of one of the parties.¹⁶
As between one of the parties to a litigation and a stranger, a question may have been conclusively decided, but that judgment is not binding upon the person who was not a party to that litigation.
- (e) Even the findings of the highest Court of Appeal in that litigation are not admissible against that party. The question in dispute between the parties has, therefore, to be decided upon independent evidence.¹⁷ Indeed, a judgment in another suit, which is not *inter partes*, is not evidence to establish the truth of the matter decided in that judgment, and the findings of fact arrived at on the evidence in one case are not evidence of that fact in another case.¹⁸
- (f) But a judgment in another suit, which is not *inter partes*, may be evidence under this Section for certain purposes, e.g. to prove the fact of the judgment; to show who the parties to the suit were, to show what was the subject-matter of the suit, to show what was decided or declared by the judgment; to show what documents had been filed by the parties in the proceedings; to establish the transaction referred to in the judgment; to show the conduct of the parties, or particular instances of the other side of a right or assertion of title¹⁹ to identify property, or to show how property had been previously dealt with; to establish a particular transaction in which

13. *Collector v. Parakhtari Singh*, I I R. 12 A. 1, (F.B.); *Ram Ratan Lal v. Kishore Lal*, 1908 B. I. 1 R. 237; A. I. R. 1966 Pat. 235; *Kesho Prasad v. Bhagjogna*, A. I. R. 1937 P.C. 69 at p. 75, where the Privy Council observed: "There are undoubtedly cases in which a judgment is evidence of weight against third parties".

14. *Shiv Charan v. State*, A. I. R. 1963 A. 511.

15. *Midnapore Zaminbar Co. Ltd. v. Naresh*, L. R. 48 I.A. 49; A. I. R. 1922 P.C. 241.

16. *Shivcharan v. State*, A. I. R. 1965 A. 511.

17. *Ockental v. Bireswar*, A. I. R. 1959 G. 195; 61 C. W. N. 970.

18. *Harihar Prasad v. Deo Narain*, 1956 S. C. R. 1; A. I. R. 1956 S. C. 305; 1955 B. I. J. R. 306-35 Pat. 22; *Kesho Prasad v. Bhagjogna*, I L. R. 16 Pat. 258; A. I. R. 1937 P.C. 69; *Gurmita Nandan Singh v. Sham Lal*, L. R. 58 I.A. 125; A. I. R. 1921 P.C. 80; *Gurmita Nandan v. Atal Singh*, L.R. 56 I.A. 419; A. I. R. 1929 P.C. 99; *Ramaji v. Manohar*, A.I.R. 1961 B. 163-62 Bom. L. R. 322.

19. *Harihar Prasad v. Deo Narain*, 1956 S. C. R. 1; A. I. R. 1956 S.C. 305.

Where the right of an adopted son is disputed and he brings a suit against trespassers who dispute his right and the *factum* of adoption, an order passed in an earlier revenue case, directing the impleading of plaintiff as the adopted son of one of the defendants in the case, is admissible to show that right as an adopted son was claimed and recognised, even though the order was not *inter partes*.⁵ So where the issue in the suit was whether a particular person was an adopted son and it was found that he was the adopted son, the judgment in that suit is admissible for the purpose of showing that there was an assertion and denial with regard to the adoption and that it was ultimately found that he was the adopted son.⁶ Where, however the question of adoption is agitated in a previous litigation and it is held that the person in question is not the adopted son, and the same finding is given in another suit, then although these decisions do not operate as *res judicata*, yet they have evidentiary value under this section.⁷

(x) *Award in partition suit*. Where an award contains recitals showing that the plaintiff had claimed the money before the arbitrators, making that fact a relevant circumstance under clause (1) of this section, the Court can proceed on the evidence contained in the award, unmistakably supporting the plaintiff's claim.⁸ In the above noted case, there was an arbitration. In finding out the extent of the estate, the arbitrators excluded the deposits made by others because they were not assets but liabilities of the estate. They, however, showed the depositors and their sums in the schedule annexed to the award. But as the depositors were not parties to the partition suit, no direction as to the repayment of those deposits was made in the decree made on the basis of the award. The depositors filed a suit on the basis of the award. It was held, that the award, though it might not be an admission of the assets held, yet it did not make the decree in the partition suit, incorporating in it the award, wholly irrelevant. The award contained recitals showing that the plaintiffs had claimed the money before the arbitrators, making that fact a relevant circumstance under clause (1) of this section. Therefore, the Court could proceed on the evidence contained in the award.

(xi) *Malicious prosecution*. *Admissibility of judgment of criminal court*. Proceedings in the Criminal Court are not evidence in the suit for malicious prosecution. The civil Court must go into evidence and decide for itself whether there was want of reasonable and probable cause, or the prosecution was actuated by malice. The judgment of the criminal Court is admissible in evidence in the civil suit only for the limited purpose of establishing the fact that the prosecution had ended in the plaintiff's favour but not for the purpose of ascertaining the grounds on which the judgment had proceeded.⁹

(xii) *Compromise decrees*. It is no doubt true that a judgment based upon a compromise or confession cannot be placed on the same footing as that in which, after contest a custom was held to be proved or negatived.¹⁰ Yet it

5. *Sullagarao v. Venkata Rama Rao*, A. I. R. 1964 A. P. 53; (1963) 2 Andh. W. R. 307.

6. *Veekararamany v. Venkatanarasayanaiah*, A. I. R. 1964 A. P. 109; (1963) 2 Andh. W. R. 169.

7. *Maheswar v. Mahana Bewa*, A. I. R. 1964 Orissa 174.

8. *Hrishikesh v. Khantamani*, A. I. R. 1959 G. 257.

9. *T. Y. Singh v. T. K. Singh*, A. I. R. 1970 Manipur 32.

10. *Imperial Oil Soap and General Mills Co. v. Mirshabuddin*, 1921 Lah. 65; I. L. R. 2 Lah. 83; cf. I. C. 325; 1974 J. & K. L. R. 462.

cannot be said that such a document is of no value. It does show the assertion of the right and acceptance of the same by the other party as well as the reasons for such acceptance.¹¹

In a case where a dispute existed between the proprietors of two estates, A and B, as to the right to water flowing through an artificial watercourse on Estate B, belonging to the defendants, proceedings were taken in the Criminal Courts by the owners of estate A against some tenants of estate B in consequence of their having crossed the watercourse. These proceedings led to a *razinama*, or deed of compromise, which was relied on as evidence before the Privy Council. Their Lordships said: "This agreement is a clear acknowledgment of right to this overtow. It was objected that this *razinama* does not bind the proprietors of B, but although it was apparently made between tenants it seems to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the water." Then their Lordships also referred to certain proceedings under Section 940 of the Code of Criminal Procedure of 1861 (corresponding to Section 147 of the Codes of 1882 and 1898) in which a *razinama* was made as to the right to use the water collected in the *tal*, observing that the proprietors of B do not seem to have challenged the decision of the Magistrate in these proceedings in the Civil Court. An order under Section 149, Criminal Procedure Code, was then administered as a *rescance* in which the right in dispute had been recognized.¹²

(viii) *Custom*. In a case decided prior to the Act, *mensuratio cultræ* were admitted as *prima facie* evidence that long before the case occurred and the suit was thought of the plaintiff put forward his right to certain lands as *mal* lands.¹³

(viii) *Business papers*. *Business papers* (contract papers, etc.) may be held to be admissible under the section as instances in which the right in question was claimed and recognised.¹⁴

(ix) *Declarations*. A declaration in a paper, in which a party or other interested party made a statement in a declaration of his own interest, was held to be admissible for the purpose of showing the existence of a paramount custom.¹⁵

11. *Abdul Kader v. Shiv Narayan*, 1964 Pat. 300, 34 C. L. R. 227, 1964 J. & K. L. R. 462.

12. *K. S. S. v. P. S. S.*, 1878 J. & K. L. R. 4 C. 640.

13. As to this see *Director v. P. S. S.*, 1878 J. & K. L. R. 4 C. 640. C. J., observed: "apparently those proceedings and the *razinama* in which they resulted would be admissible under Section 9 as evidence of facts and circumstances to produce a fact in issue. The record of the proceedings in the Criminal Court in 1861 would be the Judicial Committee admitted in evidence might be admissible under Sec. 9 or under Sec. 13 (b). In *P. S. S. v. P. S. S.*, 1878 J. & K. L. R. 4 C. 640, the Judicial Committee would possibly have held that the record in the Criminal Court of which

the judgments referred to at p. 58, formed part was admissible under Sec. 13 (b)." And see *Hira Lal v. Hira*, 1887 P. C. L. R. 528, 590. See also *Venkatasami v. Venkatasami*, 1891 M. L. J. post and *Director v. P. S. S.*, 1878 J. & K. L. R. 4 C. 640.

14. *Brajraj v. Ajiman Nissa Bibi*, 1950 Orissa 19: 1 L. R. (1949) 1 Cut. 465.

15. *P. S. S. v. P. S. S.*, 1878 J. & K. L. R. 4 C. 640; *Abdul Khaleque v. Sushil Chandra*, 39 C. W. N. 330; *Dwivedi v. P. S. S.*, 1878 J. & K. L. R. 4 C. 640; *Director v. P. S. S.*, 1878 J. & K. L. R. 4 C. 640.

16. *Ghughra Raj v. Jagannath Prasad Singh*, 1947 Pat. 475.

17. *Jagat Kishore Bala v. Anand Hari*, 1902 Cal. 410.

Although the *Inam* Fair Register is entitled to great weight as an act of State, the entries therein would not override or nullify the effect of registers prepared long before. It is only in the absence of authentic evidence that utmost importance will be given to the *Inam* Fair Register, but it will not displace earlier documents, the authenticity of which could not be questioned.¹⁸ Report by a local agent upon an enquiry made by him under Act XIX of 1810, whether a particular temple is a private or public temple is admissible under this section, when the question of the nature of the temple is under consideration.¹⁹

Where the question is whether A has a right of fishery in a river, licences to fish granted by his ancestors, and the fact that the licensees fished under them are relevant.²⁰ And where the question is whether A owns land, the fact that A's ancestors granted leases of it is relevant.²¹

9. Miscellaneous cases. The question is: Whether there is a public right of way over A's land. The fact that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and A's title-deeds showing that for a length of time, reaching beyond the time when the road was said to have been used, no one had power to dedicate it to the public, are all relevant.²² A petition to the Collector in which the right of primogeniture is stated has been held to be an instance of the recognition of such a custom.²³

Where it was alleged that land was debutter and it was contended that there was no legal evidence from which the Court was justified in inferring that it was; held that a *rubkar* by which the Collector released the land in dispute as being debutter property was a "transaction" and a relevant fact from which the lower court was entitled to infer that there had been a previous grant, though the release of itself did not constitute such a grant.²⁴

On the question of mere user of waste land as a passage as being a matter of right, the court should consider and apply its mind to the quality and the quantity of the evidence in particular.²⁵

The user of a land for over 50 years for burying the dead of the members of a particular community to the complete exclusion of strangers is a conclusive circumstance against the land being a public waqf.¹

Validity of customary right of burial depends on its being ancient, invariable, certain, continuous, peaceably and openly enjoyed and reasonable.² In U. P. Zamindars had a customary right to recover one fourth of sale consideration of a house sold by *Rivaya*.³ This custom has now been abolished

18. *Lakshminarasamma v. Raghavayya*, (1958) 1 Andh. W. R. 345.

19. *Commissioner of H. R. F. v. Kanak Durga, A.*, 1, R. 1958 Orissa 183.

20. *Rogers v. Allen*, 1 Compt. 360; see also *Neill v. Duke of Devonshire*, L. R. 8 App. Cas. 135.

21. *Doe v. Pateman*, 1842, 3 Q. B. 622, 623, 626.

22. Steph. Dig. Art. 5 illust. (c). As to proof of custom by instances, see *Vishnu v. Krishnan*, (1883) 7 M. 3.

23. *Shyamanand v. Rama*, 1904) 32 G. 6, 17.

24. *Lakhi v. Kahi*, 1907) 10 C. W. N. xxiv.

25. *Chidambara v. Vedayya*, 1, L. R. 1967, 3 Mad. 582 (1968) 1 M. L. J. 110; A. I. R. 1967 Mad. 164, 170.

1. *Abdul Salam v. Mohammad Ismail*, 1965 A. W. R. (H.C.) 296, 298.

2. *Akram Sheikh v. Muid Sheikh*, A. I. R. 1971 Cal. 405.

3. *I. B. Prasad v. Gauri Shanker*, A. I. R. 1973 All. 162.

with effect from 25th August, 1951 by U. P. Abolition of Zare Chaharum Act 1951, (Act No. 30 of 1951).

The rent note executed by a tenant of a complainant in respect of land in dispute and copy of the judgment of Nyaya Panchayat in a case filed by the complainant against the tenant for recovery of arrears of rent respecting that very land are admissible for the proving of charges under Sections 426, 447 and 506, I. P. C.⁴

An inspection note by a Magistrate strictly in conformity with Section 539 B, Cr. P. C., may be treated as admissible under Sections 13 and 35 of the Act.⁵

An order of mutation of the Revenue Officer and a judgment of a civil court though not *inter partes* in which the right of the plaintiff to succeed to a particular estate was recognised, is relevant and admissible in a subsequent suit for possession by way of redemption in which the same right is claimed.⁶ For admissibility of declarations in mutation proceedings in Punjab, please see the undernoted case.⁷

Where a Magistrate does not rely solely upon the judgment of the High Court in a previous case in order to find possession of property in respect of a disputed land, he can use the judgment as a piece of evidence of possession *quantum valebat* (as much as it was worth).⁸

Recital in sale deed that property sold was ancestral property of vendor is strong proof of the fact recited, though not an admission of vendee.⁹

Judgment of Municipal Committee is relevant only to show that permission to construct was granted. It is submitted that this was not a case of judgment but only of grant of permission in discharge of statutory duty.¹⁰

10. Pleadings. The plaint or written statement filed by a party in a previous litigation is admissible evidence of the right claimed therein.¹¹ An admission contained in a plaint or written statement or an affidavit or any sworn deposition given by a party in a previous litigation will be regarded as an admission in a subsequent action, though it is capable of rebuttal.¹² The assertion by the husband in his written statement in a previous suit for partition that his wife was *benamidar* for him in respect of certain property is rele-

4. Chingacham Thonocha v. Okram Umab, 170 Cr. I. J. 360; A. I. R. 1970 Manipur 23, 25.

5. Bisco v. Hakurji Singh, 1968 A. W. R. (H.C.) 614, 616; Baldeo Das v. Gobind Das, A. I. R. 1914 All. 59.

6. Hatalal v. Shylal, (1969) 71 Punj. L. R. 735, 738 relying on Kuldip R. v. District Board, Gurdaspur, A. I. R. 1948 Loh. 109, Talohram (Tackchand v. Mst. Miral, A. I. R. 1958 Sind 132. See also Rangayyan v. Innasimuthu, A. I. R. 1956 Mad. 226.

7. Baskin v. Jester, 1971 Sim. L. J. (H.P.) 70.

8. Ramkawal Upadhyay v. Dudhanath,

1969 Cr. I. J. 1197 A. I. R. 1969 Pat. 317, 320 (rights of cultivation and enjoyment); Abdul Shakur v. Abu Sayeed, A. I. R. 1925 Pat. 593.

9. Hetram v. Bhader Ram, 1973 W. L. N. 981 (Raj.).

10. Hazrat Lal v. Nigat Parashad, A. I. R. 1976 Raj. 91.

11. Sechantra Choor Deo v. Bibhuti Bhushan Deva, 1945 Pat. 211 I. I. R. 23 Pat. 763; 220 I.C. 260, Gopi Nath v. Nand Kishore, 1949 Ajmer 2.

12. S. T. Chendikamba v. K. I. Vishwanathamayya, A. I. R. 1959 Mad. 446.

vant in a partition suit filed by the wife after her husband's death, as the husband was dead, the assertion was also relevant under Section 32(7) *post*.¹³

What must be shown is that it was the practice in old times for the lower Courts in Bengal to set out the pleadings in their judgments and that the practice was recognized by circulars issued by the Secretary of State. Under these judgments were held admissible under this section as instances in which the right in question was claimed and disputed and as shown.¹⁴

Generally, a title to property, corporeal or incorporeal, may be proved under this section or (if the section be held to be applicable to incorporeal rights only) which it is submitted is not the case, under this and the preceding sections by evidence of acts of ownership and enjoyment, such as the receipt of rents and profits, the discharge of the burdens or repairs of the property, the payment of taxes and rates and the exercise of rights in rebuttal, proof is requisite that these acts were disputed, or done in the absence of persons interested in disputing them.¹⁵

As to *Wajib-ul-arad*, see note to Section 35.

11. **Admissibility of judgments and decrees as transactions or instances.** Judgments and judgments, or adjudications upon questions in issue and proof of the particular points they decide are only admissible either as (a) *transcripts* or (b) as being "in rem" or (c) as relating to matters of public nature.¹⁶ In (a) they are conclusive between the same parties; in (b) they are conclusive by law to be conclusive proof against all persons of certain facts, though not conclusive, they are relevant as adjudications against persons not parties to them, the reason being that, in matters of public nature, the new party to the second proceeding, as one of the parties has been virtually a party to the former proceeding.¹⁷ But judgments, orders and decrees other than those admissible by Sections 10, 41 and 42 may be relevant under Section 43, if their existence is a fact in issue or is relevant under some other provisions of the Act.¹⁸ In the sections relating to judgments, the judgment is admitted as the opinion of the Court on the questions which came before it for adjudication. Ordinarily, judgments are not admissible as between persons who were not parties and do not claim under the parties to the previous litigation. But there are exceptions to this general rule.²² The cases contemplated by Section 43 are those where a judgment is used not as *res judicata* or as evidence more or less binding upon an opponent by reason of the authority it contains, because judgments of that kind are already

13. *Satyadeo Prasad v. Smt. Chanderjoti Debi*, 1965 B. L. J. R. 800; A. I. R. 1966 Pat. 110; *Srichandra Choor Deo, v. Bibhu Bhushan*, A. I. R. 1945 Pat. 211 (the allegation in the plaint that the property was governed by the Banaras School of Hindu Law is admissible under Sec. 138, Evidence Act. *Rangaswami Pillai v. Venkatasubramanian*, A. I. R. 1947 Mad. 201. Statement of Hindu widow in answer to a suit for partition against her husband and the members of her husband's family by one of them as to the nature of the property, is relevant under Sec. 13 of the Evidence Act as a particular piece of the property claimed to be possible property, is relevant under Sec. 13 of

Evidence Act and is admissible.

14. *Bhaya v. Pande*, 3 C. L. J. 521.

15. *Will's Ev.*, 3rd Ed., 62; *Phipson, Ev.*, 11th Ed., 198; *Jones v. Williams*, (1837) 2 M. & W. 326. As to matters constituting an act of ownership, see 4 C. W. N. 101.

16. Under S. 40, *post*.

17. Under S. 41, *post*.

18. Under S. 42, *post*.

19. *See Kamaya v. Radha*, (1867) 7 W. R. 328.

20. *Per Pontifex, J.* in *Gujja Lal v. Latchu Lal*, (1880) 6 C. 171 (F.B.).

21. S. 43, *post*.

22. *Hira v. Hira*, 1882 11 C. 1 R. 528, 530, *per Field, J.*

then it approved of them. These findings appear to have been referred to, on the contrary, for answering the appellant's contention that the lower Courts had used certain of the statements of the parties as recorded in the judgments as evidence against him. The Privy Council by reference to the findings show that they did not. But the ground on which the Privy Council itself admitted the evidence was that inasmuch as by the earlier judgment a decree for rent was given at a certain rate, at which rate the land had all along been held, it was competent to use the judgment as evidence showing the rent paid for the possession at and prior to that date, then nearly 80 years ago. It was not the correctness of the decision, but the fact that there had been a decision that was established by the production of the judgment, and the existence of the judgment was admissible as a fact in issue under Section 43, post.⁴ The result of this decision appears to be that the judgments were admitted under Section 43 as facts in issue and also (if the Privy Council be taken to have affirmed the decision of the High Court on this point) as evidence of assertions of right under this section. But neither Court treated the judgments as adjudications having the effect of a kind of qualified and inconclusive *res judicata*, which appears to have been the view entertained by Ghose, J., in the last mentioned suit. In *Butto Kamear v. Kesho Persad Mistr*,⁵ their Lordships of the Privy Council, speaking of a judgment in a former suit against one of the defendants, Bacha Tewari, observed: "This decision is not conclusive against Bacha Tewari, as the suit was not between the same parties as the present suit, but their Lordships agree with the Subordinate Judge that it was admissible as evidence against him." In this case, a decree obtained against the defendant that a will was revoked was held not to be *res judicata* in a suit against him brought by other plaintiffs but admissible as evidence against him. There is no mention of this section in the judgment; and the grounds upon which the previous decisions were admitted are not stated in the report. An opinion, however, has been expressed that as the matters in controversy in the suit in which the decree was passed related to public charitable purposes, the prior decision was brought within the terms of Section 42 which treats of judgments relating to matters of a public nature.⁶ Whether the judgment might or might not have been admissible on this ground, it appears from the records of the Allahabad High Court⁷ that this was not the ground on which the Subordinate Judge (whose decision was approved by the Privy Council) admitted it in evidence. The plaintiff claimed the property in suit as the heir of Ramkishan. If the property were subject to a trust and Ramkishan had been in possession as trustee, then the plaintiff had no title to it; otherwise if there were no trust and both Ramkishan and Bacha Tewari had benefited possession. The first issue, therefore, was whether there was a trust, and this involved the question whether Bawaan had revoked the will creating the trust. The second and fourth issues were as to the time since when possession had been held and what was the nature of the possession of Ramkishan, the plaintiff's alleged predecessor, and of the defendant Bacha Tewari. These were all facts in issue. As shown that they did not hold as trustees, evidence was given of an agreement of the family.

4. Per Geidt, J., in *Abinash Chandra v. Parash Nath*, (1904) 9 C.W.N. 402. The judgment, however, was not treated as proof that the amount decreed was the correct amount payable, but that that particular amount was by the decree made payable ib., at p. 410.

5. (1897) 24 I. A. 10; 19 All. 277; 1 C. W. N. 265 (P.C.).

6. *Abinash v. Parash*, (1904) 9 C. W. N. 402 at p. 410, per Geidt J. On this point see also by Ghose J. in the same case, see p. 382.

7. See Appendix where the judgment of the Subordinate Judge, Benares, has been reproduced in full.

1850, under which Ramkishen and Bacha Tewari held the property in moieties as proprietors, an agreement which was subversive of the provisions of the will had it been existent and operative; secondly, the fact that they got possession under the agreement; thirdly, a mortgage by the defendant as proprietor on 4th September, 1877, and lastly, a suit in 1880 (which is that referred to by the Privy Council), by which certain outsiders sought to have it declared that the estate was in possession of Bacha Tewari (who was as well as his mortgagee, a party to that suit), as a trustee under the will. It was, however, held in that suit that the will was revoked and therefore the property was not subject to a trust. At the date of that suit Bacha Tewari was in possession of his moiety. He continued to hold after the suit and held under a title which negatived the trust, namely the title declared by the judgment in question. This decision (the Subordinate Judge said and, as the Privy Council held, correctly) in the opinion of the Court is admissible as evidence against Bacha Tewari, although the plaintiff was not a party to it—as showing the character of the possession of Ramkishen and Bacha Tewari over the estate in respect of which the agreement of 1850 was made. He could not after this decree, have held as trustee when the trust was negatived by it. The judgment was, therefore, relevant and admitted, not under this section, but its existence was either a fact in issue under the forty-third and fifth sections or relevant as explaining a fact in issue under the forty-third and ninth sections.

Neither of these decisions appear to affect the Full Bench decision in *Gujja Lall v. Fateh Lall*.⁸

In the later case of *Dinomoni Chowdhram v. Brojomohini Chowdhram*,⁹ in which however this section was expressly referred to, the facts were as follows:

The suit was instituted by B.M.C. as the widow and executrix of H.N.C. against J.C. to recover possession of certain land on the allegation that it was partly a reformation on the original site of, and partly an accretion to, certain of her villages. In 1880, J.C. commenced to raise disputes as to the possession of H.N.C., whereupon proceedings took place in the Criminal Court under Section 318 of the Criminal Procedure Code, XXV of 1861, in the course of which H.N.C. was found to be in possession of the land, and an order was passed by the Magistrate confirming his possession. Some time after a third party, a neighbouring proprietor, commenced a dispute which also terminated by an order of the Criminal Court under Section 530 of the Criminal Procedure Code (Act X of 1872), dated 19th June, 1876, in favour of H.N.C. In 1888, further possessory proceedings took place in the Criminal Court under Section 145 of the Criminal Procedure Code of 1882, as the result of which the defendant J.C. was found to be in possession, and by an order of 31st December, 1888, she was confirmed in possession of the land in dispute. The Subordinate Judge dismissed the suit and rejected the Criminal proceedings of 1876 as being inadmissible in evidence against the defendant, she not having been a party to them. The High Court in appeal admitted these proceedings as being relevant for the purpose of showing the identity of the land claimed in the suit with that which was claimed in 1876 and as showing that it was in existence at that time. On appeal to the Privy Council, their Lordships observed: 'The orders (made in 1867, 1876 and 1888), are merely police orders made to prevent breaches of the peace. They decide no question of title; but under Section 145 of the Criminal Procedure Code of 1882 (relating

8. (1880) 6 C. 171 (F.B.).

9. (1901) 29 C. 187.

was relevant. Were it not that the judgment of the Privy Council refers to this section, it would create no difficulty at all. With all respect, however, it may be questioned how the order of the Magistrate could be a 'transaction' or 'instance' of the character mentioned in this section except on the ground that it recognized the right to possession of a particular party or was 'inconsistent' with the possession of the opposite party as to which see post. What the reports were which were admitted is not stated in the decision, but this matter does not immediately touch that under discussion. It does not appear that the section was originally intended to refer to judgments, but to the acts and statements of persons which may be submitted for the consideration and determination of a Court and not to the judgments, decrees and orders of the Court itself. The section itself, which is intelligible enough, seems to have been intended to refer to matters such as those given in illustrations of it. Considerable difficulties, however, arise from the case law treating of the applicability of the section to judgments, decrees and orders. It must be remembered that some of the judgments, in the case referred to, were in fact admissible under other sections of the Act. There is no question that for some purposes and apart from this section judgments may be relevant. The point is whether this section can be quoted as a ground for their admission.

In the first place, the evidence rendered must be that of a 'transaction', or 'instance'. Then assuming it is a 'transaction' it must be one of the characters mentioned in clause (a) or if it is an 'instance' it must be an instance of the facts mentioned in clause (b). It seems, with all respect to contrary views, to be an incorrect use of language to describe a judgment as a 'transaction'. But if it can be so described or as an 'instance' it must come also within the other terms of the clauses in which these words appear. It is obvious that a Court does not claim or assert, or deny, or exercise a right or custom. Nor does it dispute, or depart from the exercise of a right or custom. The parties do that. What it does is to determine the cause presented to it for trial, and for that purpose it considers the claims, assertions, denials, exercise, and so forth of the litigants before it, or of those persons whose acts and statements the law treats as their own. Then even assuming a judgment is a transaction it cannot be said to create or modify a right or custom. The right or custom either exists or it does not before the cause comes to trial. The Court merely finds that before and at the date the suit was instituted the right or custom did or did not exist. If the parties litigating had no right the Court cannot give it to them. And if a right or custom exists the Court has no jurisdiction to modify either. The only words in the section which may, with any show of reason, be made applicable to judgments is the word 'recognized' in clauses (a) and (b), and the phrase 'which was inconsistent with its existence' in clause (a). But it seems that neither was intended to be so applied. The recognition referred to in the section appears to be like the other acts mentioned, an act of a person and not of a tribunal. It is an act of admission. A Court, however, does not admit a right, but adjudicates upon it. Lastly, apart from the question whether a judgment is a 'transaction' the 'inconsistency' mentioned would appear to refer to the same class of facts as the others stated in the section. In one sense, if a right is claimed and a judgment is produced which pronounces against it, that judgment may be said to be inconsistent with the existence of that right. But the inconsistency referred to in the section appears to be that which is inferent in the nature of two opposed facts, such as that referred to in the first part of illustration (a), or to the elements

right, or admission made by ancestors, or how the property was dealt with previously.²⁵ Other instances are afforded by the Privy Council decision cited.

Whatever conflict there had been must be deemed to have been set at rest, and the law on the subject at present must be taken to be as laid down by the subsequent decisions of the Privy Council, which have been followed by the Indian High Courts, and Supreme Court of India.

Privy Council decisions. Thus, in *Kumar Gopika Raman v. Atal Singh*,¹ it was held, that the Evidence Act does not make findings of fact arrived at on the evidence before the Court in one case evidence of that fact in another case. Again, in *Gurbinda Nandan v. Sham Lal*,² where a previous judgment in a partition suit not inter partes was produced in evidence in support of the rights claimed by the defendants, Sir John Lowndes observed as follows:

"The judgment in question is only admissible under the provisions of Sections 13 and 43, Evidence Act, as establishing a particular transaction in which the partition of the family estate was asserted and recognized, viz., the partition resulting from the 1795 suit. The reasons upon which the judgment is founded are no part of the transaction and cannot be so regarded. Nor can any finding of fact come to, other than the transaction itself, be relevant in the present case. The judgment therefore is no evidence that Makar Sib Singh got the Achara villages by partition; it is, at the most, evidence that he might have done so, and this is plainly not sufficient.

In *Collector of Gorakhpur v. Ram Sundar*,³ in order to prove a pedigree set up by one of the parties, certified copies of a decree in a previous suit and two pedigrees found with it were produced in evidence. The decree recited that pedigrees had been filed by both the parties, and set out, according to both pedigrees, the descent of a person from a common ancestor. Holding that the statements in the decree that the pedigrees were filed was evidence either under Section 6 as an entry in a public record, or under Section 13 as evidence of the course of proceedings in a suit, and that the particular pedigree relied on was admissible under this section as being a relevant admission, their Lordships observed⁴:

"The question whether statements in judgments and decrees are admissible under Section 13 read with Section 43 is elaborately discussed by Sir John Woodroffe in his new edition of the Evidence Act (1931), p. 181 et seq. He would hold that they are not admissible at all under Section 13, but this view is not in accordance with the decisions of the Board in *Ram Ranjan Chakrabarti v. Ram Narain Singh*,⁵ and *Dewan Ram v. Brojo Mohan*.⁶ At the bottom of page 191 however, the learned author treats judgments as evidence of admissions by ancestors."

In the subsequent case of *Keshu Prasad Singh v. M. T. Bhawanji Keshu*,⁷ Sir George Rankin delivering the judgment of the Board observed:

25. *Udeshwar v. Anant*, (1900) 24 B. L. R. 591, 598, 599.

1. 1929 P.C. 93; 56 I. A. 119; I. L. R. 56 Cal. 1003; 114 I.C. 561.

2. 1931 P.C. 89; 78 I. A. 125; I. L. R. 58 Cal. 1187; 131 I.C. 753; 33 Bom. L. R. 885.

3. 1934 P.C. 157; 6 I.A. 286; I. L. R. 56 All. 468; 150 I.C. 545.

4. *Collector of Gorakhpur v. Ram*

Sunder, A. I. R. 1931 F. C. 157 at p. 165.

5. 1884) 22 Cal. 538; 22 I. A. 60 (P.C.).

6. 1901) 29 Cal. 187; 29 I. A. 24 (P.C.).

7. 1937 P.C. 69; I. L. R. 16 Pat. 258; 167 I.C. 329.

8. At pp. 74, 75 of A. I. R. 1937 P.C. 69.

The actual source of the decree of 1916 is the next question. Whether based upon a legal principle or merely supported by reasons of convenience, the fact that so far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule in English Law. Exceptions there are, but the general rule is not in doubt. A well-known statement of it was given by Sir William de Grey (afterwards Lord Walsingham) in (1776) 2 Howell's State Trials, p. 129,⁹ and a striking instance of its application by the Board may be seen in (1888) 2 P.C. 121, 133.¹⁰ That the same rule applies in India, though it is not expressly formulated in these terms, may be seen from a reference to Section 13, Evidence Act, 1872, and the illustrations given thereunder. On the other hand, apart from all discussions whether a judgment is or is not admissible within the meaning of Section 13, Evidence Act, cf. O. Car. 1, 2, and 201 A 24, the judgment of 1916, together with the plaint which preceded it and the steps in execution which followed, are evidence of an assertion by the Raj of the right which it claims to have acquired in 1903 and are thus admissible evidence of the right. There are undoubtedly cases in which a judgment is evidence of weight even against third-parties.... But the fact that a person not in possession of the land now in suit claimed in 1911 to have been entitled to it since 1903 is not by itself serious evidence of his right. There is and was no lack of assertion on the other side. It adds little or nothing that the Raj had been in token possession (dakaradham) or even that he set up boundary pillars as well to the north of the land now in suit. The respondents could not prevent his doing these things and their rights are not in any way affected by them. Of course if it could be said that had the respondents the right they claim, they would have at once challenged these acts by bringing a suit for injunction, of that fact some weight might be attached to the fact that they did not. But in the present case such an argument would be quite hollow. It is absurd to think that any Court would grant relief upon the sole basis of the plaintiff's assertion made against other parties and because the parties now are loaded wanted to be sued. That on this basis alone possession should be awarded would be indefensible especially in *Ramkrishna's* case seeing that he was in possession of the land for rent in 1919 and 1920. Their Lordships find themselves in agreement with the observation of Ross, J.:

"The judgment is not *inter parte*, nor is it a judgment *in rem*, nor does it relate to a matter of a public nature. The existence of the judgment is not a fact in issue, and if the existence of the judgment is relevant under some of the provisions of the Evidence Act it is difficult to see what inference can be drawn from its use under the sections."

Serious consequences might ensue as regards titles to land in India if it were recognised that a judgment against a third party altered the burden of proof as between rival claimants, and much 'indirect living' might be expected to follow therefrom."

In *M. S. Srinivas v. N. S. Srinivas*,¹¹ where the question was as to the existence of a custom it was observed:¹²

9. *Ex parte Duchess* (Case, (1776) 2 State Trials, 355 n.

10. *Natal Land and Colonisation Co. v. Goss*, (1888) 2 P.C. 121, 133. 5 A.C. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

11. *Full v. Full* (1880) 6

Col. 171. 6 C. L. R. 439 (F.B.).
12. *Dinmoni Chaudharani v. Brojo Mohoni*, 1905 29 Cal. 187. 29 I. A. 21. 8 S.F. 224 (P.C.).
13. 1941 P.C. 21. 68 I. A. 1. I. L. R. 1941 Lah. 134. 193 I.C. 436.
14. At p. 82 of A. J. P. 1941 P.C.

ing a particular transaction, that is, the decision arrived at and the reasons thereon, when the judgment was founded, are no part of the transaction and cannot be considered in evidence, nor can any finding of fact thereon come to, since then the transaction itself, be relevant evidence.

Calcutta. In some cases the Calcutta High Court treated previous judgments not *inter partes* as evidence of the facts found thereon.²¹ Thus in *Gopi Sundari v. Keshu Lal Gounda*,²² it was held, that the previous litigation was a transaction or instance in which the right of the plaintiff to have the disputed land as their *patti* was successfully asserted, and that the transaction or instance was relevant or admissible in evidence. But the general tendency has been to admit previous judgments, not *inter partes* in evidence under certain circumstances and for limited purposes under the provisions of Section 48 read with Section 11 and this section, and to treat such judgments only as a piece of evidence to be considered along with other evidence, and not any such evidence exists.²³ In *Ratna Ray v. Rama Jee Prasad*,²⁴ it was held that previous judgments were not evidence in proof of title. In *Keshu Lal Gounda v. Jhannu Kanta*,²⁵ a previous judgment not *inter partes* was held to be inadmissible as evidence of a transaction in which permanent tenancy rights in land were previously claimed. In *Gadadhar Choudhary v. Sagar Chandra Chakravarti*,²⁶ it was held that "Though the recitals and findings in a judgment not *inter partes* are not admissible in evidence, such a judgment and decree are in our opinion admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what work the suit had been decreed."

The law on the subject, as finally crystallised, is, in the undernoted case,²⁷ been stated as follows:

"A judgment not *inter partes* may be admissible in evidence under Section 48 in cases establishing a particular transaction, namely, by which or an

Singh v. Rajgouda, 1939 Bom. 313; 184 I.C. 337; 41 B. L. R. 101; *Shankar v. Sarat Chandra*, 1941 Cal. 193; 195 I. C. 412; 72 C. L. J. 320; 44 C. W. N. 935; *Asaddar Ali Khan v. Province of Assam*, 1944 Cal. 57; I. L. R. 1944 Cal. 211; I. C. 460; *Mahesh v. Subbaray v. Badri Lal*, 1940 Lah. 309; 190 I. C. 689; *Prasad v. K. v. J. Gounda*, 1937 Lah. 437; 174 I. C. 722; *Maroti Lal v. K. v. J. Gounda*, 1939 Nag. 72; 184 I. C. 118; 1938 N. I. J. 465; *Shankar v. K. v. J. Gounda*, 1939 Nag. 72; 184 I. C. 118; 1938 N. I. J. 465; *Shankar v. K. v. J. Gounda*, 1939 Nag. 72; 184 I. C. 118; 1938 N. I. J. 465; *Miral*, 1938 Sind 132; I.L.R. (1939) 14 B. L. R. 101; I. C. 337; *Shanday v. Gurmukh Singh*, 1945 Sind 57; I. L. R. 1945 Kar. 40; *Purnima v. Nand Lal*, 1932 Pat. 105; I.L.R. 11 Pat. 50; 136 I. C. 577; I.L.R. (1971) 1 Delhi 64; *A. B. Sharma v. H. T. Singh*, A.I.R. 1973 Cal. 100; *Shankar v. Vrajilal v. M. Chandraprabha*, A.I.R. 1971

Gujarat 188; 164 J. & K. I. R. 462.

21. See *Ambar Chandra v. Kanya Kanta*, 1923 Cal. 270; 67 I. C. 787; *Sarada Prasanna v. Umakanta*, 1923 Cal. 485; I.L.R. 50 C. 370; 17 I.C. 450; *Purna Chandra v. Ramesh Chandra*, 1923 Cal. 108; 87 I. C. 70; *K. v. J. Gounda v. Gounda*, 1938 Cal. 335; 112 I. C. 785; *Kiran Chandra*, 1938 Cal. 472.

22. 1935 Cal. 341; 82 I. C. 100; 18 C. W. N. 942.

23. *Hem Chandra v. Purna Chandra*, 1934 Cal. 388; 108 I. C. 114; 50 C. L. J. 30; see also *K. v. J. Gounda v. H. Chandra*, 1938 Cal. 335; 112 I. C. 785.

24. 1933 Cal. 21; 50 I. C. 385; 36 C. W. N. 866.

25. 1937 Cal. 373; 65 C. L. J. 333; 1. 1941 Cal. 193 at 201; 195 I.C. 412; 72 C. L. J. 320; 44 C. W. N. 935.

26. *Asaddar Ali Khan v. Province of Assam*, 1944 Cal. 57; I. L. R. 1944 Cal. 211; I. C. 460.

is a matter of common usage that has been repeatedly brought to the notice of the Court and has been recognized in a series of cases in different parts of the country, and is of the force of law, and it is no longer necessary to prove it in evidence by oral evidence.¹⁸ In the under-noted case it has been held that a judgment of a District Court in respect of a similar case of a settlement Court relating to the same persons as concerning title to proprietary right, although not *inter partes*, is admissible under this section.¹⁹

Section 13.—In a suit in which the plaintiff sought to prove that the prevailing rate of rent was a certain amount, the Patna High Court held that the question at issue was one of fact and not of right or custom, the plaintiff in a previous suit not being a party, was not admissible under this section.²⁰ In another case, the plaintiff sought to prove a case in which it was held that the property then in dispute was not his property, was held to be not admissible in a subsequent suit to prove that the property was endow property, because even though a previous judgment may be admissible under this section, a finding in the judgment is not binding.²¹ A judgment in a previous criminal case, in which the plaintiff proved his possession to the disputed land and possession was found to be with him was held to be admissible under this section to prove the plaintiff's possession, but not prove his possession at the date of the judgment.²² In a case where the plaintiff was not a party to the original proceedings, the judgment of the court in the plaintiff, the written statement, and the plaintiff's oral evidence taken together were held to be admissible evidence of the fact that the plaintiff, namely, that his family was governed by the Hindu law, and not by the Muslim Law. A judgment in a previous litigation, where all the parties were a party, pleaded in a subsequent suit were not impleaded, the judgment was not admissible on the validity of a transfer or dedication of property, but it would be admissible under this Section to show that when or an attempt was made by the owner of the property to claim the property as his own property, the Court refused to accept that contention.²⁴

Section 14.—According to the Nagpur High Court, though the judgment in a previous case is inadmissible to prove the truth of the fact, which it states, yet where the right of party has already been concluded by a previous judgment that fact may be proved by production of the judgment since the existence of the judgment is a fact.²⁵ But the judgments in the previous suit are not admissible under this section if the right in dispute in the subsequent suit was not then in dispute.¹

Section 15.—In a Lahore case² a suit instituted by the plaintiff's ancestors against some persons in respect of a plot of land was decreed on the ground

17. *Munshi v. Rameshwar Prasad*, 1939 All. 626; 1939 A. L. J. 708.

18. *Bhagat v. Bhagat*, 1936 All. 641; 164 I.C. 1047; 1936 A. L. J. 708. See *Singh and Bhat v. Singh*, 1942 Bom. 185; 1. L. R. 1942 B. 467; 201 I. G. 759.

19. *Munshi v. Rameshwar Prasad*, 1939 All. L. J. 708; A. L. R. 1939 A. 626.

20. *Raghupati Tewari v. Narhadeshwar*, 1939 All. 100; 1939 A. L. J. 708.

21. *Munshi v. Rameshwar Prasad*, 1939 All. L. J. 708.

22. *Munshi v. Rameshwar Prasad*, 1939 All. L. J. 708; 22 P. L. T. 239; 7 B. R. 569.

23. *Bhagat v. Bhagat*, 1936 All. 641; 164 I.C. 1047; 1936 A. L. J. 708.

24. *Munshi v. Rameshwar Prasad*, 1939 All. L. J. 708; 22 P. L. T. 239; 7 B. R. 569.

25. *Munshi v. Rameshwar Prasad*, 1939 All. L. J. 708; 22 P. L. T. 239; 7 B. R. 569.

26. *Munshi v. Rameshwar Prasad*, 1939 All. L. J. 708; 22 P. L. T. 239; 7 B. R. 569.

27. *Munshi v. Rameshwar Prasad*, 1939 All. L. J. 708; 22 P. L. T. 239; 7 B. R. 569.

28. *Munshi v. Rameshwar Prasad*, 1939 All. L. J. 708; 22 P. L. T. 239; 7 B. R. 569.

Cases seem to come in the following positions:

- (1) A finding of fact derived from the evidence before the court in the case evidence of that fact in another case.
- (2) A finding of fact is only admissible under this Section and Section 13, if it is a finding of fact in a transaction in which a right or custom was asserted etc., and recognised.
- (3) A finding of fact is not admissible in evidence against a stranger to the suit.
- (4) A finding of fact may contain evidence of specific instances in which a right or custom in question was created, etc., asserted or denied and was of no value. In such a case the finding is valuable since it contains a number of specific instances relating to the right or custom.
- (5) A previous statement can be received in evidence under this Section as a finding of fact when a person asserted his right and got a reply on that footing.
- (6) Any finding of fact in a previous case not entered into may be admitted under this Section as evidence of a previous transaction, but only if it is a finding of fact in the transaction in which the right or custom was asserted, and no part of the transaction and cannot be a finding of fact in evidence, nor can any finding of fact there contained as to the transaction itself be relevant evidence.
- (7) Ordinarily, and in the absence of special circumstances, a finding of fact in a previous case cannot be a finding of fact in evidence in view thereof.
- (8) A finding of fact which has been previously found to be the value of a finding of fact is not recognised as a finding of fact in evidence in a subsequent case, but it is not necessary to prove it in each case by evidence.
- (9) The object of this Section is to enable a finding of fact to be received in evidence in a subsequent case, but only if it is a finding of fact in a transaction in which a right or custom was asserted etc., and recognised.

11-A. Judgment of criminal court. The judgment of a criminal court is not admissible in evidence in a civil suit as proof of the facts found by the criminal court, but it is admissible in a civil court only to show that there was a trial resulting in a conviction. The judgment of conviction cannot be a finding of fact in evidence in a civil court.

12. Ex parte judgments. An ex parte judgment of a civil court, whether it is a finding of fact or a judgment of law, is not admissible in evidence in a subsequent case, but it is not become less valuable as evidence of a previous transaction.

8. *Bai Nanda v. Shivabhai*, 7 Guj. L. R. 662, 668, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 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13. Subsequent judgments. Judgments pronounced subsequent to the date of the trial are not admissible as evidence of custom or usage admissible under the section.¹⁰

14. Judgments settling issue of proof. Plaintiffs' pleadings are not for proof of the facts of proof between rival claimants to property or that a particular right exists or not. It must however be remembered that the question as to the existence of a custom or usage is not dependent on the nature of the finding and of the issues involved in the two different suits.¹¹

15. Judgments relating to matters of public nature. Judgments, orders and decrees relating to matters of a public nature are void in so far as they relate to matters of public rights and customs, but are not concerned with that which they settle.¹²

16. Proof of custom and right. Ordinarily custom is a mixed question of fact and law, but where facts have to be proved and then from those facts an inference of the existence of a valid custom is drawn, the inference is a legal inference.

Where a local custom or usage is pleaded by one party and denied by the other the onus on the party pleading to show its existence and not on the other party to show its non-existence. There is, however, no presumption as to the existence or non-existence of a custom or usage.¹³ The question whether a usage has been established by the custom or law of the locality or community is a question of law and it can be considered in second appeal.¹⁴

A custom must be proved by evidence and must be proved by evidence as pleaded.¹⁵

The existence of a custom can be proved under this section by evidence of the community or of the locality.¹⁶ A custom is proved either by actual tradition or by general evidence of the members of the community who

10. *Jhingur Raut v. Emperor*, 1911 188 I.C. 115; *Milkhi Ram*, 1939 Lah. 152; 181 I.C. 703.

11. *Kesho Prasad Singh v. Mst. Bhagjogua Kuer*, 1937 P.C. 69; I.L.R. 16 Pat. 258; 167 I.C. 329.

12. *Gopal Rao v. Sita Ram*, 1927 Nag. 19; 97 I.C. 694; see also *Midnapur Zamindary Co., Ltd. v. Narash Narayan Ray*, 1922 P.C. 241; 48 I.A. 49; I.L.R. 48 Cal. 460; 64 I.C. 251.

13. *Mahto*, 1940 Pat. 341; I.L.R. 19 Pat. 172; 185 I.C. 685; 21 P.L.T. 577.

14. *V. S. 42 post*, and note. *ma*, 1954 Pat. 408; I.L.R. 1954 Pat. 423 (F.B.); *Mahommed Ibrahim v. Shaik Ibrahim* 1922 P.C. 59; 49 I.A. 119; I.L.R. 45 Mad. 308; 67

I.C. 115.

L. R., (1968) 1 Mad. 548; (1968) 2 M.L.J. 94; 80 M.L.W. 388; A.I.R. 1968 Mad. 105.

17. *Abdul Hussein v. Bibi Sona*, 1917 P.C. 181; 45 I.A. 10; I.L.R. 45 Cal. 450; 43 I.C. 306; *Kishan Singh v. Santi*, 1938 Lah. 299 at 301; 175 I.C. 87 (F.B.); *The State v. Kangan Suba Gujjar*, 1953 Punj. 201 at p. 203; I.L.R. (1953) Punj. 635.

10 B. 528 at 543; observations on proof by instances and *Anant v. Durga*, (1910) 37 I.A. 191; 32 A. 363. But custom may be proved

Ahmad Khan v. Channi Bibi, A.I.R. 1925 P.C. 267; 50 M.L.J. 637; 91 I.C. 455; (1925) 52 I.A. 379.

would be naturally cognisant of its exercise¹⁹. When a custom has been repeatedly brought to the notice of the courts, the custom may be held to have been introduced into the law without necessity for proving it in each case.²⁰ A statement contained in any deed, will or other document which relates to any such "transaction" as is mentioned in clause (a) is relevant, if the persons by whom such statement is made is dead or cannot be found, or if he is incapable of giving evidence, or his attendance cannot be procured without an unreasonable amount of delay or expense.²¹ The statement, written or verbal, giving the opinion of a person, not called as a witness for similar reasons, as to the existence of any public right or custom, or matter of public or general interest, as to the existence of which he would have likely been aware, is relevant, provided it were made before any controversy as to such right, custom or matter had arisen.²² But such evidence, after the controversy has arisen is inadmissible.²³ When the Court has to form an opinion as to the existence of any public or private right (this includes customs or rights common to any considerable class of persons), the opinion as to the existence of any general custom or right of persons who would be likely to know of its existence, if it existed is relevant,²⁴ and the grounds upon which such opinions are based are also relevant.²⁵ Judgments, orders and decrees are relevant if they relate to matters, transactions, acts and customs, of a public nature, but they are not conclusive proof of that which they state.¹ "The most satisfactory evidence," it has been said "of an enforcement of a custom is a final decree based on the custom."²

One of the modes of proof of a customary easement of privacy is to establish the particular instances referred to in Section 12³ in which it was claimed, recognised or exercised.⁴

A decision in a custom case is not a judgment in *res*. It is only relevant under this section in an instance of the custom being judicially recognized.⁴ When a custom has been repeatedly brought to the notice of the Courts and judicially recognised it becomes a part of the law of the locality where it pre-

19. *Pratibha v. P. R. v. K. S. Ramani*, 1 L. R. (1968) 1 Mad. 548; (1968) 2 M. L. J. 94; 80 M. L. W. 388; A. I. R. 1968 Mad. 105, 107.

20. *Preinraj v. Chand Kanwar*, A. I. R. 1948 P. C. 60, at p. 61; *Rama Rao v. Rajah of Pittapur*, A. I. R. 1918 P. C. 81, at p. 83; *Janardhanan Pillai v. Kaliamma*, *supra*, See also *Sivananjan v. Muttu Ramalinga*, (1864) 3 Mad. H. C. P. 10; *K. Lakshmi v. Sivanantha*, 14 Moo. Ind. App. 570, 585 (P.C.); S. N. Koya v. Administrator of Union territory of Laccadives, Minicoy and Amindivi Islands, Kozhikode, 1967 Ker. L. J. 482; 1967 Ker. L. T. 395; A. I. R. 1967 Ker. 259, 261 (customary right of possession of properties of a carwad even after actual division).

21. S. 32, cl. (7) post and *Hironath v. Nityanund*, 10 B. L. R. 263, 6. 32, cl. (4) post.

22. *Ekradeshwar v. Janeshwari*, 1914 P. C. 76; 41 I. A. 275; 42 Cal. 582; 25 I. C. 417; 12 A. L. J. 1217; 17 Bom. L. R. 18.

23. S. 48, post.

24. S. 51, post.

1. S. 42 post, 2nd notes.

2. *Gurdayal v. Jhandu*, (1888) 10 A. L. J. 10; *East India v. Zangar Ali Shah*, 1950 Lah. 6; Pak. Cas. 1950 Lah. 91; Pak. L. R. 1949 Lah. 679 v. s. 42, post.

3. *Syed Habib Hussain v. Kamal Chand*, 1968 Raj. L. W. 580; A. I. R. 1969 Raj. 31, 35.

4. *Mst. Janat Bibi v. Ghulam Hussain*, 1974 Lah. 802; 6 Lah. 307; 36 P. L. R. 256.

are that the same should be ancient, certain and reasonable and that it should also not be opposed to decency or morality. So custom which is opposed to public policy can be recognized by any Court of law. Nor can immoral usages, however much practised, be countenanced. As to the test of immorality, it must be determined by the sense of the community as a whole and not by the sense of a section of the people.²⁴

An alleged custom among the Reddiars of South India, according to which a man can marry his own daughter's daughter, cannot be recognized by a Court of law. The chief attributes of a custom, namely, that the same should not be opposed to public policy, abhorrent to decency and morality or inconsistent with the practices of good men are not present. The civilised and cultured society in which we live and the progressive country in which we are, should not approve of an incest which would not find favour even under primitive or tribal societies.²⁵ It is not correct to say that amongst non-regenerate Telugu castes in Telangana performance of customary rites and not of the rites sanctioned by the statutes is the ordinary law, hence a custom derogatory to the ordinary law need not be strictly proved.¹

19. Family custom. In order to establish a family custom at variance with the ordinary law of inheritance it is necessary that it should be established by clear and positive proof (*vide ante*).² The proof of absence of a uniform customary law among a tribe ('kanmikara' in this case) does not entitle the Court to conclude that the family is governed by any particular personal law ('matragnathayam' law in this case) which might have been pleaded by one party but not proved.³ And the more unusual the custom the stricter must be the proof.⁴ To establish a kulachar or family custom of descent, one at least of two things must be shown either a clear distinct and positive tradition in the family that the kulachar exists; or a long series of instances of anomalous inheritance from which the kulachar may be inferred.⁵ A long series of instances on which a custom has been recognized is not the only mode of proving a custom—it may also be proved by showing a clear distinct and positive tradition.⁶ It is said in the case of *Satnam Singh v. Khedra Singh*⁷ that "to legalise any deviation from the strict letter of the law it is necessary that the usage should have been prevalent during a long succession of ancestors, when

24. *Chelladurai v. Chinnathambiar*, A. I. R., 1961 Mad. 42.

25. *Bidhanilal v. Bidhanilal*, A. I. R. 1957, Mad. 97; 1 I. L. R. (1957) M. 164; see also *Ramakrishna v. Gangadhar*, A. I. R. 1958 Orissa 26.

1. *Makayya v. Arate Buchanna*, (1972) 2 Andh. L. T. 253; A. I. R. 1973 A. P. 208 (reversing A. I. R. 1971 A. P. 270).

2. *Nagendra v. Rudramath* (1863) W. R. 20 note. For Privy Council decision on family custom see *Nair Pal v. Jai Pal*, (1896) 19 A. I. R. 348; in which decision not inter partes were admitted as evidence of custom; *Chandrika v. Muna Kunwar*,

(1901) 24 A. 227; see also *Mailathi v. Subbarayya*, (1901) 24 M. 650. Migration by widow of a Hindu subject of French India to British India).

3. *Kunjarman v. Mathewan* 1971 Ker. L. J. 438; 1971 L. S. C. W. R. 752; 1971 S. C. D. 793; (1971) 2 S. C. C. 345; (1971) 3 Um. N. P. 494; (1971) 2 L. W. A. P. J. 46 (S.G.); 1971 (Supp.) S. C. R. 786; A. I. R. 1971 S. C. 398.

4. *Ganga v. Chedi*, (1911) 33 A. 605.

5. *Maharant v. Baboo Ram*, (1872) 9 B. L. R. 274, 294; 17 W. R. 316.

6. *Sarda Patil v. Shivam Narangir*, 1964 Pat. 586; 1964 (2) B. L. J. R. 381.

7. (1814) 2 Sel. Rep. 147.

it becomes known by the name of "kulachar." But a tradition in the family supplies the place of ancient examples of the application of the usage.⁸ It has been doubted whether evidence of the acts of a single family, repugnant or antagonistic to the general law, can establish a valid custom or usage. There is, however, nothing to prevent proof of such family usage.⁹ The Courts will, from modern uniform usages, presume an indefinitely ancient usage of the like kind in the absence of circumstances leading to a contrary inference, but no such presumption can be made where the practice is traced to a recent agreement.¹⁰ Where the plaintiff sued the defendants for possession of an estate on the assertion that she was the daughter of the last undisputed owner, and the defendants resisted the claim on the ground that she was excluded by a custom prevailing in the family and tribe to which the parties belonged, it was held that there was no objection to a party pleading that a custom exists both in a family and in the tribe to which the family belongs, but he must prove that it is binding on the family; and on appeal it was held by the Privy Council that evidence of a family custom excluding or postponing daughters from the inheritance of an impartible estate is admissible on an issue as to the custom of a succession in a partible estate governed by ordinary Hindu Law, since the mere fact of partibility does not make the evidence necessarily inapplicable.¹¹ Well-established discontinuance must be held to destroy family custom and usage.¹² As to "Usage of trade," *v. post*.

It must be proved that the right or custom shown to have been exercised on some particular occasion is the same with the right or custom which has to be proved. In England, the custom of one manor is not admissible to prove the instance of another unless some connection can be shown between them, as, for instance, that the custom in question is a particular incident of the general tenure which is proved to be common to the two manors.¹³ So also, where evidence of a right exercised in a particular locality was given, it was said: "Ownership may be proved by proof of possession, and that can be shown by acts or enjoyments of the land itself; but it is impossible in the nature of things to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference that the place in dispute belonged to the plaintiff if the other parts did. It has been said in the course of argument that the defendant had no interest to dispute the acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party; they are admissible

⁸ *Maharani v. Bahon Ram*, (1872) 9 B. L. R. 274 at p. 295 as to Kulachar determining succession to an impartible estate, see *Subramanya v. Siva*, (1894) 17 M. 316; *Mohesh v. Satrugan*, (1902) 29 C. 343.

⁹ *Tara v. Reeb*, (1886) 3 Mad. H. C. R. 50, 57; *Madhavray v. Balkrishna*, (1886) 4 B. H. C. R. (A.C.) 113, distinguished in *Bhau v. Sundrabai*, (1874) 11 Bom. H. C. R. 170; *Patil v. Chandrapal*, 31 A. 457, 6 A. L. J. 767; 19 M. L. J. 605; see also *Mayne's Hindu Law*, S. 51, 9th Ed., 1922.

¹⁰ *Bhau v. Sundrabai*, (1874) 11 Bom.

H. C. R. 249 ante, following *Shepherd v. Payne* 31 L. J. C. P. 297, and *Water-park v. Fenecl*, 7 H. L. 650; see also *Ramasami v. Appavu*, 12 M. 9, 14 ante, and *Joy Kishen v. Doorga*, 11 W. R. 38, ante.

¹¹ *Patil v. Chandrapal*, (1903) 8 O. C. 94, 95 and *Kozuma v. Shiva-gunga*, (1863) 9 M. L. A. 539.

¹² *Soorendranath v. Heeramanee*, (1868) 10 W. R. (P.C.) 35.

¹³ *(Marquis of) Anglesey v. Lord Hatherton*, (1842) 10 M. & W. 235 and *Taylor, Ev.* s. 321, *Rocoe v. N. P. Ev.*, 85 as to manorial rights, see note to S. 42, post.

of themselves *proprio vigore*, for they tend to prove that he who does them is owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight, that observation applies only to the effect of the evidence¹⁴ (See notes to Section 42, *post*). The fact that a custom was not pleaded in litigations between members of the community, where it might have been pleaded, is relevant evidence, and the question of its relevancy is not affected by the circumstance that some of those suits were still pending in Courts at the time of the trial.¹⁵

20. Proof of customs. The law in regard to the proof of customs is not in doubt.¹⁶

If a right is claimed by virtue of a custom, all the essential characteristics of the custom, bearing on it, have to be established. Thus, it has to be seen, whether it has been proved that the right was certain and invariable, and that its enjoyment was not by leave or permission. Then, it has to be seen whether the custom is reasonable and whether it has been in existence for a fairly long period of time. The evidence, by the very nature of the claim, has to be such that it may go to establish that the right was consciously accepted, as governing the locality or family concerned, in respect of the point covered by it.¹⁷ It is of the essence of special usages, modifying, for example, the ordinary law of succession, that they should be ancient and invariable. And it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence. They must possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.¹⁸ In dealing with a family custom, the same principle will have to be applied, though, in the case of a family custom, instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory, or to the community, or to the character of any estate. In dealing with family customs, the consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them, their statements, and their conduct would all be relevant, and it is only where the relevant evidence of such a character would appear to the Court to be sufficient that a specific family custom pleaded in a particular case would be held to be proved.¹⁹

The rule of custom should prevail in all cases and if the court comes across to departure from the rule it must endeavour to re-establish the rule of custom.²⁰

14. *James v. Williams* (1857) 2 M. & W. 309, 310; per Parker, B. *Taylor Ex.* 309, 310; see S. 11, *ante*.

15. *Mariam v. Mohamed* (1916) 28 C. L. J. 306; 48 I. C. 561; A. I. R. 1918 C. 363.

16. *Pushpavathi Vignavaram v. Visweswar*, (1964) 2 S. C. R. 403; A. I. R. 1964 S.C. 118.

17. *Rajendra Singh v. Parraj Singh*, A. I. R. 1965 Raj 217; 1965 Raj L. W. 242.

18. *Ramalakshmi Ammal v. Shivanatha*, 14 M. I. A. 570, 585; re-

ferred to in *Pushpavathi Vignavaram v. Visweswar* A. I. R. 1964 S. C. 118.

19. *Abdul Hussain v. Soni*, I. R. 45 I. A. 10; A. I. R. 1917 P.C. 181, cited with approval in *Pushpavathi Vignavaram v. Visweswar*, (1964) 2 S. C. R. 403; A. I. R. 1964 S.C. 118.

20. *Rajendra Ram Doss v. Devendra*, 1935 I. S. C. 11; 1973 S.C.D. 59; 1973 Cr. App. J. 1 (S.C.); (1973) 2 S.C.R. 911; (1974) 2 S.C. J. 87; (1975) 1 An. W.R. (S.C.) 4; A. I. R. 1973 S.C. 268.

In the customary mode of selection of successor to the Mahant of the mutt in question ability, efficiency in management, good moral character and adherence to religious rites practised at the mutt were found to be relevant considerations and seniority was not the decisive factor as appeared from the oral and documentary evidence.²¹

There is a presumption that the entries in the *Riwayat* are correct. Oral and documentary evidence of mutations and other transactions in which the custom (of collateral succession to the adoptive father governing facts of Amritsar district) are relevant material to prove or disprove the custom, besides judicial decisions which furnish reliable instances in which the custom was recognised or departed from.²²

21. Proof of Custom of Primogeniture. In the case of customs which are ancient, it is difficult to expect direct testimony of persons who were living since when the custom originated. In such cases, a party has to remain content by examining witnesses who may otherwise be competent to speak either about the inheritance or the custom governing succession to the property belonging to any family. The question still remains for consideration as to whether the witness who comes to depose about this custom heard this from his ancestors and whether there was an occasion for his having any conversation with his ancestors about that custom.²³ The burden of proving that the custom in a particular family of primogeniture regulated the succession to their property rests upon the person who claims to inherit in that right.²⁴

In a case, where there are several families all descending from a common ancestor, and the rule of primogeniture is found to prevail in several families, it gives rise to a probability that this custom was prevalent in the family in question as well.²⁵ Where a custom prevails in one branch of a family, it is strong evidence to be relied on that it applied with equal force to another branch of the same family.¹ The above rule, namely, if one family has branches, and if, in one or more of such branches, the rule of primogeniture governs, the greater probability is that such custom also prevails in other branches, is neither a presumption of law nor of fact. It is only a rule of probable inference. But the evidence about the existence of such a custom can get strength from that probability.²

22. Usage of trade. It has been said "that these words are to be understood as referring to a particular usage to be established by evidence and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions legal principles and analogies, not from evidence in *fact*."³ Thus, evidence of general

21. *Mahant Bhagwan Bhagat v. Gita Nandan Bhagat*, 11 27, 1 S.C.C. 486, 26 7, 2 S.C.J. 786, 1973 CIL 11 J. 43, 1972 2 S.C.R. 1005, 1972 B.L.J.R. 851; 1972 F. A. C. 109; A.I.R. 1972 S.C. 814.

22. *Kehar Singh v. Dewan Singh*, (1966) 2 S.C.J. 463, 1966 CIL 1 J. 42, A. I. R. 1966 S. C. 1555, 1557 overruling *Dewan Singh v. Kehar Singh*, 60 P.L.R. 657.

23. *Kameshwar Prasad v. Mithilesh Kishore Devi*, A.I.R. 1964 Pat. 150.

24. *Gurukulwa Prasad v. Saparan dwala Prasad*, I.R. 27 I.A. 288; I.L.R. 28 A. 37.

25. *Ibid.*

1. *Gajendra Nath v. Mathurlal*, A.I.R. 1956 Pat. 337, 1 Pat. 1 J. 109.

2. *Kameshwar Prasad v. Mithilesh Kishore Devi*, A.I.R. 1964 Pat. 150 per Mahapatra, J.

3. *Smith L. Gas*, 9th Ed. 581, 582.

custom is not admitted to contradict the law-merchant. A custom or usage of trade must in all cases be consistent with law.⁴ That law has, however, been gradually developed by judicial decisions, ratifying the usage of merchants in the different departments of trade; where a general usage has been judicially ascertained and established, it becomes part of the law-merchant which Courts of justice are bound to know and recognize; but it is not easy to define the period at which a usage so becomes incorporated into the law-merchant.⁵ Mercantile usage should be proved by evidence of particular instances and transactions in which it has been acted upon, and not by evidence of opinion only.⁶ Usage of trade may be proved by multiplying instances of usage of different merchants, if it appears to be the same as that of other merchants.⁷ With reference to the evidence necessary to support an alleged usage, the Privy Council said that "there needs not either the antiquity, the uniformity, or the notoriety of custom which in respect of all these becomes local law. The usage may be still in course of growth; it may require evidence for its support in each case, but in the result it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract."⁸ The usage must be shown to be certain,⁹ and reasonable,¹⁰ and so universally acquiesced in¹¹ that everybody in the particular trade knows it, or might know it, if he took the pains to enquire.¹² If effect is to be given to it, it must not be inconsistent with the provisions of the Contract Act¹³ or repugnant to, or inconsistent with, the express terms of the contract made between the parties.¹⁴

In the absence of uniform and definite usage regarding the issue of way-bills by a public carrier and their transfer on endorsement as equivalent to pledge of documents, the way bills cannot be treated as documents of title within the meaning of sub-section (1) of Section 2 of the Sale of Goods Act, 1930. If the way-bill is not a document of title, it cannot under Section 172 of the Indian Contract Act, 1872, be pledged by transfer of the same.¹⁵

14. *Facts showing existence of state of mind, or of body or bodily feeling.* Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good will towards any particular person, or showing the existence

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| 4 | Mayer v. Desser, (1864) 16 C.B.N. S. 646; Indian Contract Act, S. 1. | | |
| 5 | Rex v. N.P. 15, 24, 25, and cases there cited. | 11 | Kesharsing, (1863) 1 Bom. H.C.R. 229. |
| 6 | Mackenzie v. Dunlop, (1856) 3 Macq. 22; Cunningham v. Lonsdale, 1853, 6 C. & P. 44, but see S. 49, post. | 12 | See Mackenzie v. Chantoo, (1889) 16 C. 702; Volkart v. Vettivelu, 11 M. 459, 462, 466 ante. |
| 7 | Volkart v. Vettivelu, (1888) 11 M. 459. | 13 | Volkart v. Vettivelu, 11 M. 459, 462; Price v. Acock, (1893) 4 F. & F. 1074, per Wills, J.; Foxal v. International Land Credit Co., (1867) 16 L.J.T. 637. |
| 8 | Indomani v. Muckhund, (1859) 7 M. & L. App. 263, per Sir Coleridge, J. cited and applied in Indomani v. Manners, (1860) 23 C. 1, 2, 183 (usage in landholder's estate). | 14 | Act IX of 1872 S. 1, see Madhab v. Ragoonath, (1871) 14 B.L.R. 76; 22 W.R. 370. |
| 9 | Volkart v. Vettivelu 11 M. 459, 462, 466 ante. | 15 | Volkart v. Vettivelu 11 M. 459; Smith v. Ladda, (1892) 17 B. 129; see note to S. 29 proviso 5, post. |
| 10 | Atlappa v. Narsi & Co., (1871) 8 Bom. H.C.R. (A.C.) 19; Ransordas v. | | Canara Industrial and Banking Syndicate v. V. Ramachandra, 6 Law Rep. 737; (1967) 1 Mys. L.J. 490; A.I.R. 1968 Mys. 133. |

of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

¹⁶[*Explanation 1.* A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2. But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact] ¹⁷

Illustrations

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

¹⁸(b) A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.]

(c) A sues B for damage done by a dog of B's which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(d) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payer if the payer had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

16 Subs. by the Indian Evidence (Amendment) Act, 1891 (3 of 1891), S. 1 (b), for the original explanations.

17 See the Code of Criminal Procedure, 1973 Ss. 236, 248 (3).

18 Subs. by Act 3 of 1891.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith, believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him.

In order to show A's intent the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

(l) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms are relevant facts.

(m) The question is what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(p) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

s. 3 ("Fact").

s. 3 ("Relevant").

statements of existence of state of mind or body.")

s. 21 (1) (2) ("Admission consisting of ss. 102, 106, 111 ("Burden of proof")

Steph. Dig., Art. II and Note VI, Taylor, Ev. ss. 580-586, 150, 160, 812, 1665, 1666, 340 - 347, 188. Phipson, Ev., 11th Ed., 96 - 100, 140, 411 - 437, Lindley, Partnership, 536. Chitty's Equity Index, 4th Ed., "Notice", Brett's Leading Cases in Equity, 2nd Ed., 260. Roscoe, N.P. Ev., 683-685, 847-855, 736 et seq; Norton, Ev., 131-140. Swift, Ev., 111; Cunningham, Ev., ss. 117, 119; Pollock's Law of Torts in India (1894) 41, 45, 61, 65, 66, 68, 77. First Report of the Select Committee presented on 31st March, 1871. Roscoe (C) Ev., 13th Ed., 79-85. Lindley's Company Law, 6th Ed., 132, 433. Bevan's Principles of the Law of Negligence (1889), Cal. Pr. Code, ss. 236, 248 (3), Contract Act, S. 12; Best, Ev., p. 66, ss. 20, 433. Wills, Ev., 3rd Ed., 85-92. Wigmore, Ev. ss. 309-370, 581, 658-661, 1962-63.

SYNOPSIS

1. Principle.
2. States of mind, or of body, or bodily feeling.
3. Proof of mental and physical conditions.
 - (a) General.
 - (b) Proof to rebut suggestion of accident or mistake.
 - (i) By evidence of person concerned.
 - (ii) By evidence of other persons.
 - (iii) Contemporaneous manifestations.
 - (iv) Collateral facts.
 - (v) Similar acts.
 - (c) Admissibility of evidence to prove knowledge, or intention or other state of mind.
 - (d) Previous and subsequent events.
4. Scope of the section.
5. Catalogue of Sections 14 and 15.
6. Intention.
 - (a) General.
 - (b) *Mens rea* in Indian Penal Code and other statutory offences. England, America.
 - (c) Conclusion.
 - (d) Proof of intention.
7. Knowledge.
 - (a) General.
 - (b) Knowledge may be inferred or presumed.
8. Notice.
 - (a) General.
 - (b) Wilful abstention.
 - (c) Gross negligence.
 - (d) Registration.
 - (e) Notice to agent.

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| 9. Good and bad faith: Fraud. | (c) Illustration (c). |
| 10. Negligence. | (d) Illustration (d). |
| 11. Rashness. | (e) Illustration (e). |
| 12. Similar acts. | (f) Illustration (f). |
| 13. Malice. | (g) Illustration (g). |
| 14. State of body and bodily feeling. | (h) Illustration (h). |
| 15. Explanations: | (i) Illustration (i). |
| (a) Explanation 1. | (j) Illustration (j). |
| (b) Explanation 2. | (k) Illustration (k). |
| 16. Sedition, charge of. | (l) Illustration (l). |
| 17. Illustrations. | (m) Illustration (m). |
| (a) Illustration (a). | (n) Illustrations (n) and (o). |
| (b) Illustration (b). | (o) Illustration (p). |

1. **Principle**—The existence of a mental or bodily state or bodily feeling is established by the occurrence of an overt act if it is shown that it is more probable than not that the occurrence of the overt act is caused by the existence of the mental or bodily state or bodily feeling, or that the occurrence of the overt act is caused by the second explanation is more probable than the explanation that the overt act is caused by the body of the actor or that the overt act is caused by the body of the actor and the overt act is caused by the body of the actor.

[illegible]

19. Evidence under this section or next is not admissible when the case depends on proof of actual facts and not upon the state of mind. *Gokul v. R.*, 1925 Cal. 674; 29 C. W. N. 483; 86 I. C. 970.
20. *v. ante*, S. 3, illust. (d).
21. *Wignone, Ex.*, s. 581.
22. See First Report of the Select Committee, 31st March, 1871; *R. v. Panchu*, 1920 Cal. 500; I. L. R. 47 C. 671 (F B); 58 I. C. 929.
23. *Edington v. Fitzmaurice*, (1885) 29 Ch. D. 459 per Bowen, L. J.
24. See *Balmukand v. Ghansam*, (1894) 22 C. 391, 406 [proof of intention need not be direct; it will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and surrounding circumstances.] The Deputy Remembrancer *v. Karuna*, (1894) 22 C. 164, 174; *R. v. Rhuuten*, (1865) 2 W. R. Cr. 63; *R. v. Beharee*, (1865) 3 W. R. Cr. 23, 24, 27 (exclamations as evidence of guilty intention; conduct of prisoner) (*Re*) *Meer*, (1870) 13 W. R. Cr. 70; *R. v. Roorkni*, (1865) 3 W. R. Cr. 58 (province of jury to judge of intention); *R. v. Gokool*, (1876) 5 W. R. Cr. 35, 38 (to some degree of course the intentions of parties to a wrongful act must be judged of by the event; *R. v. Gora*, (1866) 5 W. R. Cr. 45, 46 (presumption of intention depends upon the facts of each particular case); *R. v. Shunufflooddeen*, (1870) 13 W. R. Cr. 26 (a guilty knowledge is not necessarily a thing on which direct evidence can be afforded. It

person's state of mind.²⁵ But, it may be safely and in general said that a witness must speak to facts and let the inference from those facts be drawn by the Court or jury.¹ This action is in accordance with the principle laid down in numerous cases² that, to explain states of mind, evidence is admissible, though it does not otherwise bear upon the issue to be tried. As regards this principle there is no difference between Civil and Criminal cases.³ The present section makes general provision for the subject, and the next section is a special application of the rule contained in the present one. The subject of the existence of states of mind is one of the most important topics with which judicial enquiries are concerned, in Criminal cases they are the main considerations, and in Civil cases they are often highly material, as for instance, where there is a question of fraud, malicious intention, or negligence. The present section is framed to avoid all technicalities as to the class of cases or the time within which the fact given as evidence of mental or bodily condition must have occurred. The only point for the Court to consider, in deciding upon the admissibility of evidence under this section, is, whether the fact can be said to show the existence of the state of mind or body under investigation.⁴ The same considerations will, it is apprehended, determine the question of the admissibility of facts subsequent to the fact in issue to prove intent and other like questions.⁵ So also, though the collateral facts sought to be proved should not be so remote in time as not to afford a reasonably certain ground for inference, yet such remoteness will, as a rule, go to the weight of the proffered evidence only.⁶ In the next case cited, the appellant was convicted under Sec. 209, Indian Penal Code, of having made false claims

is a matter of conscience and connected with the secret motives of a man's conduct and it must be inferred from fact): *R. v. Bleasdale*, (1848) 2 C. & K. 65 (felonious intent); *R. v. Mox*, (1850) 4 C. & P. 364 (ib); *R. v. Lloyd*, (1836) 7 C. & P. 318 (lustful intent); *R. v. Bholu*, (1900) 23 A. 124; cited in notes to S. 106. (Assembling for the purpose of committing dacoity; evidence of intention: *R. v. Pura Sen*, (1887) 21 M. L. J. 100. *Deputy Legal Remembrancer v. Karuna*, (1911) C. 153 (obtaining goods for prostitution; evidence of intent), see *R. v. Petherick*, (1875) 7 C. 70. As to burden of proof, see Ss. 102, 105, 106, post.

25. *Wagmore* *Et al.* (1902) 100⁵. The answer to the objection is not seen to be that in such case the witness is submitting his inference to the jury. Be it so the jury have themselves to draw the inference that there is no reason why the witness should be allowed to do so. As to the different meanings of "belief" or "impression" as signifying the degree of positiveness of original observation or recollection, in which case there is no legal objection or lack of actual personal observation (in which case the evidence is excluded), see *ib.*, 658.

1. *Swift* *Ev.* 111. "A witness must swear to facts within his knowledge and recollection and cannot swear to mere matters of belief."
2. See judgment of Williams, J., in *R. v. Richardson* (1880) 2 F. & F. 343.
3. *Blake v. Albion Life Assurance Society*, (1878) 4 C. P. D. 94.
4. *Cunningham, Ev.*, 117.
5. See *R. v. Mason*, (1914) 10 Cr. App. Rep. 361; *R. v. Richardson* (1911) 6 Cr. App. Rep. 20; *R. v. Debendra Prosad, I. L. R.* 36 Cal. 573; *P. L. 601*; *Reg. v. R. v. R.* (1910) Cal. 1084; 46 I. C. 696.
6. *Ev. v. W. v. W.*, (1911) 10 I. C. 614; 8 Cr. App. Rep. 10 B. 414; "True it is that the more detached the previous utterings are at point of time, the less relation they will bear to the particular uttering stated in the indictment, and when they are so distant the only question that can be made is whether they are sufficient to warrant the jury in drawing any inference from them as to the party's knowledge of the previous fact, but it would not render the evidence in itself inadmissible." See also per Lord Blackburn in *R. v. Jones*, (1843) 12 Cox C. C. 612, 614.

in three suits brought against certain persons. Two other persons besides the appellant were similarly prosecuted and convicted for bringing other false suits against the same defendants. Held, that evidence relating to suits by the appellant other than those specified in the charges were properly admitted under this and the next section for the purpose of showing the ill will or enmity of the appellant towards defendants, in those suits as a body, but the evidence relating to suits brought by other persons, when no case of a conspiracy between them and the appellant was alleged or established, was inadmissible.⁷ When the allegation against the accused, an officer, was that he was acting in pursuance of the policy of the Ittehad-ul-Muslimeen, that his state of mind was to exterminate the Hindus, it was held that he was entitled to lead evidence to show that he did not possess that state of mind but that, on the other hand, his behaviour towards the Hindus throughout his official career had been very good and he could not possibly think of exterminating them.⁸

3. Proof of mental and physical conditions. (a) *General.* The mental and physical conditions of a person may be proved either by that person speaking directly to his own feelings, motives, intentions, and the like, or by the evidence of another person detailing facts from which the given condition may be inferred, but such other person may not, in general, testify the state of mind of the first, as to which he can have no direct knowledge, and may only state those external and perceptible facts which may form the material of the Court's decisions.⁹⁻¹⁰

The state of a man's mind is a question of fact.¹¹ Whether the state of mind of a person should be proved by the evidence of that person himself or by the evidence of another person, it is not a question of law. As a matter of abstract law, the state of a man's mind can be proved by evidence other than that of the man himself. But whether that would be enough in any given case, or whether the "best evidence rule" should be applied in strictness in that particular case, must necessarily depend upon its facts.¹²

A distinction has to be drawn between simple mental phenomena which can be inferred from the facts relevant and complex mental phenomena which will be no guide on the basis of which one can prove those phenomena and raise an inference about their existence.¹³

In assessing the value of medical evidence to prove injuries on the body of a person who took the plea of the exercise of the right of private defence, what the doctor had said in the matter of the grant of certificate in another case is irrelevant.¹⁴

⁷ *Rigby v. R.*, A. I. R. 149 Cal. 1084; 22 C. W. N. 494; 19 Cr. L. J. 781; 46 I.C. 696.

⁸ *Habeeb Mohomed v. State of Hyderabad*, A. I. R. 1954 S. C. 51; 1953 S. C. I. 678; 1954 Mad. W. N. 235; 1954 Cr. L. J. 338.

⁹⁻¹⁰ See *Prinson v. R.*, 113 Fd. 99, 97; *Cunningham v. R.*, 117, but as to the opinion of expert, see § 45, post. *Wignmore v. R.*, 581 (1962-68).

¹¹ *Ranbir v. Emperor*, A. I. R. 1935 S. 203; 159 I. C. 466; 37 Cr. L. J. 106.

¹² *State of Bombay v. Pusshetam*, 162 S. C. 217; 1972 S. C. J. 503; 1952 Cr. L. J. 1269; 54 Bom. L. R. 869; (1952) 2 M.L.J. 338.

¹³ *Abdul Baburao Sawant v. State*, 1 I. R. 188 Bom. 805; 68 Bom. L. R. 187; 1967 Cr. L. J. 440. A. I. R. 1967 Bom. 109, 117.

¹⁴ *Daryao v. State*, 1969 Cr. I. J. All 1273, 1276.

It is not, however, sufficient to show that a person has been in a state of mind, or of body or bodily feeling, at the time of the commission of the crime, in order to prove that he committed the crime. It is necessary to show that he was in a state of mind, or of body or bodily feeling, at the time of the commission of the crime, and that he was in a state of mind, or of body or bodily feeling, at the time of the commission of the crime, and that he was in a state of mind, or of body or bodily feeling, at the time of the commission of the crime.²³

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23. See *Wright v. Tatham*, (1834) 7 A. & E. 313.
24. *Aveson v. Kinnaird*, (1805) 6 East. 168; *R. v. Nicholas*, (1846) 2 C. & K. 246; *R. v. Gloster*, 16 Cox 471, *Illus.* (1) (m).
25. *R. v. Johnson*, (1895) 2 C. & K. 351.
1. *Kakar v. R.*, (1924) 25 Cr. L. J. 1005.
2. *Vacher v. Cocks*, (1829) M. & M. 145; *Lewis v. Rogers*, (1834) 1 Cr. & R. 48; *Whart.*, s. 254.
3. *Phipson. Ev.*, 11th Ed., 100; see *Taylor, Ev.*, ss. 580-586.
4. *ib.*, 105; *Thomas v. Connell*, (1838) 4 M. & W. 267; *Vacher v. Cocks*, (1829) M. & M. 145; *Cotton v. James*, (1830) 1 B. & Ad. 128.
5. *Best, Ev.*, 255.

6. See notes to S. 8, ante; "When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of mind, or any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." *Steph. Dig.*, Art. 11 and see note vi, *ib.*

not of the forgery,¹³ and in a trial for cheating, evidence of a similar trick (a suggestion that a certain person would lend money) in another case was admitted to prove the state of mind of the accused.¹⁴ Where a medical practitioner is tried for causing death of a patient by administering a lethal dose of *dhatūra* and the prosecution shows that even a man of no education is aware of the extremely poisonous nature of *dhatūra*, but the defence is that there are cases in which the drug has been successfully administered for curing a certain disease, it is open to the prosecution to show that the previous experiment carried out by the accused himself, in exactly similar circumstances, had shown him that, far from being a cure, the drug was a certain killer.¹⁵

When several offences are so connected that proof of one can be arrived at through evidence going to prove the others, the evidence is not on that account excluded.¹⁶

"Sodomy is a crime in a special category because, as Lord Sumner said,¹⁷

"persons who commit the offences now under consideration seek the habitual gratification of a peculiar perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity. On this account, in regard to this crime, we think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused. The interests of justice require that on each case the evidence on the others should be considered, and even if it is in the defence raised by him, the evidence would be admissible."¹⁸

Offences against young girls are "on the same footing as unnatural offences with men or boys."¹⁹ In the Full Bench case of *Strickland Gossain v. Emperor*²⁰ where the accused was charged with taking a bribe, Dutt, J., held that evidence of a previous bribe was not admissible under this section as there was no controversy in the case about the existence of any state of mind, intention, knowledge or good faith of the accused. With regard to the currency notes he received and the evidence was not introduced merely to contradict the defence of the accused. *Updell v. Wood*, C. J. and *Wilson*, J., were inclined to hold that the evidence was admissible as it was necessary for the jury to base their decisions on their admissible evidence. In *Pratt v. R.*²¹ based on a speech, a previous

13. *Krishna v. R.*, 1917 Cal. 676; 43 C. 333; 33 I. C. 28; 17 C. L. J. 132; 20 C. W. N. 262.

14. *R. v. Yakub*, 1917 All. 251; 39 A. 253; 39 I. C. 100; 17 C. L. J. 132; *R. v. R.*, 1916 Cal. 188; 1 L. R. 42 C. 95; 39 I. C. 100; 17 C. L. J. 132; *R.*, (1913) 18 C. L. J. 578; *Giridhari v. R.*, (1909) 11 Cr. L. J. 428.

15. *Juggan Khan v. State*, A. I. R. 1939 M. 100; 1939 M. L. J. 839.

16. *R. v. Parbhudas*, (1874) 11 Bom.

H. C. R. 90; *R. v. Ella*, 1892 6 B. & C. 145, cited in *R. v. Parbhudas*, *supra*; See also *R. v. Vajiram*, (1892) 16 B. 414.

P. v. Thorsen, (1918) A.C. 221 at p. 235.

R. v. Wilson, 1946 1 K. B. 531 (1946) 1 All E. R. 697; 62 T. L. R. 431; 175 L. T. 72; 31 Cr. App. R. 158.

19. *Ibid.*

20. 1943 All. 257; 216 I. C. 100; 1944 A. L. J. 419 (F.B.).

by deliberately running down a woman bicyclist with a motor car, evidence was admitted of similar attacks on other women, immediately before or after the offence charged. In *Stratton v. Emperor*,⁶ one of the two accused was tried on charges of contravening a Price Control Order by selling salt to dealers at a price higher than that fixed, and the other accused was tried on charges of abetting the first accused. A number of dealers were called to speak of transactions, not the subject of any charge, which they had had with the accused during or shortly before or after the period covered by the dates of the offences charged. This evidence, if accepted, proved beyond doubt that the second accused knew of the first accused's illicit exactions, and connived at them. It was held, that the evidence was relevant, not only to the principal charge but also to the charge of abetting, because it showed an intention to aid the commission of the offence, and was thus admissible to prove intention under the section.

4. Scope of the section. In *R. v. Emperor, Modi v. Gadh. C. J.*, said :

"Section 14 seems to me to apply to that class of case which is discussed in *Taylor on Evidence*, 6th Edition, Sections 318-322, that is to say, cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, as, for instance, in matters of forgery, or of imprisonment, or of false imprisonment, or where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was motivated by spite or animosity against the plaintiff, or, again, on a charge of uttering coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coins in his possession, or had passed such coins before or after the particular occasion which formed the subject of the charge. The illustrations to Section 14, as well as the authorities cited in *Taylor's* show with sufficient clearness the sort of cases in which this evidence is receivable. But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling. We have no right to prove that a man committed theft or any other crime on one occasion by showing that he committed similar crimes on other occasions. Thus the possession by an accused person of a number of documents suspected to be forged was held to be no evidence to prove that he had forged the particular documents with the forgery of which he was charged."⁷

In *R. v. Parbhudas*,⁸ West, J. said :

"The possession by the accused of several other articles deposited to have been stolen would no doubt, have some probative force on the issue

6. A.I.R. 1947 P.C. 100.

7. (1881) 6 C. 655, 659.

8. *R. v. Parbhudas*, (1874) 11 Bom. H. C.R. 90; *R. v. Nur Mohamed*, (1883) 8, B. 223, 225, in which the former case was distinguished and in which it was held that evidence of the possession and utterance of forged documents in an alleged forgery is relevant

on a charge of uttering such coins soon afterwards when the factum of uttering is denied.

9. (1874) 11 Bom. H. C. R. 90, 91. "A fully argued case where Mr. Justice West gives a full and lucid exposition of S. 14 of the Indian Evidence Act" per Justice J. In *R. v. Lakrapa*, (1890) 15 B. 502

of whether he had received the particular articles which he was charged with having dishonestly received, and the receipt or possession of which he denied altogether, yet in the first illustration to Section 14 it is set forth as preliminary to the admission of testimony as to other articles 'that it is proved that he was in possession of the particular stolen article.' The receipt and possession are not allowed to be proved by other apparently similar instances but only the guilty knowledge. Illustration (c) to the same section makes a previous attempt by the accused to shoot the person murdered evidence of the accused's intention, but not of the act that caused the death, yet it is certain that in the issue of whether A actually shot B or not, the fact that he had previously shot at him, would have some probative force, so, too, would proof of a general malignity of disposition by evidence that 'A was in the habit of shooting at people, with intent to harm them,' yet this evidence is excluded, even as proof of A's intention either as too remotely connected with the particular intention in issue, or as relating to a collateral question which could not properly be resolved in the cases."¹⁰

In the same case Melby, J., said:¹¹ "It appears to me that the Indian Evidence Act does not go beyond the English Law." As to the latter, Lord Herschell said:¹²

"The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused."

In *R. v. Board*¹³ it was held that where the defence to a criminal charge is that the acts alleged to constitute the crime were done by the accused for an innocent purpose, evidence that the accused did the same act for an improper purpose on another occasion is admissible as evidence negating the defence, although it is evidence which proves the commission of another offence by the accused. In this case a person who was qualified to be and had acted as a surgeon was indicted for the offence of manslaughter. The evidence was that he had used certain instruments and the defence was that he was performing a lawful operation. It was proved that he had caused to procure as a surgeon, and evidence was introduced by the prosecution that he had on a previous occasion used the same instruments on the same count on another person with the avowed intention of procuring a miscarriage. This evidence was held admissible by the Court of Criminal Cases, Lord Alton, C. J., and Ridley, J., dissenting on the ground that there was no necessary connection between the two offences or the instruments used in the other act alleged in the evidence, and that evidence of previous acts of a similar kind is not admissible when the only question is the purpose for which an act was done.

10. *R. v. Parbhudas*, (1874) 11. Bom. H.C.R. 461.

11. *Ibid.* at p. 97.

12. *Makin v. Attorney-General*, (1894)

A.C. 57; cited in *R. v. Wyatt*, (1906) 21 Cox. 252.

13. (1906) 21 Cox. 252.

In a case in the Allahabad High Court where the accused was charged with cheating, it was held that evidence of his having cheated others not named in the charge was inadmissible because this section only applies to cases where a particular act is more or less culpable according to the state of mind of the accused.¹⁴ And in the Calcutta High Court, it has been held that where evidence was tendered of false representations of the name and character as the one charged and made to persons similarly situated, such evidence was admissible to prove dishonest intent in reference to the particular transaction charged, on the ground that Sec. 15 is an application of the general rule laid down in this section and that the words of this section and of illustrations (a) to this section and to Sec. 15 show that it is not necessary that all the acts should form part of a series of similar occurrences.¹⁵

The illustrations (e), (f) and (j) are on the point of intention,¹⁶ (a), (b), (c) and (d) of knowledge, (b), (g) and (h) of good faith, (n) of negligence and knowledge, (k), (i) and (m) of mental and bodily feeling, (n), (o) and (p) illustrate the explanation.¹⁷

5. Overlapping of Secs. 14 and 15. In their application to offences Sec. 14, no doubt, overlaps Sec. 15 in so far as it covers either by itself, or in conjunction with other sections such as Secs. 9 and 11, not only those cases where the state of mind of the accused is properly an element in proving the commission by the accused of the physical act charged,¹⁸ or in proving by way of his intention or state of mind that it was the accused who committed such act,¹⁹ but also those cases where the physical act charged may be neutral in its character and may depend for its innocence or guilt on the state of mind of the accused at the time.²⁰ Cases of the latter description, where there is conduct indicating system, fall more particularly, however, under Sec. 15.²¹⁻²²

6. Intention. (a) *General.* The question of intention is sufficiently illustrated by the illustrations (e), (f) and (j) to the present section, by the cases illustrating guilty knowledge, and by the next section, and is further considered in the notes to the last-mentioned section and in the preceding and succeeding paragraphs.

(b) *Mens rea in Indian Penal Code and other statutory offences.* The fundamental principle of English Criminal Jurisprudence to use a maxim which has been familiar to English lawyers for nearly 800 years is *actus non facit reum, nisi mens sit rea*. An act does not make a man guilty without a guilty intention

14. *R. v. Abdul*, 34 A. 95; 12 I. C. 987; 8 A. L. J. 1269, following *R. v. Vyapoori*, (1881) 6 C. 655; see also *A. H. Gandhi v. The King*, 1941 Rang. 324; *Gokul v. Emperor*, 1925 Cal. 674; 86 I C. 970; 29 C. W. N. 483.

15. *R. v. Deben*, 1900 70 C. 573; distinguishing *R. v. Holt*, 1860 Bell G. C. 280 and *Maken v. Attorney General*, 1893 A. C. 57; *R. v. Bond*, (1906) 2 K. B. 389; *R. v. Rhodes*, (1899) 1 Q. B. 77; *R. v. Ollis*, (1900) 2 Q. B. 758.

16. As to whether an act was accidental or intentional, *ib.*, s. 15.

17. See Norton, *Ev.*, 131.

18. *Director of Public Prosecutions v. Ball*, 1911 A. C. 47; 80 L. J. K. B. 689.

19. Illustrations (o) and (p), S. 14.

20. Illustrations (a), (b) and (c) to S. 14.

21-22. *Righton v. Emperor*, 1919 Cal. 1084; 46 I. C. 19; 19 Cr. L. J. 781; 22 C. W. N. 494.

22. See cases cited in first paragraph of Commentary, ante.

to do the guilty act which is made penal by the statute or common law". But there is generally no room for the application of this doctrine in the Indian Penal Statutes as their terms are precise and contain within themselves the precise and particular elements that go to make up the offences referred to in those statutes. The Indian Penal Code is one of the most exhaustive Codes of Penal Laws and devotes a substantial part towards the interpretation clause while an equally large part of it is devoted for the general exceptions, which withdraw acts which would otherwise be an offence from that category. Its elaborate paraphernalia has been designed, it is said, to prevent capricious Judges from wilfully misunderstanding the Code and cunning criminals from escaping its provisions.

So in Indian Penal Statutes where the doctrine of *mens rea* is intended to come into operation and a guilty mind is deemed essential for the proof of an offence, the Statute itself uses words like "knowingly", "voluntarily", "fraudulently", "negligently", and so on.²⁴

Blackstone's classification is based on the various conditions which in point of law negative the presence of the guilty mind, namely, the following groups of exemption: (1) where there is no will, (2) where the will is not directed to be deed, (3) where the will is overborne by compulsion, and (4) where the *actus* and *mens* combine but the *mens* is not *rea* and therefore *actus* is not *crim.* are embodied in Sections 76 to 106, I. P. C. Under group (1) sections relating to (a) infancy, (b) lunacy, (c) drunkenness, fall under group (2) provisions relating to mistake of fact, under group (3) provisions like Section 94 and under group (4) under the head of justification or excuse, Sections 76 to 79 and clause of evils Sections 81, 87, 92, 93, 95 and 96 to 106.

But now there are a large class of penal acts created under the State as well as Central Acts which are really not criminal but which are prohibited by a levy of penalty in the interests of the public. To such a category belong offences against Revenue, Adulteration Acts, Forest Laws etc. penalties directed against public nuisances, and cases in which, though the proceedings are criminal in form they are only summary modes of enforcing civil rights, public welfare offences. Of late years, the tendency of the Courts is to attach less importance to *mens rea* in statutory offences.²⁵ In such cases as pointed out by Dr. Kenny, the prosecution need only prove the prohibited act and the defendant must then bring himself within a statutory defence.²⁶ But, in determining whether an Act does create this absolute liability, regard must be paid to the object of the statute, the words used, the nature of the duty, the person upon whom it is imposed, the person by whom it would in ordinary cases be performed and the person on whom the penalty is imposed.

²⁴ *Alford v. Seaford & Co.*, 141, (1925) 1 K. B. 129.

²⁵ See the observations of M. C. Setalvad, "The Common Law in India," *P. & W.*, 1921, 80; J. P. *Hughes v. Cwyde*, [1921] 2 K. B. 661; *Cotterell v. Penn*, (1936) 1 K. B. 53; *R. v. Leinster*, (1924) 1 K. B. 311; *Harding v. Price*, (1948) 1 K. B. 695. (See 88th Ed., of *Stones Justice Manual* (1956), p. 251).

1. *Outlines of Criminal Law*, 15th Ed., p. 48.

²⁶ *Mansel Brothers Ltd. v. I. N. W. Ry.*, (1917) 2 K. B. 836 (845); *Sherras v. De Rutzen*, (1895) 1 Q. B. 918; *Russell on Crimes*, 7th Ed., Vol. I, p. 162; D. A. Stroud, *Mens Rea*, 1934; Austin, *Jurisprudence*, Lectures XVIII and XXVI; *Stephen's History of Criminal Law*, Vol. II, pp. 94-123. Indian cases: *In re Kasi Raja*, A. I. R. 1953 Mad. 156; *Ravula Hariprasad Rao v. The State*, A. I. R. 1951 S. C. 204; 1951 A. L. J. (S.C.) 55; 1951 M. W. N. 574; 64 M. L. W. 493; 52 Cr.L.J. 768; *Sarjoo Prasad v. State*

In these quasi-civil wrongs, one of the commonest phrases used is "cause or permit" in the Road Traffic Acts, and this has been the subject-matter of many irreconcilable English decisions.

Professor Edwards in his valuable monograph "*Mens Rea*" in "*Statutory Offences*" (Vol. VIII of *English Studies in Criminal Science*, edited by L. Radzinowicz) (L. Clarendon Press, 1952) pp. 98 and following, after a survey of the statutory offences based on the word "permit", points out:

"Where the word 'knowingly' is expressly inserted in a statutory offence, no doubt has ever been cast on the necessity for establishing *mens rea*. Where, on the other hand, the English law has chosen to use the alternative expressions 'permitted' or 'permitted to', a critical analysis of the cases shows the inevitable cleavage of opinion among the judges as to the requirement of proof of a guilty mind. Further in this study several cases were tentatively suggested as underlying this constant divergence of views, and it may, perhaps, be of assistance if they are restated. First it is suggested there is the trend of thought which appears to be current at the time a particular case is decided; secondly, there is the individual judge's attitude or approach to the wider question of the part to be played by *mens rea* in criminal law; and finally, there is the conflict which is created through the unreal meaning sometimes attributed to the phrase *mens rea*."

So Professor Craville I. Williams in his "*Criminal Law—General Part*", discussing theories of strict responsibility under which the doing of the forbidden act itself furnishes the *mens rea* and vicarious responsibility in that the master is held liable for even the unauthorised acts of his servant in Chapter 7 (pp. 238 and following) concludes:

"It may be said that a person may properly be punished for the crime of his subordinate because the threat of such punishment may induce him and others to exercise supervision over the subordinate. Yet if this is the reason it would seem better to phrase the rule as duty to supervise, and it should be a defence to prove that due care was taken to supervise."

The following passages from the leading text-books in England and America are extracted in *Process Chemical Laboratory v. The Drugs Inspector*,⁴ set out the current state of the law obtaining in those countries and from which we derive out our source of materials.

England—Hastings's Laws of England (Simond's Edition) (1955), Vol. III, at page 273, para. (p) 508, has the following to say:

"A statute is criminal only or may not contain an express definition of the necessary state of mind.³ A statute may require a specific intention, malice, knowledge, wilfulness, or recklessness. On the other hand it may be silent as

of U.P., A.I.R. 1961 S.C. 631 :
(1961) 1 S.C.J. 484; (1961) 1 Andh.
W.K. 80; 1961 1 K.L.R. 396;
1961 1 Mad.L.J. (S.C.) 733;
1961 All W. R. (H.C.) 199;
1961 M. R. C. 1961 B. 1.

J. R. 214; State v. S. P. Bhadani
and others, A. I. R. 1959 Pat. 9.
3. Excerpts from Ramamoorthy v. The
State, 1957 M.W.N. (Cr.) 5.
4. 1958 M.W.N. (Cr.) pp. 52-53;
1958 2 M.L.J. 308.

to any requirement of *mens rea*, and in such a case in order to determine whether or not *mens rea* is an essential element of the offence, it is necessary to look at the objects and terms of the statute. In some cases, the courts have concluded that despite the absence of express language the intention of the Legislature was that *mens rea* was a necessary ingredient of the offence. In others, the statute has been interpreted as creating a strict liability irrespective of *mens rea*. Instances of this strict liability have arisen on the legislation concerning food and drugs, liquor licensing and many other matters.⁵

According to Archbold's Criminal Pleadings, Evidence and Practice in Criminal Cases 33rd Ed. (1954) at pages 23-24:

"It has always been a principle of the common law that *mens rea* is an essential element in the commission of any criminal offence against the common law.⁶ In the case of statutory offences it depends on the effect of the statute.⁷ There is a presumption that *mens rea* is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals.⁸ Unless a statute clearly or by implication rules out *mens rea*, a man should not be convicted unless he has a guilty mind.⁹ In finding whether *mens rea* is excluded, the court should consider whether the offence consists in doing prohibited acts or in failing to perform a duty which only arises if a particular state of affairs exists.¹⁰

When there is an absolute prohibition against the doing of an act, scienter forms no part of the offence and absence of it affords no defence to the accused person, the doing of the act itself supplies the *mens rea*.¹¹

American 14 American Jurisprudence, pp 784-785 (Section 24) has the following to say:

"An evil intention or guilty knowledge which is an essential part of crimes at common law, is, in some cases, but not in others, held to be an element of crimes created by statutes or ordinance. The view is taken in some cases that a criminal intent is not a necessary element of offences which are merely *malum prohibitum*, or of prohibitive statutes which cover misdemeanours in aid of the police power, where no provision is made as to intention. This is especially important in that if a criminal intent is not an essential element of a statutory crime, it need not be proved in order to justify a conviction. In other words, it is immaterial that the defendant acted in good faith or did not know that he

5 R. v. Whorwell (1921) 45 J.P. 203.
 6 R. v. Cunningham (1957) 2 K.B. 396.
 7 R. v. Tolson (1951) 1 K.B. 396.
 8 R. v. Tolson (1951) 1 K.B. 396.
 9 R. v. Tolson (1951) 1 K.B. 396.
 10 R. v. Tolson (1951) 1 K.B. 396.
 11 R. v. Tolson (1951) 1 K.B. 396.
 12 R. v. Tolson (1951) 1 K.B. 396.
 13 R. v. Tolson (1951) 1 K.B. 396.
 14 R. v. Tolson (1951) 1 K.B. 396.
 15 R. v. Tolson (1951) 1 K.B. 396.
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 19 R. v. Tolson (1951) 1 K.B. 396.
 20 R. v. Tolson (1951) 1 K.B. 396.
 21 R. v. Tolson (1951) 1 K.B. 396.
 22 R. v. Tolson (1951) 1 K.B. 396.
 23 R. v. Tolson (1951) 1 K.B. 396.
 24 R. v. Tolson (1951) 1 K.B. 396.
 25 R. v. Tolson (1951) 1 K.B. 396.
 26 R. v. Tolson (1951) 1 K.B. 396.
 27 R. v. Tolson (1951) 1 K.B. 396.
 28 R. v. Tolson (1951) 1 K.B. 396.
 29 R. v. Tolson (1951) 1 K.B. 396.
 30 R. v. Tolson (1951) 1 K.B. 396.
 31 R. v. Tolson (1951) 1 K.B. 396.
 32 R. v. Tolson (1951) 1 K.B. 396.
 33 R. v. Tolson (1951) 1 K.B. 396.
 34 R. v. Tolson (1951) 1 K.B. 396.
 35 R. v. Tolson (1951) 1 K.B. 396.
 36 R. v. Tolson (1951) 1 K.B. 396.
 37 R. v. Tolson (1951) 1 K.B. 396.
 38 R. v. Tolson (1951) 1 K.B. 396.
 39 R. v. Tolson (1951) 1 K.B. 396.
 40 R. v. Tolson (1951) 1 K.B. 396.
 41 R. v. Tolson (1951) 1 K.B. 396.
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 47 R. v. Tolson (1951) 1 K.B. 396.
 48 R. v. Tolson (1951) 1 K.B. 396.
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 50 R. v. Tolson (1951) 1 K.B. 396.
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was violating the law. In some cases it is said that where a statute denounces the doing of an act as criminal, the law imputes criminal intent from the doing of the act....."¹²

"As general rule where an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, even when not in terms required. The Legislature may, however, forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer and if such legislative intention appears the courts must give it effect, although the intent of the doer may have been innocent. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the State, where the word 'knowingly' or other apt words are not employed to indicate that knowledge is an essential element of the crime charged. The doing of the prohibited act constitutes the crime and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt. Whether or not in a given case, a statute is to be so construed is to be determined by the court by considering the subject-matter of the prohibition as well as the language of the statute, and thus ascertaining the intention of the Legislature....."¹³

So far as the Indian Penal Code is concerned, every offence under it virtually imports the idea of criminal intent or *mens rea*. Intent denotes all those states of mind which the statute creating the offence in question regards as necessary that an accused must have in order to fix the guilt in him. But no question of *mens rea* arises where the Legislature has omitted to prescribe a particular mental condition as an ingredient of an offence, because the presumption is that the omission is intentional.¹⁴ [Extracted from *Process Chemical Laboratory v. The Drugs Inspector*.¹⁵]

(c) *Conclusion*. Though the doctrine of strict liability in criminal law has been justified on the ground of the comparative unimportance of the offence involved with a monetary penalty attached and that it would be difficult to procure adequate proof of guilty knowledge and that it is of paramount importance to take into account the social purpose behind the statute which should be incorporated in such a way as to give effect to the intention of the Legislature and that those persons who are merely *malum prohibitum* and not *malum in se* and do not require any *mens rea*, it has been severely criticised by eminent jurists. Prof. Scott points out that when the law begins to permit convictions of serious offences of persons who are mostly innocent and free from

12. See *United States v. Peo*, 131 F. 2d 100, 101 (S. Ct. 1944).

13. See *United States v. Peo*, 131 F. 2d 100, 101 (S. Ct. 1944); *U. S.*, 250 & 66 L. Ed., 604, *Shevlin-Carpenter v. United States*, 334 U.S. 651, 652 (1948); *U.S.*, 337, 69 S. Ct. 1000, 1001 (1947); *U. S.*, 153 Fed. 1; *Peo v. Rohy*, 52 Mich., 577-50; *Am. Rep.*, 270; *India Peo v. Werner*, 174 Ny. 132; *Peo v. West*, 106 Ny. 293-60; *Am. R.*, 452 extracted in footnotes.

14. *Srinivasa Mall v. Emperor*, A I.R. 1947 P. C. 135; 1947 (2) M. L. J. 328; *Isak v. Emperor*, I. L. R. 1948 Bom. 329; A. I. R. 1948

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15. *Process Chemical Laboratory v. The Drugs Inspector*, 220

231 I. C. 150; *R. v. Ramachandra*,

7 T. T. 1955 B. 224; A. I. R.

1955 B. 224; *State v. Ramachandra*

Rao v. The State, A. I. R. 1951

S. C. 204; 1951 S. C. J. 296; 1951

S. C. R. 322; 1951 A. L. J. (S. C.)

55; 1951 M. W. N. 374; 52 Cr. L. J.

768; *State v. Sheo Prasad*, 1956 All.

610.

15. 1958 M. W. N. (Cr.) pp. 52-53;

(1958) 2 M. L. J. 308.

fault and who may even be respected as useful members of the community, its restraining power becomes undermined. Once it becomes respectable to be convicted, the vitality of the criminal law has been sipped. Therefore, it is now widely suggested that public welfare offences should be separated from traditional crimes and enforced through administrative agencies and that negligence should be accepted as a sufficient degree of *mens rea* in statutory offences and that the onus of proof should be transferred to the accused to show that he acted with due care. In fact the New York Legislature has declared that traffic infractions are not crimes. In the American Model Penal Code an attempt has been made to distinguish the whole field of administrative penalties from that of criminal law. A new category of violations is to be created. "An offence defined by this Code or by any other statute of this State constitutes a violation if it is so designated or if no other sentence than a fine or fine and forfeiture or other civil penalty is authorised upon conviction. A violation does not constitute a crime and a conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offence."

(d) *Proof of intention.* When a person does an act with some intention other than that which the character and circumstances of the act suggest the burden of proving that intention is upon him¹⁶. Whether a man has or has not a particular intention is a matter of fact to be inferred from the surrounding circumstances and from the acts of the person concerned¹⁷.

The question of intention is to be inferred from legal evidence of facts, and not from antecedent declarations by the accused himself, upon occasions distinct from and antecedent to the transaction¹⁸. In a case in the Madras High Court it was said that a man must be held to intend the natural and ordinary consequences of his acts, irrespective of his object in doing such acts, if at the time he knew what the natural and ordinary consequences would be, and that if he does an act which is *prima facie* illegal, the fact that he did it with some other object, will not make it legal unless that object would, in the circumstances, make it legal¹⁹. In this case it was held that where a man with the object of establishing a fraudulent title to a house broke into it in its owner's house and took forcible possession, he was rightly convicted irrespective of that object. And in a case in the Adilabad High Court where accused had been found in complainant's house at 2 a.m. and had proffered no explanation at the time, but had afterwards stated, without being able to prove that he had gone there to have illicit intercourse with a widow, it was held that his presence there at such an hour raised a presumption of guilty intent²⁰. But in a subsequent and similar case in the same High Court where accused was able to prove his intercourse with a widow, it was held that he was guilty of no offence²¹.

16. S. 106, post, illust. (a); *R. v. Kanhai*, (1912) 35 A. 329; *R. v. Hanuman*, (1913) 35 A. 560.

17. *Law of Evidence*, 2nd ed. (S. 106) 159 I. C. 466; 37 Cr. L. J. 106; *Khetramani v. Emperor*, 1922 Cal. 539; 71 I. C. 232; 24 Cr. L. J. 104; 35 C. L. J. 451.

18. *R. v. Petcherini*, (1856) 7 Cox, 79, 83 per Greene, B. As to declara-

tions accompanying an act v. ib. and S. 8 ante, and notes thereto.

19. *Sellamuthu v. Pallamuthu*, (1912) 35 A. 395; 29 I. C. 67. (M. J. S. per B. J. S. J. S. N. karan Nair, J., diss.).

20. *Mulla v. Emperor*, 1915 All. 178; 37 A. 395; 29 I. C. 67.

21. *Gaya v. R.*, 1916 All. 152; 38 A. 517; 35 I. C. 979; 14 A. L. J. 719.

The political views of a person are relevant as a guide to his conduct and intention.²² In a prosecution for cheating, by entering into a contract to purchase goods with no intention of paying, the question whether there was an intention to deceive must be answered as at the date when the contract was made.²³

Evidence which clearly shows facts and proves the dishonest intention of a person in doing a certain act, is relevant and admissible in evidence. So, for instance, a previous judgment in a criminal case, whereby the accused was convicted for an offence is relevant and admissible to prove dishonest intention of the same accused who is being tried for the same offence.²⁴

The previous conduct of a person is also in evidence in determining his intention. Where the intention of the person is directly in issue and is relevant, any fact showing such an intention is admissible in evidence.²⁵

Evidence of preparation for the commission of an offence is admissible under Section 8 *ante*. And as it exposes the state of mind and intention on the part of the accused to commit an offence (murder in the instant case), it is admissible under this section.¹

In finding out the intention of a corporate body, the Court has to look to the resolutions passed or acts done by it. Different members may have been influenced by different considerations, but the Court is concerned with the intention of the body as a whole.²

7. Knowledge. *a. General.* Facts which go to prove guilty knowledge may be proved. In *R v. Whitey*,³ Lord Esherborough, in deciding that to prove the guilty knowledge of an utterer of a forged bank note, evidence may be given of his having previously uttered other forged notes knowing them to be forged, observed, that 'without the reception of other evidence than that which the mere circumstances of the transaction itself could furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged or whether it was uttered under circumstances which showed their minds to be free from guilt'. In the case of *R v. Fattersall*,⁴ mentioned by Lord Esherborough in *R v. Whitey*,⁵ the question reserved by Chamber J. was whether the persons had not furnished prepared evidence, and whether the jury from his conduct on one occasion might not infer his knowledge in another? The opinion of the Judges was that the jury were at liberty to make such an inference. The days in which this has been acted

22. *Marichandras Naidu v. Emperor*, 1933 All. 498.

23. *Mickson v. Emperor*, 1932 Bom. 273; I. L. R. 56 Bom. 204; 137 I. C. 142; 33 Cr. L. J. 401; 34 Bom. L. R. 313.

24. *Mohan Singh v. Golak Singh*, A. I. R. 1961 Manipur 43.

25. *Mahesh Chandra v. State*, A. I. R. 1964 A. 572; 1964 A. L. J. 581.

1. *Ayyangar v. Subbaiah*, In re, 1950 M. L. W. (Cr.) 239; *Appu v. State*, 1951 Cr. L. J. 115; A. I. R. 1951 Mad. 194.

2. *Guru Murthappa v. Bangalore Corporation*, A. I. R. 1962 Mys. 92.

3. (1804) 1 B. & P. (N.R.) 92.

4. (1801) 6 Leach. 984.

5. (1804) 1 B. & P. (N.R.) 92.

on are mostly cases of uttering forged documents or base coins but they are not confined to those cases."⁶

(b) *Knowledge may be inferred or presumed* Passing from the case of guilty knowledge, knowledge may be inferred from the fact that a party had **reasonable means of knowledge, i.e., possession of or access to, documents containing the information**, especially if he has answered, or otherwise acted upon them; or from the fact that such documents, properly addressed, have been **delivered at, or posted to, his residence.**⁷ So execution of a document, e.g., of a deed or a will, in the absence of evidence to the contrary implies knowledge of its contents,⁸ though mere attestation necessarily does not.⁹ Access to documents may at times raise a presumption of knowledge.¹⁰ But there is no presumption of law that a director knows the contents of the books of a company.¹¹ And shareholders are not as between themselves and their directors, supposed to know all that is in the company's books.¹² The publication of a fact in a Gazette or newspaper is receivable to fix party with notice, though

6 *R. v. Francis*, (1874) 12 Cox, 612, 616, per Lord Coleridge, C. J. In this case the prisoner was indicted for endeavouring to obtain an advance from a pawn-broker upon a ring by the false pretence that it was a diamond ring; evidence was held to have been properly admitted to show that two days before the transaction in question the prisoner had obtained an advance from a pawn-broker upon a chain which he represented to be a gold chain but which was not so; see *R. v. Vajiram*, 16 B 414 p. 433; *R. v. Cooper*, (1875) 1 Q. B. D. 19; *R. v. Fosteh*, (1855) Dear c.c. 456; *R. v. Weeks*, L. & C. 18; *Taylor, Ev.*, S. 345; as to guilty knowledge, see *L. v. R.* (1894) 22 C. 313, 322; *The Deputy L. & L Remembrancer v. Karuna*, (1894) 22 C. 164, 169; (Re.) *Meer*, (1870) 13 W. R. Cr. 70, 71. (It is an error in law to consider the fact of the prisoner leaving his defence to his counsel as in any way whatever indicating any guilty knowledge); *R. v. Nobokristo*, (1867) 8 W. R. Cr. 87, 89; *R. v. Shuruffooddin*, (1870) 13 W. R. 26; *R. v. Abaji*, (1890) 15 B. 189; (Re) *Ramjoy*, (1876) 25 W. R. Cr. 10, 13.

7 *Phipson, Ev.*, 11th Ed., 175; *Lloyds Bank v. Dalton*, 1942 Ch. 466; *Bates v. Hewill*, (1867) 15 L. T. 566; *R. v. Wicks*, (1936) 1 All F. R. 384 at 387; *Vacher v. Cocks*, (1829) 1 M. & M. 353; *Cotton v. James*, (1830) 1 B. & A. D. 128, as to documents found after the arrest of a prisoner v. S. 8 ante, or intercepted in the post; *R. v. Cooper*, (1875) 1 Q. B. D. 19 (when a letter is put in course of transmission the Postmaster-General holds it as

the agent of the receiver, *ib.* 22).

8 *Cooper, Re Cooper*, (1882) 20 Ch. D. 611; *Taylor, Ev.*, ss. 150, 160.

9 *Harding v. Crethorn*, 1793) 1 Esp. 57, 58; v. S. 8 ante; it does not necessarily follow that a witness is aware of the contents of the deed of which he attests the execution, *Salamat v. Budh*, (1876) 1 A. 303, 307; see *Rajlakhi v. Gokul*, (1869) 3 B L.R. (P.C.) 57, 63; *Ramchander v. Hari*, (1882) 9 C. 463, and notes to S. 115, post; *Banga v. Jagat*, 1916 P. C. 110; 1 L. R. 44 C. 186; 43 I. A. 249; 36 I. C. 420; *Lakhpatri v. Rambodh*, 1 L. R. 37 A. 350; 29 I. C. 218; A. I. R. 1915 A. 255; but see *Kandasami v. Nagalinga*, (1913) 36 M. 564, practice in Madras.

10. e.g., in the case of books kept between partners, master and servant etc., see S. 8. ante; *Lindley, Partnership*, 536; *Taylor, Ev.*, s. 812; see *Mackintosh v. Marshall*, (1843) 11 M. & W. 126. (The shipping list at Lloyds stating the time of a vessel's sailing is prima facie evidence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents from having access to it in the course of his business).

11 *Hallmark's case*, (1878) L. R. 9 Ch. D. 329; per *Bramwell, J.*, *ib.* 333: "I will only add that it seems to me in general extremely objectionable to imply that a man had knowledge of facts contrary to the real truth. This ought only to be done where there is some duty on the part of the man to inform himself of the facts."

12 *Lindley, Company Law*, 6th Ed., pp. 492, 493, and cases there cited.

20 K. v. [redacted] Mad. 884 : I. L. R.
20 C. L. J. 9. 1953, 24, per H.V.
J. and 1918. "A registered
letter sent by post cannot afterwards
[redacted] of its contents, 1901
[redacted] 25 W. R. 223.
K. v. [redacted] Yashwanth Ven-
kataratnam, 1953 Mad. 884 : I. L. R.
[redacted] Mad. 884 : M. L. J. 227.
Sarda Bhai v. A. K. Krishna, 1948
Cal. 63 : 82 C. L. J. 9.

raise a presumption of knowledge which is not allowed to be rebutted, and whatever is sufficient to put a person of ordinary prudence on enquiry is constructive notice of all to which that enquiry would lead.²¹

Such presumption of knowledge arises from—

- (1) wilful abstention from an enquiry or search which ought to have been made ;
- (2) gross negligence ;
- (3) registration (Explanation I to the definition of notice in Section 3, T. P. Act) ;
- (4) actual possession (Explanation II, ib.) ;
- (5) notice to agent (Explanation III, ib.).

(b) Wilful abstention. Constructive notice is established where the Court is satisfied from the evidence before it that the party charged had designedly abstained from enquiry for the very purpose of avoiding notice.²² In a case in the Calcutta High Court it was said that whatever puts a person on enquiry amounts to notice when such enquiry becomes a duty and would, in the exercise of ordinary intelligence, lead to a knowledge of the facts, and that constructive notice will be imputed to one who designedly refrains from enquiry for the purpose of avoiding notice.²³ So notice of a deed, or a trust, is notice of its terms.²⁴ And the acceptance of a contract in a common form without objection is constructive notice of its contents.²⁵ So, when title-deeds were deposited by way of equitable mortgage with a Bank which omitted to investigate the title, the Bank was held to have constructive notice of a charge which they might have discovered.¹ And when a share of trust fund was assigned, and the trustees did not enquire into the title of the alleged assignee, they were held to have constructive notice of it.² But, a company to whom a vessel is transferred cannot be fixed with constructive notice of the possible liability of the vendors for the unpaid costs of their solicitors, even though the actual vendor and the promoter of the company are one and the same person.³

21 See *Phipson Ex.* 1920 11th Ed. 177; *Jones v. Smith*, (1841) 1 Hare 43, as to whether registration operates as constructive notice; *Shan v. Madras Banking Co.* (1891) 15 M. 268, 277; *Joshua v. Alliance Bank*, (1891) 22 C. 185; *Brett's L. C.* in Eq., 2nd Ed. 260 (Barry, Eq. Index, 10th Ed. 260). Notice, and as to notice to agent, trustee, counsel, partner, solicitors, &c. ib., and ante. For a purchaser to be affected with constructive notice through his solicitor the latter himself must have actual notice (*Greener v. Mackintosh*, (1879) 4 C. 897, and notice acquired only before the employment as solicitor began is not sufficient (*Chabildas v. Daval*, (1907) 31 B. 566 (P.C.)).

22 *Macneil & Co. v. Saroda Sundari Devi*, 1929 Cal. 89 : 114 I.C. 142 :

23 *M. C. W. N.* 526 : 48 C. L. J. 374; *Radha v. Kalpataru* (1913) 17 C. L. J. 289; see also *Kanchan Ammal v. Sankara Muthiah*, 1941 Mad 707 : (1941) 1 M. L. J. 815 : 1941 M. W. N. 621.

24 *Patman v. Harland* (1881) 17 Ch. D. 353; *Brett's L. C.* in Eq., 260 and cases there cited; *Rajaram v. Krishnasami* (1892) 16 M. 304.

25 *Waikana v. Rymill*, (1883) 10 Q. B. D. 178.

1 *Bank of Bombay v. Suleman*, (1908) 13 B. L. P. C. following *In re Queale's Estate*, (1886) 12 L. R. 17 Ch. D. 361.

2 *Davis v. Hatchings*, (1907) 1 Ch. 356 following *Jones v. Smith*, (1841) 1 Hare, 43 affirmed (1843) 1 Ph. 244.

3 *The Barnam Wood*, (1907) P. 1: 23 T. L. R. 58.

Where the sellers at an auction sale so conduct themselves with reference to the sale that bidders are induced to leave and the purchaser is present and had notice of these circumstances, he is affected with notice of the impropriety of the sale.⁴

(c) *Gross negligence*. What constitutes "gross negligence" is always excessively difficult to define⁵ but it must be something which raises a positive equity against the negligent person.⁶ It need not amount to fraud.⁷

"On question involving negligence and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances or even the general practice of the community on the subject, are admissible as affording a standard by which the conduct in question may be gauged."⁸ In a suit in which the question was, whether the pupils at a certain school were properly treated, evidence was held to be admissible of the general treatment of boys at schools of the same class, as affording a criterion of what the treatment should have been at the school in question.⁹

In a case in which a doctor was charged with criminal negligence, the prosecution, in order to show that a particular injection given by the doctor was too strong and to negative the suggestion that the death of a particular boy, to whom it was given, was due to an exceptional reaction to the injection, tendered evidence of the symptoms, illness and death of nine other children. The Privy Council held that such evidence was rightly received, not as that of a course of conduct showing the doctor's negligence but as tending to show from the effect produced that the injection was dangerously strong.¹⁰

(d) *Registration*. Registration amounts to notice if the deed is compulsorily registrable.¹¹

(e) *Notice to agent*. The rule of imputed notice is subject to certain limitations. Notice should have been received by the agent (1) during the

4. *Chabildas v. Daval*, (1907) 31 B. 566 (P.C.).

5. *Gidyer v. Finch*, (1856) 5 H.L.C. 905; 26 L.J. Ch. 65.

6. Per Lord St. Paul, 1 C. in *Dixon v. Micklethwait*, (1888) 8 Q.B. App. 155; 42 L.J. Ch. 210.

7. *Illois Bank, Ltd. v. F. B. Gardner & Co.*, (1908) Cal. 22; 11 R. 36 Cal. 868; 121 I.C. 625.

8. *Illois Bank, Ltd. v. F. B. Gardner & Co.*, (1908) Cal. 22; 11 R. 36 Cal. 868; 121 I.C. 625. Whart: Negligence, a. 46, and cases, post; see also Bevan, Principles of the Law of Negligence, (1889); Roscoe N. P. Ev. 790 et seq. and cases there cited, and Best, Ev. p. 80. "When the facts are settled the existence of negligence is a question of law though reference is thereby implied to a standard of reasonable care and common experience with which the judge must often be necessarily acquainted."

In the case of a railway accident Willes, J. said: "I go further and say that the plaintiff should also show with the reasonable certainty what a prudent person should have taken." *Dixon v. Metropolitan Ry Co.*, (1871) L.R. 5 H.L. 45. In some cases, however, negligence will be presumed from the mere happening of an accident; see *Taver v. Es.*, 8 Q.B. 188.

9. *Boydell v. Wilkes*, (1824) 1 C. & P. 65; but evidence is not admissible of the comparative treatment of boys at any other particular school, ibid.

10. *John Oni Akerele v. The King*, 1943 P.C. 22; 1 C. 107; 44 Cr. L. J. 566; 1943 A.I.J. 427.

11. *Hutchins v. Kashi Nath*, 1942 Bom. 44 Bom. L.R. 727; *Kendegewala v. P. Chandra*, 1953 Mys. 22; 1 L.R. 1953 Mys. 152.

agency (2) in his capacity as agent, (3) in the course of the agency business, (4) in a matter material to the agency business, and (5) should not have been fraudulently withheld from the principal.¹²

9. Good and bad faith: Fraud. It is a truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements, and if those whose duty it is to investigate questions of fraud, are to insist upon direct proof in every case, the ends of justice would be constantly, if not invariably, defeated. It is not that fraud can be established by any less proof, or by any different kind of proof, from what is required to establish any other disputed question of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or that fraud should be presumed against anybody in any case, but in the generality of cases, circumstantial evidence is the only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason whatever why the Court should not act upon it.¹³ A party's good faith in doing an act may generally be inferred from any facts which would justify its doing.¹⁴ In such cases, the information (whether true or false) on which he acted will often be material. Where, in answer to a charge of theft, the accused alleges a claim to the property, the Court should not convict him of theft, if the claim was made in good faith (even if it proves to be unfounded) and this should be determined by considering all the circumstances.¹⁵ Although the opinions and acts of other parties are not generally admissible, yet when opinions and acts lead to the formation of a belief in another mind, and that belief is the fact in issue, those opinions and acts acquire a legal evidentiary relation and become admissible. So, to show the *bona fides* of a party's belief as to any matter, it is admissible to show the state of his knowledge and that he had reasonable grounds for such belief.¹⁶ For, though it is now settled that in order, apart from statute, to maintain an action for deceit, there must be proof of fraud, a false statement made in the honest belief that it is true being not sufficient and there being no such thing as legal fraud in the absence of moral fraud, yet, a false statement made through carelessness and without reasonable belief that it is true, though not amounting to fraud, may be evidence of it, and fraud is proved where it is shown that a false representation has been made (a) knowingly, or (b) without belief in its truth; or (c) recklessly, careless

12. Explanation 3 and proviso to the definition of notice in S. 3, T. P. Act.

13. Per Dwaidenath Mitter, J. in *Mafumara v. P. M.* (1897) 11 W. R. 482, 483; s.c. 3 B.L.R.R. (A.S.) 108; but fraud and dishonesty are not to be assumed upon a signature, however probable. *Indul v. Kothby* 3 Moo. I. A. 1; secrecy as evidence of fraud, see *Jodha v. Alliance Bank of India* (1894) 22 C. 185, see cases cited in notes to Ss. 102, 111 post.

14. *White v. S.* 35. Cited in Phipson, Ev. 11th Ed., p. 185.

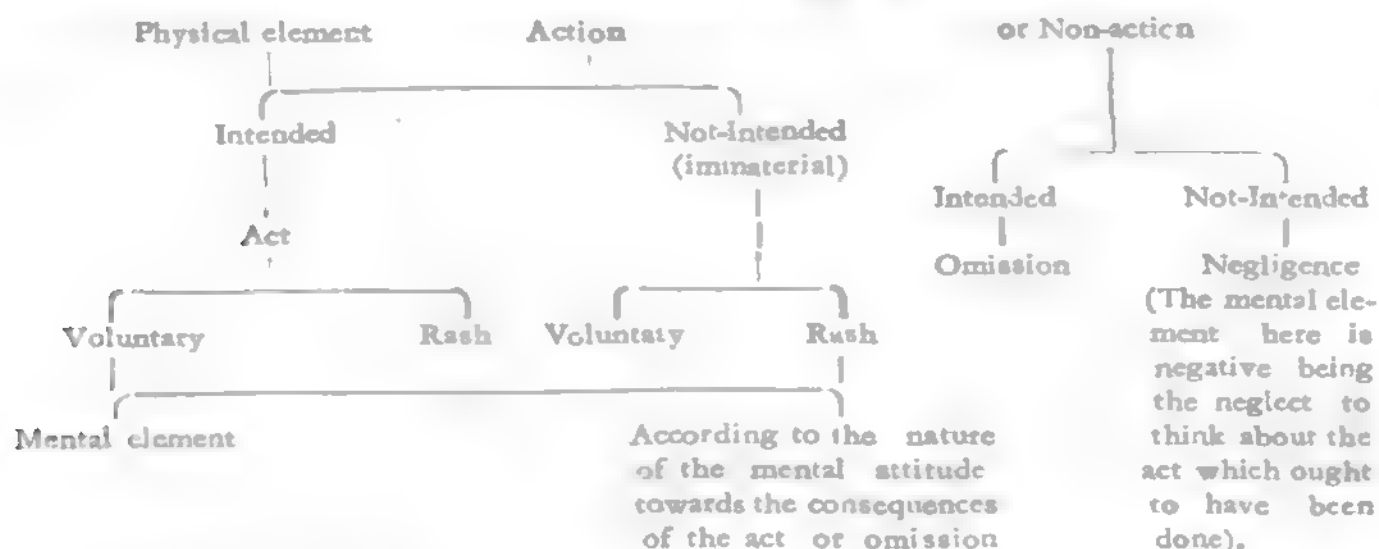
15. *Suraj Ali v. Arphan Ali*, 44 C. 66.

36 I.C. 185. 20 C.W.N. 1270. A.I.R. 1917 C. 648.

16. *Derry v. Peek*, (1889) 14 App. Cas. 337. "A man's own assertion of what he believed or recollection of what he thinks he believed, at a certain time, is worth very little without some kind of confirmation from the external conditions. Obviously the best and most natural confirmation would be found in circumstances showing that the alleged belief was such as with the means of knowledge then at hand, a reasonable man might have entertained at the time". Pollick's Law of Fraud in India, 44, 45.

whether it be true or false; and if fraud be proved, the defendant's motive is immaterial—it matters not that there was no intention to injure the person to whom the statement was made¹⁷. To show the *bona fides* of a party's belief, he may show that it was shared by the community, or even by individuals similarly situated to himself¹⁸. The relative positions and circumstances of the parties are often material in determining their good or bad faith in a transaction, a higher standard of probity being demanded from either, when the other is, e.g. of weak intellect, intoxicated, illiterate, or acting under duress or fear, or occupies the position of child, ward, client or patient to the other.¹⁹

Allegations of *mala fides* against a petitioner for winding up can generally be substantiated by circumstantial evidence only²⁰. From the delay in issue of a certificate by the Government to practise as a Notary Public, it cannot be legitimately inferred that in doing so the Government acted *mala fide* deliberately to deprive the Notary Public of his right to practise as such²¹.



17. *Derry v. Peek*, supra, 346, 356, 369 and 371 in which the distinction is made between facts which constitute fraud and those that are only evidence of it, Roscoe, N.P. Ev., 848, and cases there cited; Indian Contract Act, S. 17; Pollock's Law of Fraud in India, 432–56 as to concealment of material facts: see *Smith v. Hughes*, 1898 1 Q.B. 597; *Ward v. Hobbs*, (1878) 4 App. Cas. 13; inadequacy of price is evidence of fraud: see Indian Contract Act, S. 26; Specific Relief Act S. 28; see generally as to fraud, Roscoe, N.P. Ev. 633–635, 847–855; it must be properly pleaded; a case of fraud cannot be started in middle of cross-examination for the first time: *Lever v. Goodwin*, (1887) 36 Ch. D. 1; 36 W. R. 177.

18. *Lees v. White*, 1899 1 Q.B. 100; *Stearns v. Byrd*, 2 H. & C. 193; Roscoe, N. P. Ev., 853, see note to illust. (f). In

Penny v. Hanson, (1887) 18 Q. B. D. 487, the question was whether A intended to deceive B by pretending to tell his fortune by the stars; it was held that the evidence that A or others *bona fide* believed in his ability to tell such fortunes was inadmissible; Denman, J., remarking: "We do not live in times when any sane man believes in such a power", and see *Lewis v. Fermor*, 18 Q. B.D. 532, 536, per Willes, J.

19. *Johnson v. Johnson*, 1871 13 Q.B. 100; Pollock's Law of Fraud in India, 65, 66, 76; 77: see notes to s. 111, post.

20. *Aluminium Corporation of India, Ltd. v. Lakshmi Ratan Cotton Mills Co. Ltd.*, 40 Com. Cas. 259; (1969) 2 Comp. L. J. 357; 1970 A.L.J. 487; A.I.R. 1970 All. 452, 466.

21. *Kashi Prasad Saksena v. State Government*, 1969 1 P. A.I.R. 1969 All. 195, 199.

ment of all the qualities which we demand of the good citizen, a device whereby to measure the defendant's conduct by reference to community valuations.²⁴

11. Rashness. It is clear that a person who acts or omits to act may or may not possess a mental attitude towards the consequences of his act or omission, that is to say, he may not think about them. In the former case, his conduct is either voluntary or rash; in the latter it is heedless. In rashness, the party guilty of a rash act neither intends evil nor does he know that evil is likely nor has he reason to believe that it is likely. On the contrary, he does not think that evil will ensue. He thinks of the probable consequences of his act or omission but from insufficient advertence assumes that they will not ensue. He does think about the consequences (although insufficiently) and it is this fact which distinguishes rashness from heedlessness, for, in heedlessness the person acts because he does not think about the probable consequences of his conduct at all. In existing systems of law however, this distinction does not seem to be made and in the Indian Penal Code heedlessness is included in the term rashness which thus signifies an insufficient advertence or complete inadvertence on the part of the agent to the consequences of his conduct and this state of mind is contrasted with negligence, which denotes entire inadvertence to some act which ought to have been performed, and a *fortiori* to the consequence of its nonperformance. This distinction has been brought out by Holloway, J., in *Reg. v. Nidumarti Naga Bhushanam*.¹ Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consequences. Culpable negligence is acting without the consciousness that the illegal and mischievous consequences will follow but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness.

12. Similar acts. Where the accused was charged under Sec. 206 of the Indian Penal Code with fraudulently transferring three properties to three different persons on a certain day in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day, and apparently with the same object, held that this evidence was admissible under this and the next section to prove either that all those transfers were parts of one entire transaction, or that the particular transfers which were specified in the charge were made with a fraudulent intent.² Evidence of similar frauds, committed on other persons by the same agent of the defendant company, in the same manner, with the knowledge and for the benefit of the company, is

24 The Indian Law is the same. *Reg. v. Nidumarti Naga Bhushanam* (1899) 7 M.H.C.R. 119; *Singh v. R.* (1892) 53 Cal. 333; 91 I.C. 889; A.I.R. 1926 Cal. 300, 304; *Emperor v. Abdul Latif*, A.I.R. 1944 Lah. 163; 23 I.C. 208; *Armstrong Pillay v. Guanasooda* (1961) 2 M.L.J.N.

R.C. 59; *Parthasarthy*, *Inter.* (1959) M.W.N. (Cr.) 21 at p. 25; A.I.R. 1959 Mad. 497 (*Ramaswami J.*).
25 *Austin's Jurisprudence*, Sec. 29, p. 440.
1 (1872) 7 M.H.C.R. 119.
2 *R. v. Vauram*, (1892) 16 B. 414.

admissible to prove fraud.³ In like manner, in actions for false representation, where the question turns on fraudulent intent, other misstatements besides those laid in the statement of claim will be admissible in evidence, for the purpose of showing that the defendant was actuated by dishonest motives.⁴ And the defendant may show representations made by him to others with the view of proving his own *bona fides*.⁵ Where *A* and *B* were charged with conspiring to defraud *C* by representing that *A* owned certain property, and *B*'s defence was that he honestly believed the representation being himself the dupe of *A*, it was held that letters between *A* and *B* not communicated to *C* prior to the completion of the transaction, regarding it, were admissible in *B*'s favour.⁶ See further as to the question of good faith, illustrations (f), (g) and (h), ante.

13. Malice. Malice in doing an act has generally to be proved by the previous or subsequent conduct⁷ and relation of the parties, e.g. previous enmity, threats, quarrels and violence, waiver in rebuttal, previous expressions of goodwill and acts of kindness may be shown.⁸ Malice may even be implied from the manner in which an act is conducted in which it is in issue and, in case of libel, the mode of publication or the repetition of the libel is material to show the defendant's animus.⁹

14. State of body and bodily feeling. As to state of body and bodily feeling, see illustrations (l) and (m) ante. In a divorce case, a letter written by the wife to her mother-in-law is good evidence under this section of her feelings towards the plaintiff at the time the letter was written.¹⁰

15. Explanations. The explanations to the section are illustrated by the illustrations (n), (o), (p) and (q) appended to it. The rejection of the general facts relevant to the case and that the collateral matter is too remote, if, indeed, there is any connection with the *factum probandum*.¹¹

³ *D. v. A.* (1847) 12 A.S. 400. See also *R. v. Wyatt*, (1904) 1 K.B. 188, in which the question was whether upon an indictment for obtaining credit by means of fraud evidence could be given of secret acts committed by the accused at a period immediately preceding the offence by which the accused was being tried, and the answer given by the judges was in the affirmative.

⁴ *Hunt v. Hunt*, (1879) 1 F. & F. 465. See also *N. v. N.*, 44 Q.B. 411.

⁵ *Shaw v. Shaw*, (1884) 12 Q.B. 475.

⁶ *R. v. Williams*, (1897) 1 D. & R. N.P. 61.

⁷ *Thompson v. Thompson*, (1870) 2 B. & Ad. 845 the question being whether a letter written by the plaintiff to the defendant, filed by the clerk of the court, and used for the purpose of procuring persons from taking bail for *B* when he was arrested, was admissible in showing *A*'s malice.

⁸ For meaning of "good" and "fair" conduct and facts of good faith see *R. v. Abdool*, (1907) 51 B. 293.

⁹ *Physick v. Physick*, (1881) 188 189. *Taylor v. Taylor*, Ev., ss. 340-347. See illus. (c), ante; as to *bona fides*, see *R. v. Labouchere*, 14 Cox. 419; *Scott v. Sampson*, (1882) 8 Q.B. D. 419.

¹⁰ *Dr. Nuranjan Das Mohan v. Mrs. Eng. Mohan*, 1943 Cal. 146, 11 I.R. (1944) 1 C.L.J. 313, 205 I.C. 597, 47 C.W.N. 251.

¹¹ *Norton v. Norton*, 189. See remarks of Willes J., in *Hollingham v. Head*, (1859) 7 L.J. Q.B. 241. "It is dangerous to admit such speculative evidence. I think we are fraught with great danger. If such evidence were held admissible, it would be difficult to say in an action of assault, that the plaintiff need not give evidence of former assaults committed by the defendant upon other persons of a particular class for the purpose of proving that he was a quarrelsome individual, and therefore it was highly probable that the particular charge of assault was well founded. The extent to which this sort of thing might be carried is unconceivable."

(a) *Explanation 1*—The meaning of the first Explanation is "that the state of mind to be proved must be not merely a general tendency or disposition, towards conduct of a similar description to that in question, but a condition of thought and feeling—having distinct and immediate reference to the matter which is under enquiry." The fact that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings does not bear with sufficient directness on his conduct on any particular occasion, or as to any particular matter, to make it safe to take it as a guide in interpreting his conduct; what is wanted is a fact which will throw light on his motives and state of mind with immediate reference to that particular occasion or matter. Illustrations (a) and (b) make this clear. A man is accused of receiving stolen goods with guilty knowledge, if he is merely shown to be generally dishonest, the probability of his having been dishonest in this particular transaction is perhaps increased, but only in a vague and indefinite way; but if, at the time he is found in possession of a number of other stolen articles, this fact throws a distinct light on his knowledge and intentions as to the articles of which he is found in possession. It would be dangerous to infer that because a man was generally dishonest, he is dishonest in any single case but it is not dangerous to infer that a man, who is found in possession of 50 articles, which are shown to have been stolen from different people, came by each and all in a dishonest manner."¹²

Where the issue was whether a particular item of property comprised in a deed or mortgage was by a mistake wrongly described and so ought to be rectified, it was held that the fact that the mortgagor had mortgaged the same item to another mortgagee with the same description and has been compelled by that mortgagee to consent to rectification, was not relevant.¹³ Evidence of commission of other offences such as thefts does not show an intention to commit a different kind of offence such as dacoity and is not therefore relevant as showing the existence of any intention to commit, or to engage in a conspiracy to commit dacoity.¹⁴

The general tendency of an accused cannot be proved as that would amount to proving his bad character (see section 54 post). The facts offered in proof must show the state of mind in reference to a particular matter in question.¹⁵

(b) *Explanation 2*—The Criminal Procedure Code¹⁶ contains provisions as to the procedure to be adopted in the case of previous conviction. These provisions have been made with the view of preventing the jury or assessor, from being biased against the accused by the knowledge that he is an old offender. But, notwithstanding anything in the Code, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the

12. **Cunningham, Ev., 118, 119.**

13. **Harcourt, Ltd. v. Smt. Haridas Debi, 1944 P.C. 6, 41 I.A. 110; 14 I.R. 41 Cal. 972, 23 I.C. 687; 12 A.L.J. 774; 16 Bom. L.R. 400; 19 C.T.J. 484; 18 C.W.N. 817; 27 M.L.J. 80.**

14. **Emperor v. Wahiduddin, 1930 B. 157; 1 I.R. 54 Bom. 524; 127 I.C. 180; 31 Cr. I.J. 1168; 32**

Bom. L.R. 324; see also Emperor v. Hosham Mohamed, 1923 Bom. 71; 1 I.R. 46; 1928 75 I.C. 61; 24 Cr. I.J. 367; 25 Bom. L.R. 214.

15. **Lakshminarayana v. The State, 69 Bom. L.R. 888, 1968 Cr. I.J. 1584; A.I.R. 1968 Bom. 400, 421.**

16. **S. 310, as substituted by Act 26 of 1945 for the original s. 310.**

previous conviction is relevant under this Act.¹⁷ According to this section, previous convictions become relevant when the existence of any state of mind or body or bodily feeling is in issue or relevant.¹⁸ Under the present section, the previous conviction will not be relevant unless the commission of the offence for which the conviction was had is relevant within the meaning of the preceding portion of the section. The second Explanation, therefore, does not extend the scope of such portion, but is merely an application of the rule contained in it, to those particular circumstances in which the acts sought to be given in evidence in proof of intention have been themselves adjudicated upon in a criminal proceeding previously taken.¹⁹ The proof must always be strict. Thus, extracts from a Gaol Register and certified copies of previous convictions are insufficient without proof of identity.²⁰ Having regard to the character of the offence under Section 400 of the Indian Penal Code, previous convictions of dacoity are relevant under this section. Convictions previous to the time specified in the charge or previous to the framing of the charge are relevant under the second Explanation to this section, but convictions subsequent to the time specified in the charge, and to the framing of the charge itself are not so admissible.²¹

Evidence of a previous conviction is admissible under this section, not as evidence of character but as evidence to prove habit and association,²² and in order to prove that the person charged shared the purpose of a gang of dacoits, previous conviction for and previous commission of similar offences are relevant under this Explanation.²³ The previous offences must, however, be of a cognate character so as to reasonably permit an inference as to the state of mind of the person charged.²⁴

Where in a trial of the accused, on a charge of belonging to a gang of thieves, evidence was offered of his previous conviction for dacoity twenty-five years before, it was held that the conviction was so long ago that it was useless, except for showing that the accused was a person of criminal tendencies of theft who might be a member of the alleged gang, but that it did not go to show that he had any habit of committing theft in the period under consideration, for he might have reformed since he was released from jail.²⁵

Where an accused person is charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity, under Sec. 400 of the Indian Penal Code, evidence showing that he has been previously convicted on a charge of theft or has been ordered to give security for good behaviour is not admissible under this section.¹ And it has been held that evidence of bad livelihood is admissible to prove the habit of such offences in addition to evidence of previous convictions when, under Sec. 401 of the Penal Code, association for the purpose of habitually committing theft has been proved, and that for

17 See S. 11 C. P. Code (old).

18 *R. v. Arlovaiva* (1903) 5 Bom. L.R. 805; (1903) 28 B. 129.

19 See *Moss* (supra) ante.

20 *R. v. Abdul* 1916 Cal. 344, 43 C. 1128; 33 I.C. 825; 17 Cr. L.J. 185; 20 C.W.N. 725.

21 *R. v. Naba* (1897) 1 C.W.N. 146 referred to in *Mankura v. R.* (1899) 27 C. 139, 143; 4 C.W.N. 97.

22 *Beni Madho v. Emperor*, 1933 Outh. 375; 146 I.C. 1064; 10 C.W.N. 688. *Amudumyan v. Emperor*,

1937 Nag. 17; 11 R. 1937 Nag. 815; 100 I.C. 582, 587; 38 Cr. L.J. 237, 251 (F.B.).

23 *Sharaf Shah Khan v. State* 11 R. 1962 A.P. 96; A.I.R. 1963 A.P. 314.

24 *Idid*.

25 *Mohi Ram Hira v. Emperor*, 1925 B. 195; 89 I.C. 527; 26 Cr. L.J. 1391; 26 Bom. L.R. 1273.

1 *R. v. Sher Mahomed* 1923 Bom. 71; 11 R. 46; Bom. 948; 75 I.C. 67; 24 Cr. L.J. 807; 25 B.L.R. 314.

this purpose evidence of bad livelihood is of more weight than evidence of isolated facts. In a trial for an offence of keeping a common gaming house under the fourth section of the Prevention of Gambling Act (IV of 1887, Bombay), evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention.² In a case in the Calcutta High Court it was held that evidence of association with men accused of the same offence was relevant under this section because it was not an intention to be proved in the instant case and also under the next section because it had not been proved in a series of similar occurrences.

16. Sedition, charge of. In several cases, the question of evidence of intention in the case of sedition has been discussed. Where certain speeches formed part of a series of speeches, or lectures on the topic delivered within a short period of time, it was held that any of such speeches or lectures will be admissible under this section as evidence of the intention of the speaker in respect of the speeches which formed the subject of the charge.³ In another case it was held that seditious articles published in the same newspaper, but not forming part of the subject of the charge on which the persons were then being tried, were admissible to show the intention of the persons who printed or published the articles which were the subject of the charge, since under Act XXV of 1869, Sec. 7, which throws the onus on the accused, the printer or publisher is responsible for everything that appears in the new paper unless he can prove absence in good faith, without knowledge that during his absence seditious matter would be published.

In yet another case it was held that articles not forming part of the subject of the charge and appearing in other issues of the newspaper were not admissible to show the intention of the writer, in absence of proof of his identity, and it was declared that while the printer or publisher would be amenable on proof that the article was calculated to excite feeling of hatred, disaffection or contempt towards the Government, the writer would only be amenable on proof that such feelings were actually excited by it or that he intended them to be so,⁴ and it has also been held that under the Newspapers (Incitement and Abetment) Act VII of 1908, Sec. 8, no question of intention arises.⁵

17. Illustrations. (a) *Illustration (a)*—According to English Law such evidence of intention in the case of indictments for receiving stolen goods, is admissible only subject to certain limitations.⁶ This illustration makes no

² *Bhongu v. R.* (1911) 38 C. 408.

³ *R. v. Alphonso*, 1903, 5 Bom. L. R. 806, Jacob, J. dissenting from (1903) 28 B. 129.

⁴ *Arif v. R.* (1907) 32 C. 957, 29 I. C. 513; A.I.R., 1916 C. 188.

⁵ *Chidambaram v. R.* (1908) 32 M. L. J. 400, 30 R. v. Jogendra (1891) 19 C. 100; *Arif v. R.* (1907) 32 C. 141; *R. v. Bal G. Tilak*, (1897) 22 B. 112; *R. v. Archa Pr.* (1897) 20 A. 52; *R. v. Rani*, (1906) 2 K.B. 389; *Om Prakash v. Emperor*, 1230 Lah. 86, 123 I. C. 209, 31 Cr. L. J. 1182; *Chagnupati v. Emperor*, 1232 Lah. 90, 132 I. C. 709, 34 Cr. L. J. 83, 11 I. R. 15 Lah. 152 (S.B.); *Jagannath Prasad*

v. Emperor, 1909 Nag. 134, 189 I. C. 74, 41 Cr. L. J. 713; 1910 N.L.J. 31.

⁶ *R. v. Phanendra*, (1908) 35 C. 117, followed in *Suyendra Nath Mazumdar v. Emperor*, 1931 Cal. 100, 131 I. C. 560, 32 Cr. L. J. 78, 34 Cr. L. J. 100, 34 C.W.N. 106, dissenting from *R. v. Bal G. Tilak*, (1897) 22 B. 112.

⁷ *Mahomed v. R.* (1909) 38 C. 973; *R. v. Amba Pr.* (1897) 20 A. 55.

⁸ *Govind v. R.* (1908) 36 C. 405.

⁹ See Steph. Dig. Arts. 11, 34 & 35; Vol. c. 112, § 39; Roscoe, Cr. Ev., 10th Ed., 281, 286, and cases there cited.

(c) *Illustration (c)*. Not only is the publication of other libels evidence but the mode of their publication, to show *quo animo* they were published.²² As the existence of previous ill feeling throws light upon the *animus* with which the libel was published, so does the absence of previous quarrel, or the fact that the accused merely repeated what he had heard, affords evidence of the absence of malicious intention. But in civil suits this will only be receivable in mitigation of damages.²³

(f) *Illustration (f)*. Here the gist of the action is fraud.²⁴ *Bona fides* may necessarily always be given in evidence for where there is *bona fides*, there can be no fraudulent intent.²⁵ In a case for a false representation of the solvency of A. B. whereby the plaintiffs trusted him with goods, their declarations at the time, that they trusted him in consequence of the representation are admissible in evidence for them.¹ The case on which the illustration is based is *Sheen v Bumpstead*,² in which Cockburn, C. J., said:

"With regard to the question put to the other witnesses respecting the general reputation of W for trustworthiness as a tradesman, I think it also admissible. It was important to ascertain the state of mind of the defendant at the time he made the representation complained of, and that could only be shown by inference. A plaintiff may not be able to bring home to the defendant by direct and positive evidence a knowledge of the falsehood of his representation; the plaintiff may, however, prove certain facts which necessarily lead to that inference. Now suppose the plaintiff had called every tradesman in the town to say not only that W was insolvent but that his insolvency was notorious—would it not have been a fair and obvious remark to the jury that the defendant must have known what was the common knowledge of every other tradesman? On the other hand, if after the plaintiff has established a *prima facie* case against the defendant, the latter calls a number of tradesmen, who have had dealing with W, and they say that at the time the defendant made the representation they believed that W was perfectly solvent, is not that strong evidence—morally at least—from which the jury may infer that what was the common opinion of tradesmen in the neighbourhood was stated by the defendant and that in making the representation he acted in good faith."³

(g) *Illustration (g)*. This is the case of *Gerrish v Chartier*.⁴ The evidence was material and was properly admitted. It intended to show that the defendant was not seeking to evade payment for goods ordered for his benefit, but that he had actually paid the person with whom alone he had contracted.

22. See *Bond v. Douglas*, (1836) 7 C. 2 P. 626, where the goods brought in were carried backwards and forwards before the plaintiff's door.

23. *v. ante*; *Norton Ev.* 135, see *Pearson v. Le Marre*, (1848) 5 M. & Cr. 700, and cases cited in *Roscoe N.P. Ev.* 864; and *Cr. Ev.* 16th Ed., 711; *Taylor, Ev.*, s. 340; see *Karlsson v. Jehangir*, (1880) 14 B. 532.

24. See *Pasley v. Freeman*, (1789) 2

Smith L.C. 74.

Stoddart v. Brown, (1846) 41, 2 M. & G. 475; *Roscoe N.P. Ev.*, 859. The illustration is an example of *Norton, Ev.* 136.

1. *Fellows v. Williamson*, (1809) 1 M. & M. 306, and see *Vacher v. Cocks*, (1830), 1 B. & Ad. 145.

2. (1863) 2 H. & C. 193.

3. See *Barrow v. Hem Chunder*, (1908) 35 C. 495.

4. (1845) 1 C.B. 13.

It shows that the defendant conducted himself like a party who was dealing with 'C' as a principal and not as an agent."⁵

"A considerable body of evidence had been given by the plaintiff to show that A. interested in the matter as the defendant's agent which this evidence went directly to negative"⁶ "In an action for goods sold and delivered a general form of defence is 'I am liable to pay another person' and in such cases the jury usually comes to the conclusion that the defendant wants to keep the goods without paying for them. Here therefore it was material for the defendant to show the *bona fides* of his defence by proving payment to such third person and that was the effect of the evidence in question."

(d) *Illustration (iv)*—As regards the first instance given, see Steph. Digest, Art. 11 illustration (v)⁷. In the instances given in the illustration the first is to negative good faith, the second to rebut the presumption of *maia fides* raised by the first.⁸

The last three are on the subject of larceny of goods (see *R. v. Tharbooke*⁹ and also the whole law on the subject is considered in the judgment of Parke, B. in *Thou*), some of the reasons and *dicta* of this case have been occasionally misquoted, the case itself has been universally followed and for the most part unopposed.¹⁰ Another case of this branch of the law of larceny is *Hobbs v. Moorhead*.¹¹ In this case the defendant trespassed on a golf course and removed four golf balls which had been lost in play and (the justices found) abandoned by their owners. Property in the balls was held in the golf club. It was held that the defendant had trespassed *animus furandi* and was rightly convicted of larceny.

(e) *Illustration (v)*—This illustration which is taken from the case *R. v. Tooke*¹² is an *exemplar* illustration (see post) and differs from the two illustrations in that this illustration is a case of larceny with intent to kill, while illustration (iv) is of murder outright. In *R. v. Tooke* the prisoner was indicted for maliciously shooting at the prosecutor. Evidence was given that the prisoner fired at the prosecutor twice during the day. In the course of the trial it was objected that the prosecutor ought not to give evidence of two distinct offences, but Burrough, J., held that it was admissible on the ground that the counsel for the prisoner by his cross-examination of the prosecutor had endeavoured to show that the gun might have gone off by accident, and that the prosecutor gave evidence to show that the first was wilful and to rebut the suggestion that the second was the result of the first.¹³

(f) *Illustration (vi)*—As regards this illustration see *R. v. Robinson*¹⁴ in which previous letters sent by the prisoner were read in evidence as they served to explain the letter on which he was indicted.

5. Per Maule, J., *Gerish v. Chartier*, (1845), 1 C.B. 15.
6. Per Cresswell, J., *ib.*
7. Per Erle, J., *ib.*
8. See also Norton, *Fv.*, 157; same evidence given that the notice of the loss was within the knowledge of A.
9. See Penal Code S. 403, Expl. (2); Norton, *Fv.*, 157; Roscoe, *Cr. Fv.*, 16th Ed., 686, 687.
10. (1849) 1 Den. C.C.R. 387; 18 L. J. M.C. 140; 2 C. & K. 831.

11. 2 Russ. Cri. 12th Ed. (1964) 1011-1013 N. See also the judgment of Lord Alverstone, C.J., in *R. v. Mortimer*, (1908) 72 J.P. 349; 24 T. R. 745; 99 L.T. 204; 1 Cr. App. R. 20.
12. (1948) 2 K.B. 142; (1948) 1 All E.R. 860; (1948) 1 J.R. 1521; 64 T. L.R. 256.
13. (1823) R. & R. 531.
14. See Roscoe, *Cr. Fv.*, 16th Ed., 100; Norton, *Fv.*, 157.
15. (1746) 2 East P. C. 1010

(k) *Illustration (k)*—As regards this illustration see Taylor, *Ev.*, s. 582. This and the two following illustrations relate to feeling: the first to mental feelings of "illwill" or "goodwill", the two last to "bodily feelings."¹⁶

(l) *Illustration (l)*—As regards this illustration, see the case cited in the footnote.¹⁷

(m) *Illustration (m)*—As regards this illustration, see the cases cited in the footnote.¹⁸

(n) *Illustrations (n) and (o)*—Illustration (n) and the two following illustrations refer to the Explanation, illustration (n) illustrates "negligence" as well as illustration (o) should be read in conjunction with illustration (i) ante, v. text.

(p) *Illustration (p)*—As regards this illustration, see *Emperor v. Haji Sher Mahomed*.¹⁹

15. *Facts bearing on question whether act was accidental or intentional*—When there is a question whether an act was accidental or intentional, i.e. [done with a particular knowledge or intentional], the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations

(a) *A* is accused of burning down his house in order to obtain money for which it is insured.

The facts that *A* lived in several houses successively each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b) *A* is employed to receive money from the debtors of *B*. It is *A*'s duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by *A* in the same book are false, and that the false entry in the case in favour of *A*, are relevant.

(c) *A* is accused of fraudulently delivering to *B* a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

16. v. text.

17. See *R. v. Clutter*, 1888, 16 Cox. 471; *R. v. Johnson*, (1847) 2 C. & K. 354.

18. See *Atwood v. Kinnard*, (1865) 6 East 728; *F. v. Nicholas*, 1846, 2 C. & K. 246; 2 Cox. C.C. 136; *R.*

v. Guttridge, (1840) 9 C. & P. 471. 19. 1923 Bom. 71; 1 I. R. 46 Bom. 958; 75 I.C. 67; 25 Bom. L.R. 214; 24 Cr. L.J. 867.

20. Inserted by the Indian Evidence Amendment, Act 18d. 3 of 1891.

The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

s. 14 (Facts relevant to show knowledge s. 3. ("Relevant"). or intention).

Steph. Dig. Art. 12, Norton, Ev. 140, Cunningham, Ev. 120, Taylor, Ev. s. 328; 1 Wills, Ev., 3rd Ed., 77.

SYNOPSIS

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|---------------------------|-----------------------------|
| 1. Principle. | 4. Accident or system. |
| 2. Scope. | 5. Knowledge and intention. |
| 3. Accident or intention. | 6. Illustrations. |

1. Principle. The facts are admitted as tending to show a system and therefore an intention; this section is, therefore, an application of the rule laid down in the preceding one²¹. It will always be a matter of discussion, whether there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact. If there is no common link they cannot form a series, and this is the gist of the section²².

The principle on which evidence of similar acts is admissible is, not to show, because the accused has committed already some crimes, he would, therefore, be likely to commit another, but to establish the *animus* of the act, for which he is charged and rebut by anticipation, the defence of ignorance, accident, mistake, or innocent state of mind.²³ In the above-noted case, the contention raised was that the evidence relating to false entries said to have been made by the accused in certain documents was inadmissible in evidence. It was held, that the contention overlooked the provisions contained in Section 14 and this Section, and that the evidence relating to those entries was admissible to show that the false entries and falsification of the accounts, said to have been made by the accused during the charge period, were made wilfully with an intention to defraud the State. It was observed that evidence of that character is admissible under this Section, when the acts in question formed part of a series of similar occurrences to prove the intention or knowledge of the accused. It was said that it was not sufficient for the prosecution to prove that the entries were wrong entries and that they were made by the accused, the prosecution had to go further and prove that those entries were false entries and the accused made those entries wilfully to defraud the State, and therefore the prosecution could prove similar instances to establish that the accused made the entries in question wilfully to defraud the State.

In *Amrita v. Emperor*²⁴ it was said that facts similar to, but not part of the same transaction, as the main fact, are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts, although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *aliunde* on these points has been given to show the state of mind of the parties with

21 See Steph. Dig. Art. 12 and Cunningham, Ev., 120, and *Emperor v. Indrabai*, A. I. R. 1915 Cal. 573.
22 Norton, Ev., 140.

23 *Krishna Murthy v. Abdul Subban*, A. I. R. 1965 Mys. 128.
24 I. L. R. 42 C. 957 : 29 I C. 518 : A. I. R. 1916 C. 188.

regard to such facts; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. To admit evidence under this head the other acts tendered must be of the same specific kind as that in question and not of a different character, and acts tendered must also have been proximate in point of time to that in question.

2. Scope. This section is a particular application of the general rule laid down in the previous section²⁵. It applies to cases where there is conduct indicating a system.¹

In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence may be given to prove that the accused has been concerned in a systematic course of conduct of the same specific kind as that in question may be given.² The words of the section as well as of illustration (a) show that it is not necessary that all the acts should form part of one transaction but that such acts should form part of a series of similar occurrences.³ Under this section, the prosecution cannot use the evidence, as to the commission of other acts of a similar nature, in proof of the existence of the specific acts which form the subject matter of the charge. But when the existence of these acts has been established by evidence *abundante* and the only question which remains to be decided is whether they were done accidentally or intentionally or with a particular knowledge or intention, then and then only could the evidence of other similar acts be let in, provided: (a) it was shown that such acts were of the same specific kind, and (b) they formed part of a series of occurrences in each of which the person committing the act was concerned.⁴ Evidence of a single act is admissible. One evidentiary fact can form a series, within the meaning of this section, with the act to be proved. It was no doubt, held in *Amrita Lal's case*,⁵ that the acts tendered must have been proximate in point of time to that in question, but the decision in *Rex v. Rhoten*⁶ shows that this question of proximity relates rather to the weight to be given to the evidentiary facts than to their admissibility. It is, however, plain from all the decisions that the acts of which evidence is tendered must be of the same specific kind as that in question.⁷ This section must be read as subject to section 11 so far as evidence

²⁵ *Emperor v. Deendra Prasad*, 11 L.R. 36 Cal. 573; 9 C.L.J. 610; 13 C.W.N. 973.

¹ *Rogheerath v. R.*, 1910 Cal. 1084; 46 I.C. 696; 19 Cr. L.J. 781; 22 C.W.N. 494.

² *Amrita v. Emperor*, 1913 Cal. 188; 1 L.R. 42 Cal. 957; 29 I.C. 513 (in which it was said that *R. v. Holt*, (1880) 111 C.C. 290, 30 Cox C.C. 411 is no longer of authority); *R. v. Harjean Vahj*, 1920 Bom. 281; 1 L.R. 50 Bom. 174; 98 I.C. 407.

³ *Emperor v. Deendra Prasad*, 11 L.R. 36 Cal. 573 followed in *Emperor v. Yakub Ali*, 1971 All. 251; 89 I.C. 673; 18 Cr. L.J. 529; 15 A.L.J. 241.

⁴ *M. I. Pritchard v. Emperor*, 1928

10 Cr. L.J. 12; 1 C. 80; 30 Cr. L.J. 18.

⁵ *Amrita Lal Harra v. Emperor*, A. I.R. 1915 Cal. 18; 1 L.R. 42 C. 957; 29 I.C. 513.

⁶ (1899) 1 Q.B. 77; 68 L.J.Q.B. 57; 1 L.R. 101; 1 L.R. 57; 47 W.R. 121; 62 J.P. 774; 19 Cox C.C. 182.

⁷ *A.H. Gentry v. The King*, 144 R. 324; 1941 R.L.R. 566 relying on *Rex v. Board*, 1888 2 K.B. 89; 75 L.J. K.B. 693; 95 L.T. 296; 21 Cox C.C. 252; and *Rex v. Armistead*, 1923 1 K.B. 100; 91 L.J.K.B. 904; 16 Cr. App. R. 149; 127 L.T. 221; In *Moti Lal Roy v. Panchbibi Industrial Bank, Ltd.*, 1946 Cal. 440; 223 I.C. 481; 50 C.W.N. 437. It has been held that

of knowledge and intention is concerned. The fact that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings, does not bear with sufficient directness on his conduct on any particular occasion, or as to any particular matter, to make it a safe guide for interpreting his conduct; what is wanted is a fact which will throw light on his motives and state of mind with reference to that particular occasion or matter.⁸ So evidence of other incidents may be admissible to show that the administration of poison in the particular case was intentional and not accidental, if the administration of the poison by the accused is otherwise established.⁹ The words of Sec. 15, Evidence Act, are wide for the material word used is "concerned", but they are not so wide as to admit hearsay evidence or the evidence of facts alleged to have been discovered by the investigating Police Officer in the course of his investigation and not properly proved.¹⁰

3. Accident or intention. A distinction must be made between accident and intention. In *R. v. Harrison-Owen*,¹¹ the appellant was found in a dwelling house about 1 o'clock in the morning. At his trial for burglary, he pleaded by way of defence that he had no recollection of entering the house and must have done so in a state of automatism. The trial Judge had admitted the evidence of past convictions in view of this defence that has been raised—that there was no intention in the act from start to finish, and that his presence in the house was purely accidental.¹² Lord Goddard, C. J., delivering the judgment of the Court of Criminal Appeal, described this as a confusion of intention and accident, the real defence here being, not that the act was accidental, but that it was involuntary. Lord Goddard differentiated between a defence which is in substance 'I did not do the act, but I did it involuntarily'. In the former case the issue is causation; in the latter it is state of mind. In the former case, the defence is accident; in the latter it is the absence of intention. In the former case, the defendant contends that his activities played no (or inadequate) causative part in bringing about the facts constituting the crime.

These two classes of cases should be kept completely distinct, because the reasons for which the admissibility of similar fact evidence might be justified are very different in the two cases. The basis of admissibility of such evidence on the issue of accident is the improbability of the coincidence of many identical or similar accidents. This was clearly stated in *R. v. Sims*,¹³—although there the distinction between accident and intention was, as in so many of the decided cases, blurred. The relevance of similar fact evidence on the issue of intention, on the other hand, will usually be a relevance *via propensity*—the propensity to have a particular state of mind. Hitherto it has

⁸ "One instance cannot constitute a series of similar occurrences in the ordinary meaning of the language" and the cases of *Amrita Lal Hazra v. Emperor*, A.I.R., 1916 Cal. 188 and *Emperor v. Panchu Das*, A.I.R. 1920 Cal. 500 were relied upon in support of the proposition. But the question decided in the Rangoon case was neither raised, nor decided in these cases.

⁹ *Gunwant v. Emperor*, 1916 Nag. 73; 38 I.C. 723.

¹⁰ *Ramsingh v. Emperor*, 1942 Pat. 291; 1948 I.C. 662, *Kishnam v. Emperor*, 1928 Nag. 248; 73 I.C. 202.

¹¹ *Shewaram v. Emperor*, 1939 Sind 209; 184 I.C. 474.

¹² (1951) W.N. 483; 35 Cr. App. R. 168; (1951) 2 All F.R. 726.

¹³ *R. v. Harrison-Owen* (1951) 2 All E.R. 726, 727.

(1946) K.B. 581, 587. "The most familiar example (of admissibility) is when there is an issue whether the act of the accused was designed

house had died previous to the present charge from the same poison was held to be admissible¹⁹. When a boy of twelve gets drowned in a tank, there is always a possibility that there has been an accident, but previous attempt to kill the boy would be admissible to rebut a suggestion of accidental drowning²⁰. Upon the trial of a prisoner for the murder of her infant by suffocation in bed, it was held that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which these children died²¹. Upon the trial of an indictment for using a certain instrument with intent to procure a miscarriage, it is relevant, in order to prove the intent, to show that at other times, both before and after the offence charged, the prisoner had caused miscarriages by similar means.²² In a trial for forgery, evidence of similar transactions not included in the charge is relevant as proof of intention though not as proof of the forgery²³. Under the trial of an indictment for arson where the prisoner was charged with wilfully setting fire to her master's house, it was held that two previous and abortive attempts to set fire to different portions of the same premises were admissible, though there was no evidence to connect the prisoner with either of them.²⁴

But, in a prosecution, on a charge of arson under Sec. 486 of the Indian Penal Code, evidence of a previous act of arson, which could not have formed the subject of a criminal charge as there was no element of fraud in it, was held to be inadmissible²⁵. But, where successive shops of the accused, each of them being insured, were burnt down in three successive years, it was held that the successive fire indicated that they were not accidental but were designed and evidence of previous fires was, therefore, admissible¹.

Where the plaintiff in an action for negligence alleged that he had contracted an infectious disease through the negligence of the defendant, a barber, in using razors and other appliances in a dirty and insanitary condition, and, in support of his case, he tendered the evidence of two witnesses who deposed that they had contracted a similar disease in the defendant's shop; it was held that as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by the defendant, the evidence of those witnesses was admissible². Facts to establish that *A* and *B* have "hunted in couples" and in several instances taken part in thefts from rich prostitutes

19. *R. v. Cotton*, (1873) 12 Cox 400; *R. v. Gearing*, 1849, 18 L. J. M. C. 215 followed.

20. *Emperor v. Shankaraya*, 1940 Bom 361, 1 L. R. 1940 Bom 695, 191 I.C. 272.

21. *R. v. Roden*, 12 Cox C. C. 630 following *R. v. Cotton*, *supra*, it was objected by the counsel for the prisoner, that the evidence admitted in *R. v. Cotton*, pointed direct to prior acts of poisoning but in this case it was not proposed to prove that the four children died from other than natural causes per Lush, J. "The value of the evidence cannot affect its admissibility. The principle of *R. v. Cotton*, applies".

22. *R. v. Dale*, (1889) 16 Cox 708, *R. v. Bond*, (1906) 21 Cox, 256, in which Lord Alverstone, C. J. said:

If *R. v. Dale* is to be construed to authorize the admissibility of evidence of prior acts of a similar kind where the act is admitted and the only question is the purpose for which it was done, it goes too far.

23. *Krishna v. R.*, 1917 Cal. 676; 43 C. 783, 33 I. C. 306. *Kedarnath v. Emperor*, 1935 All. 521, 1 L. R., 1935 All. 639; 157 I.C. 557.

24. *R. v. Bailey*, (1847) 2 Cox C. C. 311.

25. *A. H. Gandhi v. The King*, 1941 R. 324, 1941 R. L. R. 560.

1. *Nursi Amin v. Emperor*, 1939 Cal. 835, 1 L. R. (1939) 1 Cal. 511; 182 I.C. 386.

2. *Hales v. Kerr*, (1908) 2 K.B. 601; 24 T. L. R. 779.

that is, a series of incidents from 1914 to 1918 to establish that they have lived together and had transactions together, that a system had been followed by them, that they used to go about together under different names, and had associated together with an evil motive namely, the commission of thefts from rich prostitutes, were sought to be given in evidence. Held (Chaudhuri, J., dissenting) that such evidence was not admissible either under Sec. 14 or under Sec. 15 of the Evidence Act. The gist of this section is that unless there is sufficient and reasonable connection between the fact to be proved and the evidentiary fact that is, unless there is in substance some common link, they cannot form a series. Evidence of general disposition, habit and tendencies is not relevant. Evidence of collateral offences cannot be received as substantive evidence of the offence on trial, though, under this Section, evidence may be given of intention and like matters, where the *factum* of such intention on like matters is relevant. The admissibility, not merely the weight of the evidence, depends upon the evidence of such conduct as would authorize a reasonable inference of a systematic pursuit of the same criminal object.³

Where, in a prosecution for misappropriation of money by detalcation of accounts, evidence of previous acts done by the accused was adduced, it was held that the evidence was admissible under this section to rebut, by anticipation, the probable plea of mistake or innocent condition of mind, the evidence being that of a system in which there was a common link between the previous and subsequent acts.⁴ But, where, in a prosecution of a public servant for criminal breach of trust under Sec. 409 of the Indian Penal Code, the accused pleaded that he paid the amount in dispute *bona fide* to wrong persons under a misapprehension, and the prosecution tendered evidence of other transactions in which they alleged that the accused appropriated sums of money out of the fund entrusted to him to his own use, it was held that the evidence was not admissible.⁵

If the evidence is relevant under section 14 *ante* or this section, merely because it might show previous misconduct of the accused, it is not inadmissible by virtue of section 54 *post* which does not control the other sections.⁶

In assessing the value of medical evidence in a case, what the doctor had done in the matter of grant of a certificate in another case is irrelevant.⁷

5. Knowledge and intention. It is wrong to say that this section only deals with intention as opposed to accident.⁸ The words "or done with a particular knowledge or intention" in the section⁹ must not be overlooked in construing the section.¹⁰

3. **R. v. Panchu Das**, 1920 Cal. 500; 1 L. R. 4 Cal. 61; 8 I.C. 270 (F.B.).

4. **Ram Kishan v. Emperor**, 1928 Lah. 80; 11 I.C. 387; 10 Cr. L.J. 805. Cf. **Dodd v. Emperor**, 1928 Cal. 112; 1 I.C. 213; 123 Cr. L.J. 294.

5. **Bochumdas v. The State**, 69 Bom. L.R. 808; 1968 Cr. L.J. 1784. A.I.R. 1968 Bom. 400; 422 following **Srinivas Mal v. Emperor**, A.I.R.

1947 P.C. 135.

6. **Dattaji v. State**, 1960 Cr. L.J. 127 at p. 1276 (All.).

7. As was determined in **R. v. Alcock**, 11 R. 28 Bom. 120; 1 Bom. L.R. 525.

8. Added by S. 2 of Act 3 of 1891.

9. Per Chaudhuri, J., in **R. v. Panchu Das**, 1920 Cal. 500 at 541; 1 L.R. 47 Cal. 671; 58 I.C. 929 (F.B.).

In *State of Bihar v. Kailash Prasad*¹¹ it was contended that the previous instances of user of the *chalanis* could not be taken into consideration as they formed the subject of another charge, namely, the charge of conspiracy which had to be decided in that very case. But the contention was repelled on the ground that the *chalanis* were subject of the charges and hence can be taken into consideration as relevant under this Section and that this implies also to separate instances still to be tried. It was said that there was no warrant for the view that the other instances cannot be used in regard to the accused's knowledge of the nature of the main fact for which specific charges had been framed simply because those other instances formed the subject of separate indictments which were tried simultaneously. Reference was made to *Amrita v. Postmaster, Post Office v. Lachu Das*¹² *State v. Emperor*¹³ and it was held that the evidence that the respondents were connected with similar cases of user of forged *chalanis* was admissible to prove their knowledge and intention in regard to the cases for which specific charges were framed against them.

6. Illustrations. *Illustration (a).* This illustration is founded on the case of *R. v. Gray*.¹⁴

Illustration (b). This illustration is founded on *R. v. Robinson*.¹⁵

Illustration (c). This illustration is very like illustration (a) to Sec. 14. The previous instances of user of forged *chalanis* are relevant. The examination is the same. In a case of specific charges of user of forged document evidence of similar instances of user is admissible to prove knowledge and intention.¹⁶

Illustration (d). *Illustration (d)* is founded on *State v. Emperor*.¹⁷ When there is a question whether a particular act was done, the existence of any course of business according to which that act would have been done, is a relevant fact.

Illustrations

(a) The question is, whether a particular letter was delivered.

The facts that it was the ordinary course of business for all letters put in a certain box to be carried to the post and that the particular letter was put in that place are relevant.

(b) The question is, whether a particular letter reached. The facts that it was the ordinary course of business and was not received at the Dead Letter Office, are relevant.

s. 3 ("Relevant").

s. 3 ("Relevant").

s. 114, illust. (f) ("Presumption as to course of business")

11. A I.R., 1961 Pat. 451; 1961 B.L.

12. (1951) 1 Cr. 140, 141.

13. (1951) 1 Cr. 140, 141; A I.R., 1950 C.

14. (1951) 1 Cr. 140, 141; A I.R., 1947.

15. (1951) 1 Cr. 140, 141; A I.R., 1947.

16. (1951) 1 Cr. 140, 141; A I.R., 1947.

17. (1951) 1 Cr. 140, 141; A I.R., 1947.

18. (1951) 1 Cr. 140, 141; A I.R., 1947.

19. (1951) 1 Cr. 140, 141; A I.R., 1947.

20. (1951) 1 Cr. 140, 141; A I.R., 1947.

21. (1951) 1 Cr. 140, 141; A I.R., 1947.

22. (1951) 1 Cr. 140, 141; A I.R., 1947.

23. (1951) 1 Cr. 140, 141; A I.R., 1947.

24. (1951) 1 Cr. 140, 141; A I.R., 1947.

25. (1951) 1 Cr. 140, 141; A I.R., 1947.

26. (1951) 1 Cr. 140, 141; A I.R., 1947.

27. (1951) 1 Cr. 140, 141; A I.R., 1947.

28. (1951) 1 Cr. 140, 141; A I.R., 1947.

29. (1951) 1 Cr. 140, 141; A I.R., 1947.

Steph. Dig., Art. 18; Powell, Ev., 9th Ed., 316-323; Norton, Ev., 141; Roscoe, N. P. Ev., 43, 213, 374; Phipson, Ev., 11th Ed., 182; Taylor, Ev., ss. 176-182; Field, Ev., 6th Ed., 82; Best, Ev., s., 403; Cunningham, Ev., 121; Wigmore, Ev., s. 92.

SYNOPSIS

1. Principle.
2. Course of business.
3. Postal and Telegraphic service.
4. Endorsement of refusal.

1. Principle. Evidence of the existence of the course of business is relevant, as laying a foundation for the presumption which the Court may raise from the course of business, when proved. The Court may then presume that the common course of business has been followed in the particular cases,¹⁹ and this presumption is but an application of the general maxim *omnia prae-sumuntur rite esse acta*, and proceeds the well-recognized fact that the conduct of men in official and commercial matters is to a very great extent uniform. In such cases, there is a strong presumption that the general regularity will not, in any particular instance, be departed from. Customs may like any other facts or circumstances, be shown, when their existence will increase or diminish the probabilities of an act having been done or not done, which act is the subject of contest.²⁰ It would seem to be axiomatic that a man is likely to do, or not to do, a thing, or to do it, or not to do it in a particular way, according as he is in the habit of doing or not doing it.²¹ But the course of business must be clearly made out in order to establish that connection between the facts proved and sought to be proved which is the foundation of the presumption.²²

2. Course of business. As to the meaning of the words "course of business," see notes to the second clause of thirty-second section, *post*. This section relates to private as well as public offices. Illustration (a) relates to the former, illustration (b) to the latter, namely, the post office itself.²³ Where it was sought to prove that a certain endorsement had been made on a (lost) licence entered at the Custom House, it was held to be relevant to show that the course of office was not to permit the entry without such endorsement.²⁴ And where the question was whether *A* paid *B* his wages, it was held relevant that *A*'s practice was to pay all his workmen regularly every Saturday night, that *B* was seen with the rest waiting to be paid and had not

19. S. 111 (thus, *cf. post*: the matter dealt with by this section is treated by English text writers under the subject of presumption. The ordinary course of business is proved and the Court is asked to presume that, on the particular occasion in question, there was no departure from the ordinary and general rule, see authorities cited, *supra*. *Dwarka v. Jankee*, 1855, 6 M. L. A. 88 ("It is reasonable to presume that that which was the ordinary course was pursued in this case").

20. *Walker v. Barron*, 6 Minn. 508, 512 (Amer.).

21. *State v. Redford*, 52 N. H. 528, 532 (Amer.) per Sargent, C. J. See *Wigmore, Ev.*, s. 92.

22. See *Cunningham, Ev.*, 121.

23. *Norton, Ev.*, 141.

24. *Butte v. Allart*, (1816) 1 Starkie 222; *Phipson, Ev.*, 9th Ed., 111; *Taylor, Ev.*, s. 180 A; see also *Van Omeron v. Devick*, (1809) 2 Campb. 42; *Waddington v. Roberts*, (1868) L. R. 3 Q. B. 579; *Mason v. Wood*, (1875) 1 C. P. D. 65.

afterwards been heard to complain.²⁵ So also where the demand was for the proceeds of milk sent daily to customers by the defendant as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff, every day the money which she had received, without any written vouchers passing between them, it was ruled that it was to be presumed that the defendant had in fact accounted, and that the onus of proving the contrary lay on the plaintiff. Where evidence was admitted of a book-keeper's custom of handing over collected notes to the teller as indicating that it was done in this instance, **Sherwood, J.**, said :

"It is really immaterial whether he was able to do more than to verify his entries and prove his invariable custom. These things being proved, the presumption arises therefrom that the usual course of business was pursued in this particular instance. Every one is presumed to govern himself by the rules of right, reason and consequently that he acquits himself of his engagements and duty. Whenever it is established that one act is the usual concomitant of another, the latter being proved, the former will be presumed, for this is in accord with the experience of common life. It is simply the process of ascertaining one act from the existence of another."²⁶

Where a bank used to keep at the end of each day its cash box in sealed condition in the Police Station, and it was stolen from the Station, the bank tendered in evidence its cash book and the detailed book of accounts to show the sum which was put into the box; it was held that the evidence was admissible and there was no difficulty in holding that the amount was in fact in the box.²⁷

Where it is proved that an injunction was granted the presumption is that the injunction was not only issued, but, has also been duly served.²⁸

Registration is a solemn act, to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present, are competent to act, and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. Of course it may be shown that a deliberate fraud upon him has been successfully committed; but this can only be by very strong evidence.²⁹ It may be certificate endorsed on a sale-deed by a registering officer under Section 17 of the Indian Registration Act is a relevant piece of evidence for proving the execution of the sale deed.³⁰ Where there is evidence that certain land was attached, it ought, in the absence of any evidence to the contrary, to be presumed that all necessary formalities were complied

²⁵ *Wright v. Wright*, 1735 1 Esp. 204; 10 Mod. 135; 135).
²⁶ *Roscoe v. Wm. & A. Co.*, 87 and see
Sherwood v. Sherwood, 1829) 4 C. &
P. 80.

²⁷ *Bank v. Bell*, 1811 3 Camp. 10; *Roscoe, N.P. Ev.*, 37.

²⁸ *Mitchell v. O'Neil*, 94 M. O. 527
6 S.W. 253, (Amer.).

²⁹ *B. C. Coop. Bank v. State*, A.I.R. 1959 M.P. 77.

⁴ *Bharon Prasad v. Mahant Laxmi Narayan Das*, 1924 Nag. 385; 29 I.C. 609.

⁵ *Gangamoni v. Troiluckhya* 33 I.A. 60; I.L.R. 33 Cal. 537.

⁶ *Piara v. Fattu*, 1929 Lah. 711; 116 I.C. 911.

with.⁷ Where the question was when a particular letter was received by the defendant and the evidence was that the letter was given by the plaintiff on a particular day to his peon to deliver it to the defendant, that the invariable practice followed by the peon was to despatch a letter either on the day on which he received it or the next day, or else to return it to the plaintiff's office and that the entry in the peon-book showed that it was received by the defendant, but there was no date of the receipt, it was held that the Court could presume that the letter was received by the defendant either on the date when it was despatched or the next day.⁸

It was held by the Rajasthan High Court⁹ that a typewritten reply to plaintiff's notice received by post, purporting to be from the defendant may be presumed to be on behalf of the defendant. It is submitted that it will be a highly risky presumption unless the circumstances justify it.

3. Postal and telegraphic service. The fixed methods and systematic operation of the postal and telegraphic service is evidence of due delivery of matter placed for that purpose in the custody of the proper authority. If a letter properly directed¹⁰ is proved to have been either put into the post office or delivered to the postman,¹¹ it is presumed, from the known course of business in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed.¹² If an insurance policy is sent to a person by post at his proper address, the law presumes that it must have reached him; see Illustration (f) to section 114 *post*.¹³ The presumption would apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced, signed on behalf of the addressee by some person other than the addressee himself.¹⁴ But see *Bank of Bihar v. T. S. D. (C. S.) Cal. Ltd.*,¹⁵ where it has been held that the

7. See Sec. 114 *post*. *Mohammad Akbar v. Mian Musharaf*, 1934 P.C. 217; 61 I.A. 371; 1 I.L.R. 15 Lah. 836; 115 I.C. 221; see also *Dhanpati Devi v. The Corporation of Calcutta*, 1922 Cal. 467; 1 I.L.R. (1932) 2 Cal. 321, 55 C.W.N. 751.

8. *Smt. Sushila Dasce v. H. A. Tapaswari*, 1952 Cal. 455.

9. *Nathuram v. Firm Bhonreyal Hiratal & others*, 1971 Rent C.J. 220; 100 W.L.N. 254; 1 I.L.R. (1971) 21 Raj. 472.

10. See *Walter v. Haynes*, (1824) Ray 830; 139, *Burmester v. Barron*, (1822) 17 Q.B. 828; *Taylor Ev.*, s. 142; no inference should be drawn from posting of a letter that it was properly addressed. *Ram Das v. The Official Liquidator*, (1887) 9 A. 306, 384.

11. *Skilbeck v. Carbutt*, (1845) 7 Q.B. 846.

12. *Harinarayan Banerji v. Ramshashi Roy*, 1918 P.C. 102; 45 I.A. 222; 1 I.L.R. 46 Cal. 458; 48 I.C. 277; 15 A.L.J. 961; 21 Bom. L.R. 522;

55 M.L.J. 707; 9 I.W. 148; P.C.) *Hiratal Sahu v. Lachmi Prasad Narain Singh*, 1927 Pat. 511; 102 I.C. 752; *Best., Ev.*, s. 408; *Taylor Ev.*, s. 179, and cases there cited; *Saunderson v. Judge*, (1795) 2 H.B.L. 509; *Woodcock v. Houldsworth*, (1846) 16 M. & W. 124; *Warren v. Warren*, (1854) 1 C.M. & R. 250. If a letter is sent by the post it is *prima facie* proof until the contrary be proved that the party to whom it is addressed received it in due course, per *Parke, B.* in *Warren v. Warren*, *supra*; *Lachmi v. Mohan v. Jeerjee Mohan*, (1921) 10 W.R. 253. If a letter is forwarded to a person by post and registered it must be presumed that it was tendered to him; see also S. 14 *ante*, see presumption as to post letters summarised in *Powell, Ev.*, 94.

13. *Mohan Lal v. Kurnari Babli*, 69 *Punj.L.R.* 578, 585.

14. *Hanbar Banerji v. Ramshashi Roy*, *supra*.

evidence of a general clerk whose duty was to make over the cover containing drafts to a peon of the office for posting, that the particular letter was brought to him in an envelope, that he had the envelope sealed in his presence and made it over to the peon for posting, is not sufficient to prove the posting of that letter, in the absence of the evidence of the peon.¹⁶

As to letters or notices properly directed to a gentleman be left with his servant, it is only reasonable to presume, *prima facie*, that they reached his hand.¹⁷ The fact, too, of sending a letter to the post office will, in general, be regarded as presumptively proved, if the letter be shown to have been handed to or left with the clerk, whose duty it was in the ordinary course of business to carry it to the post, and if he can declare that, although he has no recollection of the particular letter, he invariably took to the post office all letters that either were delivered to him, or were deposited in a certain place for that purpose.¹⁸ Upon the settlement of the list of contributories to the assets of a company in course of liquidator, one of the persons named in the list denied that he had agreed to become a member of the company or was liable as a contributory. The District Court admitted, as evidence on behalf of the official liquidator, a press-copy of a letter addressed to the objector, for the purpose of proving that a notice of allotment of shares was duly communicated. No notice to the objector to produce the original letter appeared on the record, but at the hearing of the appeal, it was alleged by the official liquidator, and denied by the objector that such notice had been in fact given. There was no evidence as to the posting of the original letter, or of the address which it bore, but the press-copy was contained in the press-copy letter-book of the company, and was proved to be in the handwriting of a deceased Secretary of the company whose duty it was to despatch letters after they had been copied in the letter book. The objector denied having received the letter or any notice of allotment; it was held that the Court should not draw the inference that the original letter was properly addressed or posted; that the press-copy letter-book was inadmissible in evidence, and that there was no proof of the communication of any notice of allotment.¹⁹

A notice under section 100, Transfer of Property Act, 1882 (4 of 1882), sent by registered post, returned with the endorsement of refusal (Inkan Wapis Han) must be deemed to have been served. The circumstances in which the presumption will stand rebutted would vary from case to case and a mere denial may not be sufficient.²⁰

16. See also *Hulas v. Allahabad Bank*, A I R 1958 Cal 644.

17. *Macgregor v. Kew*, (1849) 3 Ex. 741; *Taylor, Ex.*, s. 182; *Powell, Ex.*, 97.

18. *Taylor, Ex.*, s. 182, and cases cited there; and ante *Skilbeck v. Garbett*, 1883 14 L J O B 338; *Hetherington v. Kemp*, (1817) 4 Camp 193; *Trotter v. Maclean*, (1875) 13 Ch. D. 509; *Ward v. Fouldesborough Ltd*, (1892) 12 C B 252. To prove the sending of a notice by post the plaintiff's clerk was called who testified that a letter containing the notice was sent by post on a Tuesday morning, but he had no recollection whether it was put in by

himself or another clerk. It was held that this was not sufficient evidence of putting into post; *Hawkes v. Salter*, (1830) 4 Bing. 715, see *Roscoe, N. P. Ev.*, 574 and *Toasey v. Williams*, (1827) 1 M & M. 129; *Chuni Lal v. Hartford Fire Insurance Co.*, A I R 1958 Punj 440; *Ramdas v. The Official Liquidator*, (1887) 9 A. 366.

19. *Badhur v. Kamala*, 1968 A I J. 707; 1968 A W R (H C) 507; *Ganga Ram v. Philwati*, A I R 1970 All. 440 (F B); *Saeed Ahmed v. S Q. Ali*, A I R 1973 All 24; 1972 A W R 628; *Pakhar Singh v. Kishan Singh*, A I R 1974 Raj 112.

4. Endorsement of refusal. Where a registered letter is posted to a firm's correct address but is returned with the word 'refused' endorsed upon it, the presumption under this section in favour of the existence of common course of business is that the letter reached the firm's place of business and it may also be presumed that it was refused by an agent or partner of the firm.²¹ When a registered letter, which is properly addressed, comes back with the endorsement of refusal made by the postal peon the ordinary presumption which arises in the case of service by registered post under Section 27 of the General Clauses Act and Sections 114 and 16 of this Act is available to the sender who can rely on the endorsement of refusal for proof of the fact that the letter had been duly delivered but the addressee refused to accept the letter. Even if the addressee denies on oath that the letter was ever received by him or refused by him this denial by itself does not rebut the natural presumption.²²

Where a notice to quit was sent by registered letter the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon it purporting to be by an officer of the post office stating the refusal of the addressee to receive the letter, it was held, that this was sufficient service of notice.²³ Illustration (b) to this section only means that each of the facts, namely, posting of a letter and the non-return of the original from the Dead Letter Office, is relevant. It cannot be read as indicating that, without a combination of these facts, no presumption as to receipt of the letter can arise. Indeed this section, with the illustrations thereto has nothing to do with presumptions but only with relevance.²⁴ Where an acknowledgment due registered letter is received back by the sender with the endorsement 'refused', even if the author of the endorsement is not examined as a witness, the presumption is that the postal employee duly observed the regular course of duty. The presumption is one of fact, and the Court may refuse to raise it if the material on record or the circumstances of the case raise any doubt.²⁵

The question whether a presumption can be drawn as to the due delivery of a letter by post must depend on the particular circumstances of each case.¹ In *Gobinda Chandra Saha v Dwarka Nath Patita*,² it was held that an en-

21. **Louis v. Vishindas & Co.**, 50 I.C. 194; 12 S.I.R. 112; A.I.R. 1919 S. 60 (2); **Balabhadar v. C.I.T. Punjab** A.I.R. 1957 Punj. 284.

22. **Sarkar Estates (Private) Ltd. v. Kusumia Iron Works (Private) Ltd.** A.I.R. 1961 C. 484; **Saeed Ahmed v. S.Q. Ali**, A.I.R. 1973 All. 24; **Pakhar Singh v. Kishan Singh** A.I.R. 1974 Raj. 112.

23. **Jogendra v. Dwarka**, (1888) 15 C. 681, see also **Isolf Ali Meah v. Pearee Mohan** 1873 16 W.R. 228; **Durganath v. Rajendra Naram**, 17 C. W. N. 1079; 20 I. C. 269; **Gurish Chandra v. Kishore Mohan**, 1920 Cal. 287 (2); 54 I.C. 5; **Hari Pada v. Joy Gopal**, 39 C.W.N. 934; **Nirmala Bala v. Pooval Kumari** 52 C.W.N. 659; **Shri Afzal v. Mohan Lal**, 1926 Lah. 520;

94 I.C. 103; **Bachcha Lal v. Lachman**, 1918 All. 388; 176 I.C. 393; 1938 A.L.J. 311; **Ramnaq Ram v. Prabhu Datta**, 1930 Lah. 154, 121 I.C. 382; **James v. Vaman Das & Co.** 1919 Sind 66 (2); 50 I.C. 194; **Meharaj Ali Ahmed v. State of Bombay**, A.I.R. 1967 S.C. 857; 1967 Cr. L.J. 1346; 1958 All. W.R. (H.C.) 112; 61 Bom. L.R. 49; 1958 N.L.J. (Cr.) 42.

25. **Joshi Kishore v. Bombay Revenue Tribunal**, 60 Bom. L.R. 195; 1 I.R. (1929) Bom. 123; A.I.R. 1959 Bom. 81.

1. **Ma Meah v. R.M.R.M.N. Chettyar Firm**, 1933 R. 76; 146 I.C. 322; **Gurish Chandra v. Kishore Mohan**, 1920 Cal. 287 (2); 54 I.C. 5; 1910 Cal. 813; 20 I.C. 962; 20 C.L.J. 455; 19 C.W.N. 489.

ADMISSIONS

GENERAL

SYNOPSIS

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| <ol style="list-style-type: none"> 1. Principles. 2. Definition of Admission. 3. Statement. 4. Admission by conduct. 5. Confessions. 6. Distinction between confessions and admissions. 7. Proof of confessions. 8. Admissibility of confessions under Sec. 8. 9. Judicial and extra-judicial confessions. <ol style="list-style-type: none"> (a) General. (b) Corroboration. 10. Persons by whom admissions may be made. 11. Time when admissions may be made. <ol style="list-style-type: none"> (a) General. (b) Admission by insolvent. | <ol style="list-style-type: none"> 12. To whom admissions may be made? "Accused person". 13. Nature and form of admission. 14. Hearsay and opinion. 15. Effect and circumstances of admissions. <ol style="list-style-type: none"> (a) General. (b) Effect of Section 145. 16. Matters provable by admission. <ol style="list-style-type: none"> (a) Under English Law. (b) Under Indian Law. 17. The whole admission or confession must be considered. <ol style="list-style-type: none"> (a) Admissions. (b) Confessions. 18. Admission must be unambiguous and clear. 19. Weight to be given to admissions. |
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1. **Principles.** The following sections (i.e. Secs 17-31), exhaustively¹² deal with the subject of admissions and confessions which have been generally said to form exceptions to the rule which excludes hearsay. This is not entirely correct. Admissions are sometimes used as merely discrediting a party's statement by showing that he has on other occasions made statements inconsistent with the case afterwards set up. Their effect in such a case, is merely destructive. It is their inconsistency with the party's present claim that gives them logical force and not their testimony of credit. In such cases, the truth of the admission is not relied on and therefore they are not obnoxious to the hearsay rule.¹³ In effect broadly it may be stated that anything said by a party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or testimony. It follows that the subject of an admission is not limited to facts against the party's interest at the time, for though the weight of credit to be given to such statements is increased where the fact stated is against the person's interest at the time, that circumstance has no bearing upon their admissibility.¹⁴ An admission, in the legal sense, is not always an admission in the popular sense, i.e., a statement which, at the time it was made, was against the real or apparent interest of the party.¹⁵ But an admission may also state facts against interest as where it admits a claim or a tort committed by the adversary. In such cases, the admission is used as evidence of the truth of its contents and as possessing an evidentiary force for so. It is then equivalent to affirmative testimony for the party offering it. Admissions, in such cases, have a testimonial force independent of the contradiction and hence

12. *Baz Bahadur v. Raghunath*, 107 All. 585, 111 R. 49 All. 70, 100 I.C. 1037; 25 A.L.J. 572.

13. *Wigmore, Ev.*, s. 1048 et. seq.

14. *Wigmore, Ev.*, s. 1048, et. seq.

15. *Pherson, Ev.*, Ch. 13, 283, omitted in the 11th Ed.

the statements of persons not witnesses, form exceptions to the hearsay rule. In this sense it has been said that :

'The general rule is, that every material fact must be proved by testimony on oath. There is an exception to that rule, namely, that the declarations of a party to the record, or of one identified in interest with him, are as against such party admissible in evidence.'

The statements which are the subject of these sections are admitted, firstly, as informative of the case made, and secondly, when amounting to proof for the adversary, because in respect of the persons making them, there is some security for their accuracy which countervails the general objections to hearsay testimony. An admission is only relevant against the person who makes it or his representative in interest¹⁷. This is only a branch of the general one that a man shall not be allowed to make evidence for himself¹⁸. But, as universal experience testifies that, as men consult their own interest, and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety be taken to be true as against them—at least until the contrary appears. Where, in a petition, there is an advertent admission¹⁹ as to the nature of certain property, it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement²⁰.

2. Definition of Admission. An admission has been defined to be a statement, oral or documentary, which suggests any inference as to any act in issue or relevant fact and which is made by any of the persons and under the circumstances in the following sections mentioned²¹. In English law the term 'admission' is usually applied to civil transactions, and to those statements of fact in criminal cases which do not amount to acknowledgments of guilt, or which do not suggest the inference of guilt; the term 'confession' being generally restricted to acknowledgments of guilt or statements which suggest the inference of guilt.²²

An admission is a confession of voluntary acknowledgment made by a party or someone identified with him in legal interest of the existence of certain facts which are in issue or relevant in issue with the case. The predominant characteristic of this type of evidence consists of its binding character.

Admissions are broadly classified into two categories, (a) judicial, and (b) extra-judicial. The former are formal admissions by a party during the proceedings of the case. The former admissions are fully binding on the party making them. They constitute a waiver of proof (vide S. 58). Extra-judicial or informal admissions are also binding on the party against whom they are set up. But they are binding only partially except in cases where they ope-

16. *Storpe v. Brewster* (1829) 9 B. & C. 935, 938, per Bayley, J.

17. S. 21 and notes thereto, post; the exceptions to this rule are contained in S. 21, 22, 23, 24. The admissibility of books of account under S. 34 is also an instance of statements made by person being offered on his own behalf. An admission may further be proved on be-

half of a party, if it is relevant otherwise than as an admission. S. 21, cl. (3).

18. *Best, Ev.*, 2, 519.

19. *Best, Ev.*, s. 19; *Taylor, Ev.*, s. 723.

20. *Dunabandhu Nandi v. Mannu Lai Park* 1919 Cal. 385, 52 I.C. 443.

21. S. 17, post see *Wills, Ev.*, 2nd Ed., 149.

22. *Taylor, Ev.*, 724.

rate as, or have the effect of, estoppel, in which cases again, they are fully binding and constitute the foundation of the rights of the parties²³.

3. "Statement". The word 'statement' has been used in sections 17 to 21, 32, 39 and 145 in its primary meaning of 'something that is stated' and communication is not necessary in order that it may be stated.²⁴ The word has not been defined in the Act. Therefore, one has to go to the dictionary meaning in order to discover what it means. Assistance may also be taken from the use of the word in other parts of the Act to discover in what sense it has been used therein. The primary meaning of the word 'statement' is 'something that is stated'—written or oral communication. Although a statement may be made to someone in the sense of a communication, yet that is not its primary meaning. The word has been used in a number of sections of the Act in its primary meaning of 'something that is stated'. That meaning should be given to it unless there is something that cuts down that meaning for the purposes of any section. Words are generally used in the same sense throughout in a statute unless there is something repugnant in the context²⁵.

4. Admission by conduct. Besides admission, written and oral, a party may make admissions by his conduct. These are not mentioned in the seventeenth section, as they have already been dealt with in the eighth section *ante*. Admissions by assumed character, conduct, silence, and the like are not exceptions to the hearsay rule; they are usually argued circumstantial evidence of the facts to which they relate.¹

Confessions, like admissions in civil cases, may be inferred from the conduct of the prisoner and from his silent acquiescence in the statements of others, made in his presence, respecting himself.²

Analogous to admissions by conduct is the rule which treats as admissions by a party, statements made in his presence and not denied by him, provided the circumstances were such as to make a denial necessary or appropriate.³

Conduct is not statement and the statements mentioned in various returns filed under section 59 of the Bihar Hindu Religious Trusts Act, 1950 (Act 1 of 1951) are not such as to amount to an admission of the fact that the trust in question is a public trust.⁴ Mere conduct is not admission as defined in this section.⁵

23. See *Ajodhya Prasad Bhargava v. Bhawani Shankar Bhargava*, A.I.R. 1957 All. 1; I.L.R. (1956) 2 All. 999 (F.B.).

24. *Bhogilal Chummilal Pandya v. State of Bombay*, A.I.R. 1959 S.C. 356; 1959 Cr. L.J. 389; (1959) Andh W.R. (S.C.) 101; 1959 Mad. L.J. (Cr.) 105; 1959 All. W.R. (H.C.) 16; (1959) 1 Mad. L.J. (S.C.) 16; 61 Bom. L.R. 746.

25. *Bhogilal Chummilal Pandya v. State of Bombay*, 1959 S.C.J. 210; A.I.R. 1959 S.C. 356; 1959 Cr. L.J. 389; (1959) Andh W.R. (S.C.) 101; 1959 Mad. L.J. (Cr.) 105; 1959 All.W.

R. (H.C.) 156; (1959) 1 Mad. L.J. (S.C.) 101; 61 Bom. L.R. 746.

1. Best, Ev., American Notes, p. 488; Norton Ev., 142. As to admissions by conduct, see Powell, Ev., 277; Taylor Ev., s. 801; S. 8, ante.

2. Taylor, Ev., s. 907.

3. Best, Ev., American Notes page 488; *Mercantile Bank v. Tahir Ram*, 1914 Sind 154; 27 I.C. 309; see notes, to S. 8, ante.

4. *Bihar State Religious Trust Board v. Mahant Jaleswar Gir*, 1968 Pat. L.J.R. 507, 514.

5. *Board of Religious Trust v. A. J. Amrit Das*, A.I.R. 1974 Pat. 95.

5. **Confessions.** A confession has been defined as "an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime."⁶ Accepting this definition as correct, it was held in several cases that mere admissions of incriminating facts, without direct acknowledgment of guilt, amounted to confessions.⁷ But it would not be consistent with the natural use of language to construe a confession as a statement by an accused "suggesting the inference that he committed" the crime. No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of, and was in recent possession of, the knife or revolver which caused a death with no explanation of any other man's possession.⁸

Where in a case of murder the accused confessed about his guilt for giving blows by a dagger on the body of the deceased, it was held that the statement of the accused amounted to a confession.⁹ A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. A statement which when read as a whole is of an exculpatory character and in which the prisoner denies his guilt is not a confession and cannot be used in evidence to prove his guilt. A confession must be a confession properly so called. It cannot in part admit a crime and in part exonerate the accused. An admission of a gravely incriminating fact is not of itself a confession. A confession, that contains self-exculpatory matter, cannot amount to a confession, if the exculpatory statement is of some fact, which, if true, would negative the offence alleged to be confessed.¹⁰ A statement by an accused in which he does

6. Steph. Dig., Art. 21: the Act contains no definition of a "confession."

7. *R. v. Babulal*, 6 All. 509 (F. B.); *R. v. Nand*, 14 Bom. 260 (F. B.); *R. v. Shivabhai*, 1926 Bom. 513; 1 I.R. 20 (Bom. 1927); 1 C.C. 660, 27 Cr. L.J. 1140; 28 Bom. L.R. 1013; *R. v. A. V. N.*, 1925 Bom. 529; 1 I.R. 46 (Bom. 1925); 1 C.C. 1046; 26 Cr. L.J. 1148; *Mohammed Yusuf v. Emperor*, 1925 S.C. 126; 1 C. 440; 3 Cr. L.J. 1026; *Emperor v. Kibbad Ma.*, 1917 Cal. 296; 1 I.R. 41 (Cal. 1917); 1 C. 103; 15 Cr. L.J. 71; *Kishan Din v. Emperor*, 1920 I.D. 328; 115 I.C. 1; 1 C. 1; 1 I. 385; *Emperor v. Manicka Pal*, 1921 Mad. 493; 72 I.C. 49; 14 I.W. 14; 24 Cr. L.J. 385.

8. *Pakala Narayan Smami v. Emperor*, 1939 P.C. 47; 66 I.A. 66; 1 I.L.R. 18 Pat. 234; 180 I.C. 1; 40 Cr. L. 1; 164 I.A. 1; 208 41 Bom. I.R. 478; 69 Cr. L.J. 275; 43 C.W.N. 13; 1939 I.M.L. 736; *Palvinder Kaur v. State of Punjab*, A.I.R. 1952 S.C. 354; 1953 Cr.

107; 1 B. L. J. 30; 1953 A.W.R. (Sup.) 19, see also *Anwarul Hasan v. State*, 1953 All. 142; 1954 Cr. L. J. 385; *Ambar Ali v. Emperor*, 1929 Cal. 539; *Mohammad Baksh v. Emperor*, 1941 S. 129; 1 I.R. 1941 Kar. 257; 195 I.C. 458; 42 Cr. L. J. 741, in *R. v. Jagrup*, 7 All. 646; (1887) 3 A.W.N. 181, Straight J., was of opinion that the word "confession" cannot be construed as including a mere incriminatory admission which falls short of an admission of guilt but he also added that he did not find anything in Mr. Stephens's definition at variance with the view he took.

9. *Amar Singh v. State*, 1956 M. B. 107.

10. *Palvinder Kaur v. State of Punjab*, A.I.R. 1952 S.C. 354.

11. *Jasoda Haldar v. Sailendra Nath*, A.I.R. 1957 Cal. 352 following *Palvinder Kaur v. State of Punjab*, A.I.R. 1952 S.C. 354; 1953 Cr. L.J. 154; 1953 All. I.J. 18; 1953 M.J.W.N. 419; 1 I.R. 1955 Punjab 107.

not implicate himself, is not a confession and is inadmissible against him.¹² A confession is not exculpatory and does not cease to be a confession though it brings out some mitigating circumstances.¹³ Where a statement comprises both confessional and non-confessional parts, and the confessional part of the statement is severable from the non-confessional part, the non-confessional part of the statement is admissible in evidence as an admission but not the confessional part except in defined cases.¹⁴

The proposition that a statement which contains an admission or confession must be considered as a whole and the court is not free to accept one part while rejecting the other, is too widely stated and cannot be accepted.¹⁵ The authorities establish that (a) where there is other evidence, a portion of the confession may, in the light of that evidence, be rejected, while acting on the remainder with the other evidence, and (b) where there is no other evidence and the exculpatory element is not inherently incredible, the court cannot accept the inculpatory element and reject the exculpatory element.¹⁶ In the aforesaid observations in *Balmukund v. R.*,¹⁷ the Supreme Court fully concurred.¹⁸ Distinguishing previous decisions¹⁹ as cases in which there was no other evidence to reject the exculpatory part of the confession, the Supreme Court held in *Nishi Kant Jha v. State of Bihar*, *supra*, that where the exculpatory part of the confession is not only inherently improbable but is contradicted by other evidence enough to reject that part, the court acts rightly in accepting the inculpatory part and piecing the same with the other evidence to come to the conclusion that the accused was the person responsible for the crime. This view has been followed in the undernoted case.²⁰

In other words, the Court cannot start with the confession; it must begin with the other evidence adduced by the prosecution and after it has formed

12. *Harbans Singh v. State*, A. I. R. 1960 Cal. 722.

13. *Anand v. State*, 62 Punj. L. R. 781.

14. *Lachhuman v. The State of Bihar*, A.I.R. 1964 Pat. 210.

15. *Nishi Kant Jha v. State of Bihar*, (1969) 2 S.C.R. 1033; (1969) 1 S.C.C. 347; (1969) 1 S.C.J. 844; (1969) 1 J.L.S.C. 587; 111 R. 48; Pat. 9; (1969) A.I.J. 658; 1969 B.L.J.R. 731; 1969 Cr. L.J. 671; 1969 M.P.W.R. 590; A.I.R. 1969 S.C. 422, referring to Taylor, 11th Edn. Atty. Gen. 21, p. 502, with regard to the general law of admissions, Roscoe on Criminal Evidence, 16th Edn., p. 52 citing *R. v. Clewes*, 1850, 4 Cr. P. 221 and Archbold's Criminal Pleadings Evidence and Practice, 6th Edn. p. 423, principle reiterated in *H.H. Advani v. State of Maharashtra*, (1970) 1 S.C.R. 821; (1970) 2 S.C.A. 10; (1970) 2 S.C.J. 122; 1970 M.L.J. (Cr.) 490; A.I.R. 1971 S.C. 44.

16. *Balmukund v. R.*, I.L.R. 52 All.

1011; A.I.R. 1931 All. 1 (F.B.); *Kamalashanker v. State of Gujarat*, A.I.R. 1968 Guj. 312; see also *Budu v. State*, 31 Cut. L.T. 401; A.I.R. 1965 Orissa 170.

17. *Supra*.

18. *Pavinder Kaur v. State of Punjab*, 1963 S.C.R. 94; 1962 S.C.J. 545; 1963 A.I.J. 18; 1963 A.W.R. 506; 9; 1963 Cr.L.J. 14; 1963 M.W.N. 418; 111 R. 103; Punj. 107; A.I.R. 1952 S.C. 354.

19. *Harimant v. State of Madhya Pradesh*, 1952 S.C.R. 109; 1952 S.C.J. 509; 1952 M.L.J. 653; 1953 Cr.L.J. 29; A.I.R. 1952 S.C. 443; *Patel v. State of Punjab*, *supra*; see also *Narain v. State of Punjab*, 1960 Supp. 1) S.C.R. 74; 1959 S.C.J. 417; 1959 A.W.R. H.C. 292; 1959 Cr.L.J. 537; 1959 M.L.J. (Cr.) 285; 61 Punj.L.R. 509; 111 R. 199; Punj. 778; A.I.R. 1959 S.C. 484.

20. *Nishi Kant Jha v. State of Bihar*, 1971 A.W.R. (H.C.) 757.

its opinion with regard to the quality and effect of that evidence, then it may return to the confession to receive assurance in support of its conclusion.²¹

A statement by an accused under section 161, Cr. P. C., which is exculpatory but admits his presence at the place of occurrence, does not amount to a confession but it can be treated as an admission about his presence on the spot.²²

6. Distinction between confessions and admissions. There is a distinction between admissions and confessions in the Act²³ which, however, as it does not contain a definition of the word, 'confession', does not itself declare in what that distinction exists. The nature of this distinction has, however, been the subject of judicial consideration.²⁴ In the first place, as Secs. 17-31 deal with admissions generally, and include Secs. 21-30 which treat of confessions as distinguished from admissions, it would appear that confessions are a species of which an admission is the genus.²⁵ All admissions are not confessions but all confessions are admissions.²⁶ Thus a statement amounting under Secs. 21-30 to a confession in a criminal proceeding may be an admission under the twenty-first section in a civil proceeding. So statements made to the police by accused persons as to the ownership of property which is the subject-matter of the proceedings against them, although inadmissible as evidence against them at the trial for the offence with which they are charged, are admissible as evidence with regard to the ownership of the property in an enquiry under Sec. 523 (old), 457 (new), of the Criminal Procedure Code.²⁷

Sections 18 to 21 are not confined in their application to civil cases only. Incriminating statements not hit by Sec. 162, Cr. P. C., may be admissible as admissions against interest even in criminal cases.²⁸

The present portion of the Act adopts the term 'admission' as the generic term for both civil and criminal proceedings, and uses the particular term

21. *Kashmira v. State*, A.I.R. 1952 S.C. 159; 1952 Cr.L.J. 839; 1952 M.W.N. 402; 1952 All.W.R. (Sup.) 64; *Prabhu Bh. v. R.* (S.C.) 193; *Hari Charan v. State*, A.I.R. 1964 S.C. 1184; 1964 Cr. L.J. (S.C.) 208; (1964) 2 Cr. L.J. 344; 1964 M.L.J. (Cr.) 535; 1964 B.L.J.R. 510.

22. *Chintamani Das v. State*, 36 Cut. L.T. 823; 1970 Cr. L.J. 906; A.I.R. 1970 Orissa 100, 104.

23. *R. v. Meher Ali*, 1882 10 B.L.R. (App.) 2 Per Phear, J., *R. v. Dabee Pershad*, (1881) 6 C. 530; *R. v. Meher Ali*, (1888) 15 C. 589, 593; *R. v. Nannadib*, 1888 15 C. 595, per Petheram, C. J.:—"If the contents of the document did not amount to a confession, the document itself would be relevant as an admission under S. 21." *ib.*, 607. Note, however, of the above cases indicates the difference between 'admissions' and 'confessions', see also *R. v. Baba Lal*, (1884) 6 A. 509 (F.B.), 539; *R. v. Jagrup*, (1885) 7 A. 646; *R. v. Pandharinath*,

(1881) 6 B. 34; *R. v. Nana*, (1889) 14 B. 260 (F.B.) 263; *Azimaddy v. R.* 1927 Cal. 17; 54 C. 237; 99 I.C. 227; 28 Cr.L.J. 99; 44 C.L.J. 253.

24. *Ram Singh v. State*, A.I.R. 1959 All. 518; 1959 Cr.L.J. 940.

25. *Sidheshwar Nath v. Emperor*, 1934 All. 351; I.L.R. 56 All. 730; 152 I.C. 174; 36 Cr.L.J. 45; 1934 A.L.J. 178.

26. *Nannadib Chaudhary v. Emperor*, 1937 Cal. 433 at p. 445; 170 I.C. 201; 38 Cr.L.J. 852 (S.B.); *Beoparia v. State of Ajmer*, 1955 Ajmer 10 (every confession is essentially an admission).

27. *R. v. Lobbayan*, (1884) 9 B. 131, 134.

28. *Akil Sahu v. Emperor*, 1948 Pat. 62; I.L.R. 26 Pat. 49; 230 I.C. 157; 48 Cr.L.J. 565; *Muhammad Baksh v. Emperor*, 1941 Sind 129; I.L.R. 1941 Kar. 257; 195 I.C. 458; 42 Cr.L.J. 741; *Pakala Narayana Swami v. Emperor*, 1939 P.C. 47; 180 I.C. 1.

'confession' for admissions 'a in criminal proceedings' (b) made by a particular person viz., an accused person⁴ of the particular character denoted in the definition given above.⁵

A 'confession' is a statement which it is proposed to prove against a person accused of an offence to establish that offence,⁶ while under the term 'admission' are comprehended other statements amounting to admissions within the meaning of the seventeenth and eighteenth sections. Evidence may be given of a confession provided it be not expressly excluded, whether made to a private person or Magistrate otherwise than in the course of judicial enquiry. If proved it must be so proved like any other fact.⁷

The distinction between a confession and an admission may also be expressed thus:—If the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If, on the other hand, the statement falls short of it, it amounts to an admission. Where there is a direct admission of guilt it is not possible to treat the statement as an admission. There is a distinction between making a statement giving rise to an inference of guilt and a statement which directly admits guilt. When the admission extends only to the acceptance of a circumstance from which an inference of guilt can be drawn, but which is not conclusive to prove the guilt, it can be treated as an admission. Where conviction can be based on the statement alone, the statement is a confession, but where something more is needed to justify a conviction, then the statement is an admission. No statement, which contains self-exculpatory matter, can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the guilt.⁸ A confession is an admission by an accused in a criminal case and if he does not incriminate himself, the statement cannot be said to be a confession.⁹

7. Proof of confessions. A judicial confession is recorded by the Magistrate and it proves itself by virtue of Sec. 80 of the Act. Extra-judicial confessions are those which are made by a party elsewhere than before a Magistrate. They are proved by witnesses who heard the speaker's words constituting the confession. When the fact of the confession is proved, that itself becomes evidence which serves as a means to the ascertainment of the fact in issue.¹⁰ The proof of an extra-judicial confession should be very convincing particularly when it is not reduced to writing.¹¹ Oral evidence of an extra-

4. *R. v. Tibbhoan*, (1884) 9 B. 131, 134; *R. v. Jagrup*, (1885) 7 A. 646, 648 (c).

5. *Pakala Narayan Swami v. Emperor*, 1939 P.C. 47; 180 I.C. 1.

6. *R. v. Tibbhoan*, (1884) 9 B. 131, 134, it is "an admission of a criminalizing circumstance on which the prosecution mainly relies" *R. v. Subbalingam*, 1923 14 B. 31-37; *R. v. Nana*, (1889) 14 B. 260 (F. B.), 263.

7. *R. v. Vitan*, (1886) 9 M. 224, 240; *T. P. Obigadu v. P. Pedda*, 1922 Mad. 10; 11 I.R. 3; *Mo. 1923* 69 I.C. 264; 23 Cr. L.J. 680; 42 M.L.J. 37; 1921 M.W.N. 779; as to proof; see *Nur Ali v. R.* 1924 Lah.

498; 1 I.L.R. 5 Lah. 140; 81 I.C. 530; 23 Cr. L.J. 914. As to admissibility of confessions see notes under S. 21 post. The substance of it is enough. *ib.*

8. See *Ram Singh v. State*, A.I.R. 1959 A. 518; 1958 A.L.J. 660, case law referred.

9. *Sobar Singh v. State of Bihar*, 1966 B.I.R. 81; 1966 Cr.L.J. 1360; A.I.R. 1966 Pat. 448, 451.

10. *Mst. Sumitra v. Emperor*, 1940 Nag. 287; 190 I.C. 273; 41 Cr.L.J. 886; 1940 N.L.J. 343.

11. *Prabhu Singh v. Emperor*, 1911 Sind 201; 141 I.C. 392; see also *R. v. Mst. Jagia*, 1938 Pat. 308; 1 I.L.R. 17 Pat. 369; 174 I.C. 524.

official confession, though original evidence is no proof of the fact stated, the existence of which must be established independently. At best it can only be corroborative evidence¹². Where a person is convicted of a murder on the basis of his confession the judgment convicting him is no evidence to prove the truth of the confession regarding the murder. The judgment proves nothing beyond the fact that he was found guilty of that murder. Whether he committed that murder or not is another question¹³.

8. Admissibility of confessions under Sec. 8. Statements by way of confession which are excluded by Secs. 24-30 are inadmissible under the eighth section, *ante*. This latter section, therefore, in so far as it admits a statement as included in the word "confession", must be read in connection with the twenty-fifth and twenty-sixth sections, and cannot admit a statement as evidence which would be shut out by these sections¹⁴. As in the case of admission in civil suits, the principle upon which the reception of confessions depends is the presumption that a rational being will not make admissions prejudicial to his interest and safety except when urged by the promptings of truth and conscience¹⁵. In such cases, the maxim is *habeamus optimum testem, confitentem reum*¹⁶. If prisoners really voluntarily confess, their confessions are the best possible evidence against them, and a verdict based on voluntary confession is just as good as a verdict based on the testimony of credible witnesses.¹⁷

But self-harming evidence is not always receivable in criminal cases as it is in civil. There is thus condition precedent to its admissibility that the party against whom it is adduced must have supplied it voluntarily or at least freely. Section 24, *post*, requires a confession to be made spontaneously, and without inducement, threat or promise, and voluntarily, only in that sense.¹⁸

In order to support a conviction, the admission by the prisoner must be an admission of guilt. So, where some prisoners during a preliminary investigation stated that the crime was committed by other persons and that any share they had in it was under compulsion, it was pointed out that, though such a statement contained an important admission, it was not an admission of guilt and that upon such a statement alone no person ought to be convicted¹⁹.

9. Judicial and extra-judicial confessions. (a) *General*. Confession have been divided by English textwriters into two classes namely,

12. *Kumar Singh v. State*, 1951 Hima. Cril. L.J. 19, 1952 Cr. L.J. 242, rev'g *R. v. Christie*, (1914) A.C. 545 at 553.

13. *Wes. Singh v. State*, 1973 All. 785, 1973 Cr. L.J. 1817.

14. *R. v. Noy*, (1881), 14 B. 260, see also *R. v. Jora*, (1874) 11 Bom. H. Cr. R. 240, see notes under Sec. 8 *ante*.

15. Taylor, Ev., s. 865; Best Ev., s. 524; Phillips and Arnold, Ev., 401 *R. v. Yella Reddi*, 6 Bom. L.R. 773; in which also the question of the im-
probability of a variation in confessional statements is discussed.

16. In Criminal cases a deliberate confession carries with it a greater probability of truth than an admission in civil cases, the consequences being more serious and penal. Phillips and Arnold, Ev., 402. In *R. v. Bailey* (C.C. 2 Den 430 at p. 454 Erie, J. said: "I am of opinion that when a confession is well proved it is the best evidence that can be procured."

17. *R. v. Wuzir*, (1876) 25 W.R. Cr. 25, 26.

18. Best Ev., s. 551.

19. *Khatia v. Emperor*, 1953 All. 2, I.L.R. 45 All. 300; 73 I.C. 62.

20. *R. v. Kisto*, (1867) 7 W.R. Cr. 8.

judicial and extra-judicial. Judicial confessions are those, which are made before a Magistrate, or in Court, in the due course of legal proceedings. Either of these is sufficient to support a conviction, though followed by a sentence of death, they both being deliberately and solemnly made under the protecting caution and oversight of the Judge.²¹ Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate, or in Court.

(b) *Corroboration*. A prisoner may be convicted on his own uncorroborated confession.²² The weight to be attached to an extra-judicial confession depends entirely upon the circumstances. It depends on the person to whom it is made and the conditions under which it comes to be made. When such a confession is made spontaneously by the accused to a Magistrate, who was totally in the dark about either the investigation or of the identity of the accused, there would be good reason to presume its voluntariness; and hence it would be admissible both as an admission and as a first information report.²³

It has been said in England that the Court is usually reluctant to accept and record a confession of guilt on indictments for grave crimes, and will generally advise the prisoner to retract it and plead not guilty.²⁴ But where the prisoner refuses to withdraw his confession, there is no alternative but to accept it, even in the case of murder, of which instances have occurred.²⁵ No such exception is made in Indian law or even in American law. "A free and voluntary confession of guilt by a prisoner, whether under examination before Magistrates or otherwise, if it is direct and positive, and is duly made and satisfactorily proved, is sufficient to warrant a conviction without any corroborative evidence."²⁶

Judicial confessions are "sufficient to found a conviction even if to be followed by a sentence of death, they being deliberately made, under the deepest solemnities, the advice of counsel, and the protecting caution and oversight of the Judge."²⁷ It may be doubted whether a conviction can be based solely upon an extra-judicial confession, but there is no reason for hesitating to base conviction on a judicial confession. The evidence of verbal confessions of guilt may have to be received with great caution, as advised by Greenleaf in para. 211. But many of the reasons which necessitate great caution do not operate in the case of judicial confession. Again a case, where there is no proof of *corpus delicti*, must be distinguished from another where that is proved; in the absence of proof of *corpus delicti*, a confession alone may not suffice to justify conviction.²⁸ A confession, particularly a judicial con-

21. Taylor, Ev., s. 866; v. ante: R. v. Bhuttun, (1869) 12 W.R. Cr. 49; as to the effect of judicial confessions and as to retracted confessions, see S. 24, post.

22. R. v. Runjeet, (1866) 6 W.R. Cr. 73; R. v. Hyder, (1866) 6 W.R. 83 (Cr.) or on his own admission coupled with the evidence: R. v. Kallychurn, (1867) 7 W.R. Cr. 59, as to the effect of extra-judicial confession v. post.

23. Ramachandran, In re, I.L.R. 1960

Mad. 224; A.I.R. 1960 Mad. 191; see also Chinnasami, In re A.I.R. 1960 Mad. 462; 1960 Cr.L.J. 1344.

24. 2 Hale 255; see also Phipson, Ev., 9th Ed., p. 266.

25. Archbold's Criminal Pleadings, Evidence and Practice, 3rd Ed., s. 691.

1. Ibid.

2. Greenleaf on Evidence, 7th Ed., Vol. I, para. 216.

3. See Wills on Circumstantial Evidence, page 120.

fession, is not a tainted piece of evidence and if it is made freely and without inducement or compulsion does not suffer from any infirmity such as exists in the testimony of an approver.⁴

As regards extra-judicial confession, a Bench of the Madras High Court referring to the views of various text-writers and the case law on the subject observed :

Though we cannot lay down as an inflexible rule of law that in no case an extra-judicial confession will afford the sole basis for conviction, we are of the opinion that in that case of homicide and such other similar grave offences it would not be safe to convict a person on the confession alone unless corroborated by other evidence. This is a rule of prudence rather than of law. The nature and the quality of corroborative evidence must again necessarily depend upon the facts of each case.⁵

The words actually used by an accused, who is said to have confessed, ought to be ascertained. And, if a statement by an accused is the only evidence against him it must be taken as a whole, and nothing not actually included by it can be read into it. The Court should not accept merely the conclusion at which the witnesses deposing to a confession, themselves arrived, from the answers which the accused gave to questions put by them. The view of the Privy Council, however, is that the exact words of an extra-judicial confession need not be proved in every case, because in most cases, laymen to whom it is made, do not note down the words as they are uttered by the accused. Therefore, the Court could take the substance of the statement into consideration. As regards the value to be attached to such a confession it could be proved that while there is the fact that it is made in the presence of a person in authority (which imports in consequence a necessity for the Court to scrutinise the evidence and the circumstances carefully in order to ascertain whether the confession had been voluntarily made), nevertheless it cannot be said that on the basis of that circumstance alone, the confession had not been freely made.⁶

In regard to the value and appreciation of the extra-judicial confessions, the following may be borne in mind. Taylor says that evidence of oral confession of guilt can be received with great caution. But eminent author gives the following reasons :

Not only does considerable danger of mistake arise from the misapprehension and misrecollection of witnesses, the misuse of words, the failure of the party to express his own mind, the infirmity of memory but the zeal which generally prevails against offenders, especially in cases of a heinous crime, and the

1. *Birey Singh v. State*, 1953 All. 785; 1953 Cr.L.J. 1817; see also *Jangir Singh v. State*, 1952 Pepsu, 19; *Emperor v. Lal Bahadur*, 1945 Lah. 47; 220 I.C. 325; 36 Cr.L.J. 736.

2. (In re) *Venkayalapati Kotaiyah*, 51 Mad. 350 (I.L.R., 1951 Mad. 100); *State v. W. S. S. S.*; see also the *State v. S. S. S.* cited therein; *State v. Ramachandran*, In re,

1 I.L.R. 1960 Mad. 224. A.I.R. 1960 Mad. 191.

6. *Pika v. R.* (1912) 39 C. 855, *Soobhan*, (1873) 10 B.L.R. 332, 335; *R. v. Mohan*, (1881) 4 A. 46, (D. Ramayee, In re, A.I.R., 1960 Mad. 187; 1960 Cr.L.J. 491.

8. *Krishna v. The State*, A.I.R. 1958 Pat. 166; 195 B.L.J.R. 6.

9. *Ibid*.

strong disposition which is often displayed by persons engaged in pursuit of evidence to magnify slight grounds of suspicion into sufficient proof together with the character of witnesses who are sometimes necessarily called in cases of secret, and atrocious crime, all tend to impair the value of this kind of evidence"

To these sources of distrust may well be added the following remarks of Macaulay in his "History of England" :

"Words may easily be misunderstood by an honest man. They may easily be misconstrued by a knave. What was spoken metaphorically may be apprehended literally. What was spoken ludicrously may be apprehended seriously. A participle, a tense, a mood, an emphasis, may make the whole difference between guilt and innocence."

Hasty confessions made to persons having no authority to examine are the weakest and most suspicious of all evidence. Words are often misreported through ignorance, intention or malice, and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative evidence by which proof of plain facts may be, and often is, confronted (Foster, J.).

Such confessions are spoken to by persons who will generally be found to have a motive to implicate the accused person. Their Lordships of the Judicial Committee have remarked in *Harold White v. The King*¹⁰ that it would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness who had a strong motive for implicating someone else in the murder and uncorroborated from any other source.

But it does not follow that extra-judicial confessions are always to be rejected. They may be made in such circumstances as to leave no reasonable doubt as to their truth. In fact, extra-judicial confessions should be accepted when the evidence is clear, consistent and convincing. As pointed out in *Emperor v. Bidul*¹¹ the evidence of an admission of guilt to villagers may be as strong evidence against the accused person as a confession before a magistrate. It requires no corroboration. But the court has to decide whether the persons before whom the admission is said to have been made are trustworthy witnesses¹². Thus, an extra-judicial confession is of great importance, but it must be a true extra-judicial confession and not one fabricated in order to provide additional evidence for what rightly or wrongly the investigating officer considers to be a weak case¹³. The same principles govern the acceptance of judicial and extra-judicial confessions.¹⁴

10. A.I.R. 1945 P.C. 181; 1945 A.I.J. 511; 58 M.L.W. 523.

11. A.I.R. 1928 Oudh 393; 112 I.C. 897.

12. *Munnu v. Emperor*, A.I.R. 1951 Oudh 415; 134 I.C. 1018.

13. *Taule v. Emperor*, A.I.R. 1929 Oudh 272; 117 I.C. 757.

14. *Om Prakash v. The State*, A.I.R. L. E. 75.

1957 All. 35. *Gaya Prasad v. The State*, A.I.R. 1957 All. 459; (In re) Chinnaswami, A.I.R. 1960 Mad. 462; (In re) Ramayee, A.I.R. 1960 M. 187; (In re) Muthukarunga Konar, (1959) M.W.N. (Cri.) 49 at p. 52; A.I.R. 1959 Mad. 175. Ramaswami, J.

In two cases then Lordships of the Supreme Court have laid down the following principles:

An extra-judicial confession, if voluntary, can be relied upon by the Court along with other evidence in convicting the accused. The confession will have to be proved just like any other fact. The value of the evidence as to the confession just like any other evidence depends upon the veracity of the witness to whom it is made. It is true that the Court requires the witness to give the actual words used by the accused as nearly as possible, but it is not an invariable rule that the Court should not accept the evidence if not the actual words but the substance were given. If the rule is inflexible that the Courts should insist only on the exact words, more often than not, this kind of evidence, sometimes most reliable and useful, will have to be excluded for, except perhaps in the case of a person of good memory, many witnesses cannot repeat the exact words of the accused. It is for the Court having regard to the credibility of the witness, his capacity to understand the language in which the accused made the confession, to accept the evidence or not. In the case cited below, the confession made by the appellant was not a complicated one and the witnesses stated without any conflict practically the exact words used by the appellant and also how they understood the words. In the circumstances, if the evidence of the witness is acceptable, there is no reason why the extra-judicial confession made by the accused could not be acted upon. There may be some confusion in the mind of the witnesses in this case as to the actual words used by the appellant but there seems to be no confusion in their mind with reference to the statement that he had admitted that he had stabbed the deceased. The circumstantial evidence and the extra-judicial confession leave no reason for doubt that the appellant had stabbed the deceased and was therefore, rightly convicted under **section 302, I.P.C., for murder.**¹⁵

Usually and as a matter of caution Courts require some material corroboration to an extra-judicial confessional statement, corroboration which connects the accused person with the crime in question.¹⁶

As to retracted confessions see note to Sec 24 *post*.

10. Persons by whom admissions may be made. Admissions may be made by (a) a party to the proceeding¹⁷ and a party to the proceeding may be affected by the admissions of the following persons, (b) an agent to such party duly authorized,¹⁸ (c) a person who has a proprietary or pecuniary interest in the subject-matter of the suit¹⁹ (d) a predecessor in title or a person from whom the party to the suit has derived his interest,²⁰ (e) a person whose position it is necessary to prove in a suit when the statement would be relevant in a suit brought by or against himself,²¹ (f) a referee or a person to whom a party to the suit has expressly referred for information.²² Where several persons are jointly interested in the subject-

15. *Malk Raj v. State of U. P.*, A.I.R. 1959 S.C. 902; 1960 All. W.R. (H.C.) 18; 1959 Cr.L.J. 1219.

16. *Ratan Gond v. State of Bihar*, A.I.R. 1959 S.C. 18; 1959 Cr.L.J. 108; 1959 B.L.J.R. 1; 1959 All. J.J. 37; 1959 M.P.C. 46; 1959 Mad.L.J. (Cr.) 109; 1959 All.W.R.

(H.C.) 108; I.L.R. 37 Pat. 1109.

17. S. 18, *post*.

18. *ib.*

19. *ib.*

20. *ib.*

21. S. 19, *post*.

22. S. 20, *post*, also notes to ss. 18-20 *post*.

matter of a suit—the general rule is that the admissions of any one of these persons are receivable against himself and his fellows whether they be all jointly suing or sued, provided that the admissions relate to the subject-matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.²² The requirement of the identity in the legal interest between the joint owners is of fundamental importance. The admission of one coplaintiff or co-defendant is not receivable against another merely by virtue of his position as a coparty in the litigation. If the rule were otherwise, it would, in practice, permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's coparty, and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other; it must be because of some privity of title or of obligation.²³ In *Nagendra v. Lawrence Jute Co.*²⁴ guardians of the person of an infant were said to be not competent to bind the ward by an admission as to his proprietary rights. An admission by a Court of Ward cannot bind or prejudice the infant proprietor.²⁵ An admission made by a landlord is not binding on his tenant, and, this being so, a compromise entered into between the proprietors of a certain land and others whereby the parties to the compromise become joint proprietors of the land has no binding effect upon the tenants of the land. In a criminal trial, if it is intended to bind a master by the statement of his servant, the relationship of master and servant must be strictly proved.²⁶ Generally, with respect to the persons whose admissions may be received, the doctrine is, that the declarations of a party to the record, or of one identified in interest with him are as against such party receivable in evidence.²⁷ But, if they proceed from a stranger they are in general inadmissible.²⁸ The Act has rendered such admissions receivable in the two cases mentioned in the nineteenth and twentieth sections, *post*.²⁹

Subject to the provisions of the thirtieth section relating to confessions by persons who are being tried jointly for the same offence, the general rule is that an accused person can only be affected by the admissions or confessions of himself and not by those of agents, accomplices or strangers³⁰ unless made in his presence and assented to by him.³¹ Nor, of course, can such admissions

22. *Dhirst v. N. & C.*, 48 I.C. 195; A.I.R. 1918 Nig. 41.

24. *Ambar v. Lutfi Ali*, 1918 Cal. 971; I.L.R. 45 C. 159; 41 I.C. 116; 25 C.L.J. 619; 21 C.W.N. 996.

25. I.L.C. 1906 I.C. 544; 25 C.W.N. 80. It was held that the admission of K in the previous suit was not admissible as admission against the plaintiff.

1. *Banwari v. Dwarka*, 29 C.L.J. 577; 52 I.C. 825; A.I.R. 1918 C. 34.

2. *Purgan v. Dhopat*, 1919 Pat. 309; 52 I.C. 739.

3. *Ritbaran v. R.*, 19 Cr. L. J. 789; (1916) 4 Pat. L.W. 120; 46 I.C. 709.

4. *Taylor, Ev.*, s. 740; *Spargo v. Brown*, (1829) 9 B. & C. 935.

5. *Ib.* *Barrough v. White*, (1825) 4 B. & C. 325.

6. As to when admissions proceeding from strangers are admissible; see *Taylor, Ev.*, ss. 759, 765, *v. post*; the admissibility however, of the evidence in the case of referees may be said to be governed on the principle of agency, the party referring to another makes that other his agent for the purpose of making the particular admission; *Wills Ev.*, 112.

7. *Taylor, Ev.*, ss. 904–906; 3 Russ. Cr. 485–491; *Roscoe Cr. Ev.*, 16th Ed., 53–54; see as to admissions by agents Sec. 18 Note 4 *post*; and as to admissions by co-proprietors *v. 10 ante*.

8. *R. v. Cox*, (1859) 1 F. & F. 90; *R. v. Mallory*, (1884) 15 Cox. 456, 458; *Taylor Ev.*, s. 907.

be used in his favour. As to admissions by prosecutors *v. post*, see notes to Secs. 17-20.

11. Time when admissions may be made. (a) *General.* When a party sues, or is sued personally, an admission made by him on any former occasion may be given in evidence against him. Such admissions may have been made by him while a minor. For though a minor, as he cannot appoint an agent,⁹ cannot be bound by the admission of an agent purporting to act for him, yet admissions made by the minor himself may be proved in an action brought against him after attaining his majority.¹⁰

A statement in a previous suit by a person that his status was of a tenant can be used as his admission of his possession being permissive.¹¹ A statement in a prior proceeding is relevant as admission in a subsequent similar proceeding.¹²

A primary use and effect of an admission is to discredit a party's claim by exhibiting his inconsistent utterances. It is therefore immaterial whether these other utterances would have been independently receivable as the testimony of a qualified witness. It is then inconsistency with the party's present claim that gives them logical force.¹³ An admission which ought not to bind a minor is an admission suggesting an inference which prejudices the case of the minors in the proceeding in which the admission is made. But if the admission was in his interest in that proceeding, it would be admissible against him in the subsequent proceeding.¹⁴

When a party sues, or is sued, personally, an admission made by him on a former occasion while sustaining a representative character, may also be given in evidence against him. Thus, where a person, when defending a suit as guardian for a minor, made an affidavit of certain facts, this affidavit was held to be evidence against that person of the facts sworn to in a subsequent action against him personally.¹⁵ That the party making the statement, that the consideration under the document in question was paid by a certain person, was a child at the date of the document, is not a ground referred to in Sec. 17 which will hinder the statement from being regarded as an admission under law, by supposing that because of his childhood at that time he could not be expected to speak out of personal knowledge.¹⁶ Admissions made by infants before the proceedings are commenced are accepted by Courts in the normal course of events and they are given whatever weight the Court may consider it proper to attribute to them.¹⁷ But admissions by a person sued or suing in a representative character are not admissions, unless they were made while the party making them held that character.¹⁸ Such persons therefore cannot affect the party represented by their admissions made before sustaining, or after they have ceased to sustain their representative character.¹⁹

9. Act IX of 1872, Contract Act s. 185 and see s. 11 *ib.*, *v. post*.

10. *O'Neil v. Read* (1914) 5 J. L. R. 434 (evidence of necessities supplied to an infant during his infancy). See *Dharamaji v. Gurray*, (1873) 10 Bom. H.C.R. 311.

11. *Madho v. Yeshwant*, 1973 Mah. L. J. 771 (1 L. R. 1974 Bom. 752; A. I. R. 1974 Bom. 12).

12. *Elammal v. Veeraswami*, 1975 Cr. L.J. 28 (Mad.).

13. *Wigmore*, s. 1058.

14. *Kesho Prasad Singh v. Parmeshri Prasad Singh*, 1923 Pat. 276; I.L.R. 2 Pat. 414; 71 I.C. 902; 1 P.L.L. 135.

15. *Beasley v. Magrath*, (1861) 2 Sch. & Let. 31, 34; *Laylor*, Fv. s. 755; *Stanton v. Percival*, (1854) 5 H. L.C. 257.

16. *Kaghavan v. Soudhni Amma*, A.I. R. 1957 Ker. 178.

17. *Alderman v. Alderman and Dunn*, (1938) 1 W.L.R. 177 (2).

18. S. 18, *post*; *Wills Ev.*, 3rd Ed., 171.

19. See *Steph. Dig. Art. 16*.

An admission made by a person in a written statement filed in a prior litigation in the character of a legal representative of a deceased defendant as a legatee under his will is not binding on him in a subsequent suit filed by him as the reversioner to the estate of the deceased, because the subsequent suit is brought by him not only on his behalf but on behalf of all the reversioners.²⁰

Further, statements by a party interested in the subject matter, or by a person from whom interest is derived, must have been made during the continuance of the interest,²¹ and statements by the persons mentioned in the nineteenth section must have been made whilst the person making them occupied the position or was subject to the liability in the section mentioned.²²

The effect of admission made during the conduct of suit may be taken into consideration.²³

(b) *Admission by insolvent.* Answers given by an insolvent in former proceedings are admissions, even if his examination in such proceedings was not authorised.²⁴

The admissions of a debtor made before his adjudication as insolvent are receivable to prove the petitioning creditor's debt.²⁵ Statements made by an insolvent in the course of his public examination under Sec. 27 of the Presidency Town Insolvency Act,¹ may be admissible against himself, but not against another insolvent or against the official assignee.² Answers given by a witness at his private examination are not merely evidence against him in any insolvency proceeding but also the evidence against him in any civil proceeding, whether in insolvency or in a civil suit.³ An acknowledgment of a debt in an insolvency petition by a partner binds himself but not his co-partners.⁴

12. To whom admissions may be made? So far as its admissibility in evidence is concerned, it is, in general, immaterial to whom an admission is made.⁵ Thus, an admission made to a stranger is as receivable as one made to an opponent. "It has indeed been held that in order to render an account stated binding on a party, the admission of liability must be made to the opposite party or his agent,"⁶ but this only refers to the effect of the admission, not to its admissibility.⁷ Even an admission made in confidence to a legal adviser or a wife is receivable, if proved by a third person.⁸ But a solicitor's

20. *S. T. Chendikamba v. K. I. Vishwanathamayya*, 1959 Mad. 446; (1959) 1 M.L.J. 227; 1959 M.W.N. 275; 49 L.W. 273.

21. S. 18, post.

22. S. 19, post.

23. *Jwala Singh v. Prem Singh*, A.I.R. 1972 Delhi 221.

24. *Joseph Perry v. Official Assignee*, 1920 Cal. 911; 11 I.R. 47; C. 254; 36 I.C. 7-8; 21 C.L.J. 522; 24 C.W.N. 425.

25. *Coole v. Braham*, 1848; 3 Ex. 183.

1. III of 1909.

2. *Tuchiram v. Radha Charan*, 1922 Cal. 267; 11 I.R. 49; Cal. 93; 60 I.C. 15; 34 C.L.J. 107, relying on

In re Brunner, (1887) 19 Q.B.D. 572.

3. *Jnanendra Bala Datta v. Official Assignee of Calcutta*, 1926 Cal. 597; 93 I.C. 834; 30 C.W.N. 346.

4. *Kisselbuss v. K. M. Spinning and Weaving Co., Ltd.*, 1917 Mad. 518; 36 I.C. 380.

5. *Best, Ev.*, s. 528.

6. *Breckon v. Smith*, (1883) 1 A. & E. 488; *Hughes v. Thorp*, (1889) 5 M. & W. 367; *Bates v. Townley*, (1884) 2 Exch. 152; *Taylor, Ev.*, s. 799.

7. *Best, Ev.*, s. 528.

8. *Taylor, Ev.*, s. 881 (see ss. 122, 126, 129, post).

admission in order to bind his client must have been made to the opposite party,⁹ and an admission to support an account stated must have been made to the creditor or his agent.¹⁰ So, private memoranda never communicated to the opposite side or to third persons are evidence against a party¹¹ as are admissions made to himself in mere soliloquy.¹² But what a person has been heard to say while rickling in his sleep seems not to be legal evidence against him, however valuable it may be as indicative evidence, for here the suspension of the faculty of judgment may fairly be presumed complete.¹³

So, with regard to voluntary confessions subject to the provisions of the twenty-fifth and twenty-sixth sections, *post* (relating to confessions made to, and whilst in the custody of, a police officer), it is in general immaterial to whom they have been made. So, what the accused has been overheard muttering to himself or saying to his wife or any other person in confidence will be receivable in evidence, provided that, in the latter case, it is proved by some person other than the wife, counsel, or solicitor.¹⁴ An admission of crime, when fairly made after due warning, is not inadmissible simply because, at the time it was made, no formal accusation had been made against the party making it.¹⁵

Accused person. The words "accused person" include any person who subsequently becomes accused.¹⁶ So, a confession made to a police officer by a person before he is accused of any offence was held to be inadmissible against him when he was accused of the offence.¹⁷

13. Nature and form of admission. In respect of the nature of admissions, no difference exists, in regard to their admissibility, between direct admissions and those which are incidental or made in some other connection or involved in the admission of some other fact.¹⁸ So far, at least as its admissibility is concerned, the form of an admission is in general immaterial.¹⁹ Thus admissions are receivable which are made parol, or are contained in books of account or letters,²⁰ documents (e.g. a map) filed as correct in former proce-

9. *Wilson v. Turner*, (1808) 1 Taunt 398.

10. *Shaw v. Shaw*, (1885) 2 K. B. 113 at pp. 135-6; 104 L.J.K.B. 549; 153 L.T. 245.

11. *Bruce v. Garden*, (1869) 17 W.R. (Engl.) 990; *Whart. Ev.*, s. 1123.

12. *R. v. Simons*, (1834) 6 C. & P. 540; *Best, Ev.*, s. 521.

13. *Best, Ev.*, s. 29; *R. v. Fitzhugh Sippets, Kent. Summ. Ass.* 1839, cited, *ib.*, *Gore v. Gibson*, (1845) 13 M. & K. 623, 627.

14. See *Taylor, Ev.*, s. 881, and cases cited ante, see ss. 25, 26, *post*, see *R. v. Sageon*, (1887) 7 W.R. Cr. 56.

15. *R. v. Ram*, (1865) 4 W.R. Cr. 10.

16. *Emperor v. Bagwan Dass*, 1941 Bom. 50; 111 R. (1941) Bom. 27; 192 I.C. 61; 42 Bom. L.R. 938; see also *Pakshi Narayanaswami v. Emperor*, 1939 P.C. 47; 66 I.A. 66; 11 L.R. 18 Pat. 234; 40 Cr.L.J. 364; 190 I.C. 1; 1939 A.L.J. 298; 41 Bom. L.R. 428; 43 C.W.N. 473; (1939) 1 M.L.J. 756; *Abdul Ghani*

v. Emperor, 1931 Lah. 763; 133 I.C. 55; 32 Cr.L.J. 985.

17. *Sat. Ish. Aung v. R.* (1911) 15 I.C. 305; 13 Cr.L.J. 465.

18. *Taylor, Ev.*, s. 800.

19. *Emperor v. F.C.D. Wheeler*, 1929 Sind. 15; 112 I.C. 50; 29 Cr.L.J. 962; *Wills, Ev.*, 3rd Ed., 155; *Phipson, Ev.*, 9th Ed., 236; *Best, Ev.*, s. 521, as to admissions "without prejudice," see s. 23, *post*.

20. *Rai Sukisach v. Rai Hukishen*, (1853) 5 M.I.A. 432, 443; *R. v. Hargrave*, 1871 L.B. 61; 617, *v. post*, a letter containing an admission does not require a stamp before it can be admitted in evidence *Said v. Manohar*, (1875) 23 W.R. 1; see also *Narain v. Ram*, 1880) 5 C. 864, where an entry showing the extent of the holding and the amount of the rent made in a book belonging to the lessor and signed by the lessee, was held relevant as an admission, though neither stamped nor registered; and *Galstaun v. Hutchinson*, (1912) 39 C. 789.

deeds,²¹ rough draft of a plaint previously filed,²² depositions,²³ verified plaint²⁴ or verified petitions²⁵ or written statements or answers to interrogatories, affidavits and the like, in former suits,¹ for a statement made by a party in another suit may clearly be used as an admission within the meaning of the eighteenth section.² Entries in books of account, though proved not to have been regularly kept may yet be relevant as admission.³ Admissions may be also contained in recitals and descriptions in deeds,⁴ horoscopes⁵ receipts, or mere acknowledgments given for goods or money, whether on separate papers, or endorsed on deeds or on negotiable securities, banker's passbooks, accounts rendered, such as a solicitors' bill, sworn inventories and declarations by executors which operate as an admission of assets,⁶ and survey maps,⁷ "but not in a passport, which is not conclusive evidence."⁸ A statement made by a firm in support of income tax returns where the suit item is shown as a debt owing by the firm to the plaintiff, constitutes an admission of liability of the firm to the plaintiff in respect of the amount mentioned therein.⁹ The omission of a claim by an insolvent in a schedule of the debts due to him given on oath is an admission that it is not due.¹⁰ A statement in a bill of sale is evidence against those who are parties to it the seller and the purchaser and the person who purchased from such last mentioned purchaser.¹¹

Statements recorded in a rent suit under Act X of 1859, which do not conform to the requirement of the sixtieth section, cannot be relied on as admissions.¹² An instrument which is not duly stamped cannot operate as an admission as to a collateral matter, except in criminal cases.¹³

Admission of a signature of a person on a document is not tantamount to admission of execution of the document by that person for the two things are different and have different legal implications.¹⁴ Statement that a person

21. **Huronath v. Preonath**, (1867) 7 W.R. 249.
22. **Byathamma v. Avulla**, (1891) 15 M. 19.
23. **Ollay v. Barjov**, (1869) 9 W.R. 162; **Soojoo Bibee v. Achmut Ali**, (1874) 14 B.L.R. App. 8; (1874) 21 W.R. 414; **Impey v. F.C.D. Wheeler**, 1929 Sind. L.J. 152 I.C. 50; 29 Cr.L.J. 962, v. post and see cases cited post, *passim*.
24. **Girish v. Shama**, (1871) 15 W.R. 457.
25. **Ib. Gour Lall v. Mohesh**, (1871) 14 W.R. 483 and see post **Mohun v. Chitto**, (1874) 21 W.R. 34, as to certificates filed in Court in name of pardanashin, see **Asmutoonissa v. Alla Hafiz**, (1867) 8 W.R. 468.
1. **Hurish Chunder v. Prosunno Coomar**, (1874) 22 W.R. 303; **Bhugmunt v. Lall**, 1882 M.L.S.L.J. 48; **Government of Bengal v. Motilal**, A.I.R. 1914 Cal. 69; I.I.R. 11 C. 173; 26 I.C. 81; 14 Cr.L.J. 321; 18 C.L.J. 452; 17 C.W.N. 1253 (S.B.) affidavits in answer to motion.
2. **Hurish Chunder v. Prosunno Coomar**, (1874) 22 W.R. 303 as to pleadings in the same proceedings, v. post. As to the same admissibility

- in England of pleadings in other actions, see **Phipson, Ev.**, 9th Ed., 236.
3. **R. v. Hanmanta**, (1877) 1 B. 610, 617, v. post.
4. **Taylor, Ev.**, 91, 100, 858, **Roscoe, N.P. Ev.**, 76; **Powell, Ev.**, 9th Ed., 465, 466, v. post; **Konwar Deogannath v. Ram Chander**, (1876) 4 I.A. 52; 2 C. 341 (P.C.); (1973) 3 Sim.L.J. 24 (H.P.).
5. **Raja Goundan v. Raja Goundan**, (1893) 17 M. 154.
6. **Taylor, Ev.**, ss. 859, 860.
7. See notes to s. 36, post and cases there cited.
8. **Yakub Mulla v. Union of India**, 62 C.W.N. 589.
9. **Somanna v. Subba Rao**, A.I.R. 1958 Andh. Pra. 200.
10. **Taylor, Ev.**, s. 804; **Nicholls v. Downes**, 1841 M. & Ryb. 49; **Hart v. Newman**, 3 Camp. 13.
11. **Soojoo Bibee v. Achmut Ali**, (1874) 21 W.R. 414.
12. **Pogha Mahtoon v. Gooron Baboo**, (1875) 24 W.R. 114.
13. Act II of 1899 (Stamp), s. 25.
14. **Gatabai v. Dayaram Shankar**, 72 Bom.L.R. 32; 1969 Mah.L.R. 838, A.I.R. 1970 Bom. 160, 162.

signed on blank paper does not amount to admission of execution of document.¹⁵

In matrimonial cases the admissions of parties can be acted upon provided there is no collusion between them.¹⁶

A return made to a collector by an occupant of land, stating the amount of the rent, is an admission as to the amount of the rent and is binding upon the occupant and all who claim under him.¹⁷ As to admissions in *avow feist* or in notices to enhance rent, see cases noted below.¹⁸

A judgment generally irrelevant, as between strangers may be relevant as between strangers if it is an admission.¹⁹ Thus, where *A* sued *B*, a carrier for goods delivered by *A* to *B*, a judgment recovered by *B* against a person to whom he had delivered the goods, was held to be relevant as an admission by *B* that he had them.²⁰ "It is true that a record is sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a solemn admission by such party in a judicial proceeding with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because the record is admitted in this case as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is, therefore, to be treated according to the principles governing admissions to which class of evidence it properly belongs."²¹ Though a judgment of a Criminal Court or verdict of conviction cannot be considered in evidence in a civil case²² a plea of guilty in the Criminal Court may be so considered as evidence of an admission.²³ A confession may be held proved where the evidence gives only the substance though not the actual words.²⁴ As to admissions made in pleadings, see notes to the fifty eighth section, *post*.

14. Hearsay and opinion. Personal knowledge is not required. "An admission is receivable, although its weight may be slight, as when it is founded on hearsay,²⁵ or, consists merely of the declarant's opinion or belief,¹ but

15. *Ethirajulu Naidu v. K.R.C. Chettiar*, 88 M. I. W. 265 (1975) 1 M.L.J. 5; A.I.R. 1975 Mad. 333; *Birbal Singh v. Harphool Khan*, A.I.R. 1976 All. 23.

16. See *Mahendra Nanilal Napavati v. Sushila Nanavati*, (1964) 7 S.C.R. 267 (1965) S.C.D. 95; (1965) 1 S.C.J. 788; 66 Bom. L. R. 681; 1975 M. P. L. J. 509; 1965 Mah. I. J. 365; A.I.R. 1965 S.C. 364; *Abulvahan v. Sitaram Bajpai*, 1969 J.L.J. 70.

17. *Avadh Bihari v. Ram Raj*, (1872) 18 W.R. 10.

18. *Ganga Prasad v. Gogun Singh*, (1877) 3 C. 322; see also *Narain Coomary v. Ram Krishna*, (1880) 5 C. 864; *Judovathi v. Rajah Buroda*, (1874) 22 W.R. 220.

19. *Steph. Dig. Art. 44* see also *Krishnasami v. Rangopala*, (1894) 18 M.

20. *Tiley v. Cowling*, (1701) 1 Ld. Ry. 73, 77, 78.

744; s.c. B.N.P. 243; *Steph. Dig. Art. 44*; illus. (c); *Taylor, Ev.*, s. 1694.

21. *Taylor, Ev.*, s. 1694.

22. See notes to 43 (*post*) to establish the truth of the facts upon which it was rendered.

23. *Shumboo v. Modhoo*, (1868) 10 W.R. 56.

24. *Nur Ali v. Emperor*, 1924 Lah. 498; 1 I.R. 5 L. 140; 81 I.C. 530; 25 Cr.L.J. 914.

25. *Wigmore, Ev.*, s. 1053; (*Re*) *Perton*, 53 I.T. 707 (1885) (Statement of a person as to his illegitimacy), see also *R. v. Walker*, (1884) 1 Cox 99, in *Taylor, Ev.*, s. 787 the point is treated as doubtful; as to statements by an agent containing hearsay or opinions, see (*The*) *Actacon*, (1853) 1 Spinks F. & A. 176; (*The*) *Solway*, (1885) 10 P.D. 137.

1. *Doe v. Steel*, (1811) 3 Camp. 115.

*Mahe Lal Rao v. Pann Panna Las Aya Rao*²¹ and in an exhaustive review of the case law, the question was answered in the following terms:

(1) A party's previous admission is relevant under Sec. 21 and can be used as evidence against him if that party has not given evidence in the witness-box at all. The value of the admission as a piece of evidence depends on the circumstances of each case, but generally an admission is a valuable piece of evidence.

(2) An admission is a relevant piece of evidence and can be used as legal evidence against a party even in cases where the party appears in the witness-box, but makes no statement inconsistent or contradictory to that admission, and a denial of the admission is not involved in the statement made by the party in the witness-box by considering the statement as a whole.

(3) A previous admission of a party who has given evidence in the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission or the statement made in the witness-box is such that it involves a denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence for the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with specific portions of that statement which were sought to be used as admissions. Without complying with the procedure laid down in Sec. 145, the admission contained in the previous statement cannot be used as legal evidence against that party.

The Patna High Court also has held that "Where a defendant does not give evidence in a previous statement which he had made in earlier proceedings can be put in evidence as an admission made by him and would be admissible against him". In another case the same court held that it is only when a document becomes relevant only by reason of Sec. 145 first before a statement made in it can be used to contradict the statement of the party, his attention must be drawn specially to the statements which are to be so used. Where however in a question goes to the root of the case and is relevant under Sec. 21 and it is necessary is not affected by the question of whether the party may or may not have given evidence consistent with the statement contained in it, it is not necessary to observe strictly the provisions of Sec. 145. In a case the same High Court has held that procedure prescribed by section 145 does not apply to a question in view of sections 17 and 21. In some view has been taken by Calcutta and Mysore High Courts in the above cases.²² The legal position under the provisions of Sec. 145 is that evidence in a previous suit does not prove anything and it ought to be given to the witness, but is not so in the case of admissions, where the party making the admission is required to explain and rebut the same, and unless a denial that is satisfactorily done the fact admitted must be taken to be established. Especially it is for the

21. 1946 Lah. 65; 229 I.C. 579; 47 P.L.R. 391 (F.B.).

22. *MS. Bhoj K. v. Hassan Khan*, 1942 Pat. 230; 1 I.L.R. 1212; 1942 P.W.N. 716.

23. *Rameshwar Day v. Bafloo*, Supd. 1936 Pat. 588; 165 I.C. 805; 17 I.L.R. 1212; 1936 P.W.N. 716.

24. *Arjun Mahton v. Monda Mahton*, A.I.R. 1971 Pat. 215.

25. *2 Cur W.R. 1812; 38 Cut.L.T.*

26. *Lingadagudi*, A.I.R. 1973 Mys. 280; 1973 P.W.N. 115 (F.B.) relied on; A.I.R. 1946 Lah. 65 (F.B.)

within the provisions of the twenty-eighth section *post*. But, if no inducement (within the meaning of the twenty-fourth section) has been held out relating to the charge, it matters not, as far as admissibility is concerned, in what way a confession has been obtained, though the manner in which it has been procured may affect its weight.¹⁶

Before using a statement (oral or written) as an admission, the facts which made it an admission must be proved.¹⁷

16. Matters provable by admission. *as Under English law.* Under the English law Admissions are receivable to prove matters of law, or mixed law and fact, though (unless amounting to estoppel) these are generally of little weight being receivable founded on mere opinion. Thus a defendant's admission that his trade was a nuisance has been received.¹⁸ So, a defendant's admission of a former void marriage is some, though not sufficient, evidence to support a conviction for bigamy.¹⁹ Matters of fact simply may always be proved in this manner. Thus, a wife's admission of adultery, though uncorroborated, has on more than one occasion been held sufficient evidence, where considered trustworthy upon which to grant a divorce,²⁰ though, if corroboration is available,²¹ it must be produced.²²

(b) Under Indian law. But, in India, an admission by a party on a pure question of law is not binding on him,²³ and he is not precluded from asserting the contrary, in order to obtain the relief to which upon a true construction of the law he may appear to be entitled.²⁴ An admission on a point of law is not an admission of a 'thing', so as to make the admission a matter

16. See Taylor, *Ev.*, s. 881, S. 29, *post* and notes thereto.

17. *Barindra v. R.*, (1909) 37 C. 467.

18. *R. v. Neville*, (1791) Peake. N.P.C. 9. See also as to the case *R. v. Fairie*, (1857) 8 E. & B. 486.

19. *R. v. Savage*, (1876) 13 Cox., 178; [sic., *sed q.* Whether reference intended or not *R. v. Flaherty*, (1847) 2 C. & K. 782]; *R. v. Savage*, overrules the previous decision of *R. v. Newton*, (1843) 2 M. & Rob. 503; *R. v. Simmonsto*, (1843) 1 Cox C. C. 30; *R. v. Lindsay*, (1902) 66 J. P. 505; *R. v. Naguib*, (1917) 1 K. B. 359; In *R. v. Phillips*, (1830) 1 Moo. C. C. 264 however, a declaration of the person showing who were (according to his own belief), his co-partners was rejected when by reason of the invalidity of the document evidencing the transfer of their shares, their legal title to them could not be established.

20. *Robinson v. Robinson*, (1858) 1 S. & T. 362; *Williams v. Williams*, 1866 L. R. 1 P. & D. 29; *Getty v. Getty*, (1907) P. 334; 76 L. J. P. 158; 98 L.T. 60.

21. *White v. White*, (1890) 62 L.T. 663.

22. *Phipson, Ev.*, 11th Ed., p. 310; in re-

gard to admissions involving matters of law it is said in *Phillips, Ev.*, p. 344, 10th Ed., "Where admissions involve matters of law, as well as matters of fact, they are obviously in many instances entitled to very little weight, and in some cases, they have been altogether rejected". Thus it has been held, that the discharge of a defendant by a Court of Quarter Sessions, under the Debtors Act could not be established by proof of an acknowledgment of the discharge by the plaintiff himself, for the discharge might have been irregular and void, or might have been mistaken by the plaintiff: *Scott, v. Clare*, (1812) 3 Camp. 256; *Summersett v. Adamsan*, (1882) 1 Bing 73; *Morris v. Millen*, (1767) 4 Bur, 2057.

23. *Ram Bharosey v. Ram Bahadur Singh*, 1948 Oudh 125; I.L.R., 23 Luck, 58; 1947 O.W.N. (C. C.) 558; *Gulab Chand v. Bhaiya Lal*, 1929 Nag. 343; 119 I.C. 698; *Banarsi Das v. Kanshi Ram*, A.I.R., 1963 S.C. 1165; 1963 S.C.D., 758.

24. *San Jagore v. Ganendramohan Tagore*, 18 W.R. 359 at 367; (1872) I.A. Supp. Vol. 47.

of estoppel²⁵. Even a Counsel's admission on a point of law cannot be binding upon a court, and the court is not precluded from deciding the rights of the parties on a true view of the law¹. Counsel's admission even on a question of mixed law and fact is not binding². The binding nature of an admission as to the existence of a fact, which is a question of mixed law and fact, depends upon the circumstances of each case³. In a Lahore case, it has been held that the question whether a particular custom does or does not prevail in any particular tribe is a matter on which the tribe men themselves are in the best position to pronounce an opinion, and an admission as to the existence of the custom does not stand on the same footing as an admission on a question of law⁴. On a question as to who under the law or custom is entitled to succeed, the statement of law by the tribe men as to the nature of the law or custom is not binding on the parties.⁵

Again, oral admissions are not sufficient to prove the contents of documents except where secondary evidence is admissible as to the genuineness of a document produced in question⁶. The execution of documents (whether attested or not) which are not required by law to be attested, is proved by admission or confession⁷. In the case of documents required by law to be attested, the admission by a party to an attested document of its execution by himself is sufficient proof of its execution as against him⁸. But the admission of a party to the execution of a document, even if made, that document a registered document, does not constitute compliance with the Registration Act, unless it is not objected to by the other party⁹. The courts have held that the document is signed and attested by the party, and it is not sufficient to hold that the document is duly executed in the absence of circumstances showing that the document is not the work of the party¹⁰. Admissions may even sometimes be received as to entries produced in evidence, provided they are proved by a third person.¹¹

It is in the case of admissions by a party to a document, that each of the parties and the court are bound by the admission of the party¹².

17. The whole admission or confession must be considered. (a) *Admissions*. The whole admission or confession must be taken to-

25. *Jagwant Singh v. Silan Singh*, 1 L.R. 21 All. 285 at 287; 19 A.W.N. 66; see also *Gopeelall v. Chundralal Bhoojee*, 11 B.L.R. 391 at 395; 19 W.R. 12; *Surendra v. Doorgasundari*, 19 I.A. 108; 19 C. 513 P.C.; *Dungaria v. Nandlal*, 5 A.L.J. 141 (1931); 27 Cal. 156; 26 I.A. 216; 4 C.W.N. 274.

1. *Societe Belge de Banque v. Rao Girdhari Lal Chaudhary*, 1940 P.C. 90; 187 I.C. 770; 1940 Kar. (P.C.) 208; 1940 A.W.R. 86; 51 I.W. 713; 1940 O.W.N. 445; 42 P.L.R. 339; 6 B.R. 618; As to further discussion on the binding nature of admissions by Counsel, see notes post.

2. *Kesar v. Buta*, 1945 Lah. 336; 17

3. *Mahadeo v. Baleshwar Prasad*, 1939 All. 626; 1939 A.L.J. 708.

4. *Ghulam Sarwar Khan v. Abdul Majid Khan*, 1928 Lah. 779; 113 I.C. 99.

5. *Mahabir Singh, Buhari Devi v. Pirthi Singh*, A.I.R. 1963 Punj. 66. See also *Sharnappa v. Pathan*, A.I.R. 1963 Mys. 335.

6. S. 72, post; see *Taylor, Ev.*, ss. 414, 1843; *Common Law Procedure Act*, 1854, s. 26.

7. S. 70 post; *Taylor, Ev.*, ss. 1848-1853.

8. *Sharnappa v. Pathan*, A.I.R. 1963 Mys. 335.

9. *v. ante*.

10. *Vallammai Achi v. Ramanathan*, 1 L.R. (1969) 1 Mad. 734; (1970) 2 M.L.J. 331; 83 M.L.W. 36; A.

written statement, the admission in the replication to the first written statement still binds the plaintiff and will operate as an admission.¹⁷

Admissions in pleadings are to be taken in their entirety. Any document, in order to be established as an admission, is to be introduced into evidence by tendering that piece of admission if it is in the nature of a document, for then the parties will have an opportunity to test that which is going to be used against them as an admission.¹⁸

Thus, where in a suit for rent, at an enhanced rate after notice, the plaintiff set forth that the defendant and his predecessors had been holding the tenure without any change in the rent, but alleged also that the tenure had its origin at a period long after the permanent settlement, it was held, that the defendant was not at liberty to avail himself of such portion of the admission as afforded a ground for the presumption of uniform payment from the permanent settlement without accepting the latter part of the admission which rebutted such presumption.¹⁹ It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all.²⁰

The principle upon which the rule is grounded is, that if a party makes a qualified statement, that statement cannot be used against him apart from that qualification; an unfair use is not to be made of a party's statement, by trying to convert into a particular admission by him that which he never intended to be such an admission.²¹ But though it is the rule that an admission, which is qualified in its terms, must be ordinarily accepted as a whole or not taken at all as evidence against a party, yet when a party makes separate and distinct allegations without any qualification, this rule does not apply. It is by no means the case that no portion of a party's statement can, by any possibility, be given in evidence against him, without every portion of the statement from the beginning to the end being also read.²² A distinction must also be drawn between the case where an admission by one party has merely the effect of relieving the other party from giving proof of a particular fact, and the case where one party failing to adduce independent evidence in his favour attempts to rely on the statement of the other party as an admission. In the latter case, as the party relies on the admission, he must take the whole of it together; in the former case, the one party cannot be said to use the admission of the other as evidence at all.

Under the Civil Procedure Code, it is the duty of the Court to examine the written statements in order to see on what points the parties are at issue

17. *Bharat Nidhi, Ltd. v. Megh Raj Mahajan*, C.P.D.R. (D) 88 A.I.R. 1967 Delhi 22, 23.

18. *M. G. A. Hossain v. Binani Properties* 73 C.W.N. 591, 604.

19. *Judoonath v. Raja Buroda*, (1874) 22 W.R. 220.

20. *Motabhoj Mulla Fsebhoy v. Mulji Haridas*, 1915 P.C. 2; 42 I.A. 103; I.L.R. 39 Bom. 399; 29 I.C. 223; 15 A.L.J. 529; 17 Bom. L.R. 460; 21 C.L.J. 507; 19 C.W.N.

713; 28 M.L.J. 589; 1915 M.W.N. 2. *Sundara Reddy v. Gopal Thevan*, 1934 Mad. 100; 150 I.C. 132; 39 L.W. 34.

21. *Bykint Coomar v. Chunder Mohan Chowdhry*, (1868) 1 B.L.R. (A.C.) 133; 10 W.R. 190; *Explaining Poolin v. Watson & Co.*, (1868) 9 W.R. 190.

22. *ib.* see S. 39, post; and notes there-to.

to lay down the issues and to receive and consider the evidence adduced on the points in dispute, but the Court will not allow the parties to waste its time by producing evidence to establish that which has never been contradicted, and when a defendant admits any one fact contained in the plaint, and thereby excludes independent evidence thereof, he is not entitled to say that the plaintiff has relied on his statement as evidence and that he (the defendant) is, in consequence, in a position to claim that the whole of it may be read as evidence in his own favour. If a party wishes to give evidence in his own favour, it is in his power to come forward, like any other witness, and subject himself to examination and cross-examination, but until he has subjected himself to cross-examination no statement which he may volunteer can be used as any evidence in support of his own case, unless the right so to use it, has accrued from the deliberate act of his adversary. A party cannot himself determine that his own statement shall be used as evidence in his favour.²³

(b) *Confessions*. As in the case of admissions in civil cases admissions in criminal cases must be taken as a whole, and the general rule is that whole of a confession must be given in evidence, and read and taken together. It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all.²⁴ In *Palvinder Kaur v. The State of Punjab*,²⁵ their Lordships of the Supreme Court observed:

"The Court thus accepted the inculpatory part of that statement and rejected the exculpatory part. In doing so, it contravened the well-accepted rule regarding the use of confession and admission that this must either be accepted as a whole or rejected as a whole, and that the Court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible. Reference in this connection may be made to the observations of the Full Bench of the Allahabad High Court in *Emperor v. Jagmool* with which our observations we fully concur. The confession there comprised of two elements, (a) an account of how the accused killed the woman, and (b) an account of his reasons for doing so, the former element being inculpatory and the latter exculpatory, and the question referred to the Full Bench was: 'Can the Court, if it is of opinion that the inculpatory part commands belief and the exculpatory part is inherently incredible, act upon the former and refuse to act upon the latter?' The answer to the reference was that where there is no other evidence to show independently that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible."

23. *Shurfuraz v. Dhunoo* (1871) 16 W.R. 257, per Ainslie, J.

24. *Hamunt Govind v. State of Madhya Pradesh*, 1952 S.C. 343; (1952) S.C.J. 509; 1954 Cr. L.J. 129; (1952) 2 M.L.J. 631; 1953 M.W.N. 417; *Harold White v. The King*, 1945 P.C. 181; 224 I.C. 176; 47 Cr. L.J. 575; 1945 A.L.J. 511; *Jagmal v. Emperor*, 1948 All. 211; 49 Cr. L.J. 245; 1948 A.L.J.

106; *Neelakantan Vasu v. State*, 1954 Trav-Co. 282; but see *Emperor v. Etwa Munda*, 1938 Pat. 258; 175 I.C. 300; 39 Cr. L.J. 554; 19 P.L.T. 176 (S.B.).

25. 1952 S.C. 354 at 357; I.L.R. (1953) Punj. 107; 1954 Cr. L.J. 354; 1953 A.L.J. 18; 1953 M.W.N. 418.

1. 52 All. 1011 (F.B.); 129 I.C. 258; A.I.R. 1931 A. 1.

It would therefore appear that a statement or a confession of an accused person need not be considered as true in its entirety if there is other evidence including circumstantial evidence which casts doubt upon some portion thereof, and it is open to the Court to accept a part of the admission or confession which appears to the Court to be true and reject the other part which is not in the light of such other evidence.² The Court cannot start with the confession, it must begin with the other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of that evidence, then it may turn to the confession to receive assurance in support of its conclusion.³

"There is no doubt that, if a prosecutor uses the declaration of a prisoner, he must take the whole of it together and cannot select one part and leave another,⁴ and if there be either no other evidence in the case, or no other evidence incompatible with it the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner and the whole of the other evidence must be left to the jury for their consideration, precisely as in any other case where one part of the evidence is contradictory to another."⁵ A confession is evidence for the prisoner as well as against him and it must be taken altogether, but still the jury may, if they think proper, believe one part of it and disbelieve another. The Court is at liberty to disregard any self-exculpatory statement contained in the confession which it disbelieves.⁶ When the prosecution relies on such a statement as the only evidence of an offence, care must be taken that nothing is read into that statement.

2. **Koli Jera Jodha v. State**, 1954 **Sau.** 115; 1955 **Cr. L. J.** 1473; **Ranjit Singh v. State**, 1952 **Himachal Pradesh** 81; **Nihal Singh v. Emperor**, 1940 **Lah.** 157; 41 **Cr. L. J.** 576; 188 **I.C.** 826; **Emperor v. Jate Union**, 1940 **Pat.** 541; 41 **Cr. L. J.** 472; 187 **I. C.** 586; **Emperor v. Jawa Munida**, 1938 **Pat.** 226; 175 **I.C.** 300; 34 **Cr. L. J.** 573; 19 **P.L.I.** 476 (S.B.); **Para Kinkar v. State of Tripura**, 1955 **Tripura** 19.

3. **Kashmira v. State**, **A.I.R.** 1952 **S.C.** 169; 1952 **Cr. L. J.** 830; 1952 **M.W.N.** 482; 1952 **All. W.R.** (Supp.) 4; 1952 **I.M.L.J.** 754; **Hari Chetan v. State**, **A.I.R.** 1964 **S.C.** 1184; 1964 **B.L.J.R.** 510; 1964 **Cur. L.J.** (S.C.) 208; 1964 (2) **Ch. L.J.** 344; 1964 **M.I.J.** (Cr.) 555.

4. **R. v. Chikoo** (1866) 5 **W.R. Cr.** 79; **R. v. Boollloo** (1867) 8 **W.R. Cr.** 38; **R. v. Gan**, (1861) 1 **W.R. Cr.** 17; 21 **18**; **R. v. Chulundee**, (1856) 3 **W.R. Cr.** 35, 56; **R. v. Beshon** (1872) 18 **W.R. Cr.** 29; **R. v. Nityo**, (1875) 24 **W. R. Cr.** 80; **Goloke v. The Magistrate Chiuagong**, (1876) 25 **W.R. Cr.** 15 (admission not amounting to con-

fession of guilt); **R. v. Sonaoollah**, (1865) 2 **W.R. Cr.** 23, 24; **R. v. Dida**, (1880) 15 **B.H.C.R.** 459, 479. "If one part of a conversation is admitted part of a confession of the crime, the prisoner has a right to say before the Court the whole of what was said in that conversation, at least so much as is explanatory of the part already proved and perhaps in *favor*em *some* all that was related to the statement." **Ex parte The Queen's Case**, (1820) 2 **Br. & Bing.** 287; as to distinct or opposing statements, if the accused, see **R. v. Seaton**, (1878) 1 **B.H.C.R.** 522; **R. v. Nese**, (1877) 24 **W.R. Cr.** 80, and **Pika v. R.**, (1912) 39 **C.** 855.

5. **R. v. Jones**, (1827) 2 **C. & P.** 629, per **Bosanquet, J.**

6. **R. v. Jones**, *supra*, 4 **C. & P.** 221; 226; **R. v. Dida**, *supra*, 15 **B.H.C.R.** 459; **R. v. Dida**, *supra*, 15 **B.H.C.R.** 459; **R. v. Sonaoollah**, (1865) 2 **W.R. Cr.** 23, 24; it may be that the Court would not read into the whole to the exculpatory parts; **R. v. Amrita**, (1870) 19 **B.H.C.R.** 497, 500.

7. **Pika v. R.**, *supra*.

18. **Admission must be unambiguous and clear.** Before any statement can be used as an admission, it must be shown to be unambiguous and clear on the point at issue.⁸ If an admission is capable of two interpretations, an interpretation unfavourable to the person making it should not be put on his admission. The requirement is that an admission must be clear, precise, not vague or ambiguous.⁹ Before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive; there must be no doubt or ambiguity about it.¹⁰

19. **Weight to be given to admissions.** As stated above, admissions must be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of this Section and Section 21 of the Act, though they are not conclusive proof of the matters admitted. Admissions duly proved are admissible in evidence, irrespective of whether a party making them appeared in the witness box or not, and whether that party, when appearing as witness, was confronted with those statements, in case he made a statement contrary to those admissions. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness.¹¹ What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.¹²

Where the plaintiff pleaded minority on a particular date but the defendant pleaded that the plaintiff was a major on that date and in appeal each wanted to rely upon such admission of the other. Thus admission against admission set the matter at large and the answer to the question would depend on other evidence in the case.¹³

‘Evidence of oral admissions ought, however, always to be received with great caution. Such evidence is necessarily subject to much imperfection and mistake; for, either the party himself may have been misinformed, or he may

8. *Parash Nath v. Ghasi Ram*, A.I.R. 1960 Pat. 46; *Sita Ram v. Ram Chandra*, 1957, 2 S.C.C. 49; A.I.R. 1977 S.C. 1712.

9. *Chandra Kumar v. Narpot Singh*, I.L.R. 34 F.A. 27; I.L.R. 29 A. 184; *Nagibai v. Shamrao*, 1956 S.C.R. 411, 406; A.I.R. 1956 S.C. 600; I.L.R. 1956 Mys. 152; *Ramji v. Manohar*, A.I.R. 1961 B. 169, 62 Bom. I.R. 522.

10. *C. Koteswara Rao v. C. Subba Rao*, 1969 S.C.D. 380, 1970, 2 S.C.J. 679; (1970) 2 Andh. W.R. (S.C.) 127; (1970) 2 M.L.J. (S.C.) 127; A.I.R. 1971 S.C. 1742.

11. *Bharat Singh v. Bhagirathi*, (1966) 2 S.C.J. 53; 1966 S.C.D. 153; (1966) 1 S.C.W.R. 222; A.I.R. 1966 S.C. 405, 415; *Makhaa Kumbhar v. Fague Kumbhar*, I.L.R. 1966 Cut. 483; 52 Cut.L.J. 1041 (muta-tion petition admission in previous

proceedings); *Ishar Das v. Arjan Singh*, 1966 Cut. I.J. 587; *Punjab University Chandigarh v. Prem Chand*, 1971 Cut. L.J. 20; A.I.R. 1971 Punj. 177; *Ramudu Mudaliar v. Eammal*, A.I.R. 1971 Pat. 215; *Burabai Rout v. D. Rout*, (1972) 38 Cut. I.J. 161; *Veerbasavaradhya v. Devotees of Lingadagudi Mutt*, A.I.R. 1973 Mysore 280.

12. *Bharat Singh v. Mst. Bhagirathi*, A.I.R. 1966 S.C. 405, 410 (1966) 1 S.C.W.R. 222; 1966 S.C.D. 153; (1966) 2 S.C.J. 53; *Makhaa Kumbhar v. Fague Kumbhar*, I.L.R. 1966 Cut. 483, 52 Cut. I.T. 1041, 1044 (admission in prior mutation proceedings); *Ishar Das v. Arjan Singh*, 1966 Cut. I.J. 587; *Punjab University v. Prem Chand Handa*, 1971 Cut. I.J. 20; A.I.R. 1971 Punj. 177, 181.

13. *Hetram v. Bhader Ram* 1973 W. L. N. 981 (Raj.)

not have clearly expressed his meaning, or the witness may have misunderstood him, or may purposely misquote the expression used. It also sometimes happens that the witness, by unintentionally altering a few words, will give an effect to the statement completely at variance with what the party actually said.¹⁴ So, where a plaintiff sued for a sum said to be due upon a settlement of account and, instead of producing and proving the account current between himself and the defendant, produced evidence to prove the admission of the debt, the Privy Council said: "They consider that it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, especially when there are other means of proving the case, if a true one."¹⁵ But where an admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature.¹⁶ Admissions depend very much upon the circumstances under which they are made,¹⁷ and possible motives for incorrect statements by interested parties should not be ignored. The nature of the facts admitted is also a material point to be considered. If the fact admitted is one within the personal knowledge of the party admitting, and there is no evidence of convincing explanation forthcoming, its value is considerable. If, on the other hand, the fact admitted is an inference from evidence and circumstances, the weight of admission may be very little. A general allegation by an interested party as to the existence or nonexistence of a custom is his conclusion of a mixed question of law and fact. This is particularly so in pleadings in which a party has to make allegations both of fact and law.¹⁸

As in the case of admissions in civil proceedings, the evidence of oral confessions of guilt ought to be received with great caution.¹⁹ But a deliberate and voluntary confession of guilt, if clearly proved, is among the most effectual proofs in the law, the degree of credit due to the confession must be estimated by the Court or jury according to the particular circumstances of each case.²⁰ In the first instance it must be clear that there is really a confession.²¹ To constitute a confession the person confessing should make a full and explicit admission of his guilt so clear as to have no other hypothesis tenable.²² The ordinary rule is that a confession is evidence for the prisoner as well as against him and must be taken altogether. But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. If other evidence incompatible with a part of the confession is on record, it may be relied on in preference to that part.²³ In order to determine whether statements are confessions the whole of the statements must be taken into consideration, and where the statements are self-exculpatory they are inadmissible.²⁴ Although a confession must be taken as a whole and considered along with the admitted facts of the case, the accused being judged by

14. *Taylor. Ev.*, s. 861.

15. *Tala v. Jaggemath*, (1883) 10 I A 74, 79; 13 C.L.R. 266, 271.

16. *Taylor. Ev.*, s. 861.

17. *R. v. Simmonsto*, (1843) 1 C & K. 164, 166, see notes to s. 31, post.

18. *Mahadeo v. Balshwar Prasad*, 1939 All. 626; 1939 A.L.J. 708.

19. *Taylor. Ev.*, s. 862.

20. *Taylor. Ev.*, s. 865, v. ante, Introduction. See as to the degree of credit to be given to confessions *Roscoe, Cr. Ev.*, 16th Ed., 39: 1

Phillips & Arn. Ex., 402, 10th Ed., *R. v. Dada*, (1889) 15 B 452, at p. 480.

21. *R. v. Pramathanath Bagchi*, 1920 Cal 78, 33 I C 282; 21 Cr L.J. 266; 30 C.L.J. 503.

22. *Smith v. R.*, 1918 Mad 111; 43 I.C. 605; 19 Cr. L.J. 189.

23. *Husnu v. R.*, 1918 Nag. 131; 20 Cr. L.J. 77; 53 I C 145.

24. *Ah Loong v. R.*, 22 C.W.N. 834; 28 Cr. L.J. 105; 46 C 411; 48 I.C. 504; A.I.R. 1919 C. 696.

his whole conduct, the Court is at liberty to disregard any statement contained in the confession which it disbelieves.²⁵ In trials by jury, it is the duty of the judge to lay the confessions properly before the jury, pointing out the circumstances bearing for, and against, their value, but it is for the jury to form an opinion as to their weight.¹ A Judge, in fact, is hardly justified in treating a confession made by a prisoner before a Magistrate, as a mere piece of evidence which a jury may deal with in the same way as they would with the evidence of a witness of doubtful veracity. If a prisoner has confessed before a Magistrate the attention of the jury should be drawn to the question whether there was any reason to suppose that that confession was made under any undue influence, and if there is no reason to suppose anything of the kind, the jury should be told so and advised that they may act upon it.² The informative hypothesis affecting self-criminative evidence have been, in particular, dealt with in the works of Bentham and Best.³ False confessions are either the result of mistake (which may be of fact or of law) or are intentional. In the case of intentionally false confession, the field of motive must be searched for such causes as mental and bodily torture, desire to stifle further inquiry, weariness of life, vanity, desire to benefit or injure others, and motives originating in the relation of the sexes. False confessions are not confined to cases in which there has really been a crime committed. Frequently such confessions have been made under hallucination of events which are impossible. The above causes affect more or less every species of confessional evidence. But extra-judicial statements are subject to additional informative hypothesis such as mendacity in the report, misinterpretation of the language used and incompleteness of the statement.⁴ Their value, except in very rare cases, is not very high. It would be unsafe to rely upon an extra-judicial confession when there is no other corroborative evidence in support of it.⁵

17. *Admission defined.* An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned

s. 3 ("Document.")

s. 3 ("Fact in issue.")

s. 3 ("Relevant fact.")

s. 21 (Proof of admission.)

ss. 22 (a), (b) Admissions as to documents)

s. 23 (Admission "without prejudice")

ss. 24-30 (Rules with regard to admissions which amount to confessions.)

s. 31 Effect of admissions)

Admissions generally: Steph. Dig., Arts. 15-20; Taylor, Ev., ss. 723-861; Wharton, Ev. 1075-1220; Roscoe, N.P., Ev., 62-79; Plapson, Ev., 11th Ed. 304-338; Wills, Ev., 3rd Ed., 153-181; Best, Ev., s. 518 et seq; Powell, Ev.,

25. *Kamoda v. R.*, 1918 Nag. 198 (2);

19 Cr. L.J. 785; 46 I.C. 705.

1. *R. v. Dada*, (1889) 15 B. 452, 461, 478; *R. v. Mania*, (1886) 10 B. 497, 502.

2. *R. v. Shahabut*, (1870) 15 W. R. Cr. 42-43 per Norman, C.J.

3. Best, Ev., ss. 554-575; Norton, Ev., 155, 161.

4. Best, Ev., ss. 554-575; Norton, Ev., 155, 161.

5. *Udhan Lohar v. Emperor*, 1939 All.

685; 184 I.C. 390; 40 Cr. I.J. 954; 1939 All. L.J. 752; *Emperor v. Kommoju*, 1940 Pat. 165 I.L.R. 19 Pat. 301; 188 I.C. 57; 41 Cr. I.J. 533; *Fakir Chand v. State*, 1950 M.B. 76; 51 Cr. L.J. 1265 (I.B.); *Kandhai v. State*, 1953 V.P. 38; *State v. Thingham Dhabalo Singh*, 1955 Manipur 1; *Mst. Bhagan v. State*, 1955 Pepsu 33; *Des Raj v. Emperor*, 1928 Lah. 858; 111 I.C. 449.

9th Ed., 420–445; Norton, Ev., 142–154; Giesle, Ev., 456; Phillips and Arn., Ev., 308–401; Greenleaf, Ev., Ch. XI; Wigmore, s. 1048, et seq.

By agents—Steph. Dig., Art. 17; Taylor Ev., ss. 602, 605; Roscoe N. P. Ev., 69–71; Best, Ev., s. 531, p. 487; Evan's Principal and Agent, 187–193, 2nd Ed.; Norton Ev., 144; Pearson's Law of Agency in British India, 426, 428; Powell Ev., 9th Ed. 209; Story on Agency, ss. 134, 135; Roscoe Cr. Ev., 16th Ed., 55; Wigmore, Ev., s. 1078.

By persons having proprietary or pecuniary interests—Steph. Dig., Arts. 16, 17; Taylor, Ev., ss. 743–754, 756, 758, 787; Roscoe, N. P. Ev., 67; Act IX of 1908, Limitation Act, 1963, S. 20).

By persons from whom interest is derived—Steph. Dig., Art. 16; Taylor, Ev., ss. 787–794, 758–190.

By strangers—Steph. Dig., Art. 18; Taylor, Ev., ss. 740, 759–765.

By referees—Steph. Dig., Art. 19; Taylor Ev., ss. 760–765.

SYNOPSIS

1. The section.

2. Principle.

1. The Section. The Section defines “admission”. According to it, an admission is—

- (1) a statement, that is, something which is stated,
- (2) such statement may be oral or documentary, but
- (3) the statement must suggest any inference as to—
 - (a) any fact in issue, or
 - (b) any relevant fact, (otherwise the statement will not amount to admission.⁵⁻¹)
- (4) the statement must be made by any of the persons mentioned in the following Sections, and
- (5) the statement must be made under the circumstances mentioned in the following Sections.

2. Principle. The reception of admissions, considered as exceptions to the rule against hearsay, is grounded upon the fact, that what a person says may be presumed to be true as against himself, and when not obnoxious to that rule upon the fact of inconsistency. But the very ground of this presumption excludes such an inference, when the declarations of a person are tendered as evidence in his own favour⁶. The general rule is that an admission can only be given in evidence against the party making it, and not against any other party⁷. To this rule there are certain exceptions which are mentioned in Secs. 18–20. When broadly stated in such a manner as to include these exceptions, the rule is that the declarations of a party to the record, or of one identified in

5-1. *Sivaram v. Ramchandra*, A. I. R. 1977 S. C. 1712 (1977) 2 S.C.C. 49.

6. *Best*, Ev., s. 519; *Wills*, Ev., 150; but see also *Taylor*, Ev., s. 723; v. ante

Introduction and S. 21 post. (in re) *Whitely* (1891) 1 R. 1 Ch. 558, 563, 564; *Stanton v. Percival*, (1854) 5 H.L. Cas 257.

interest with him, are, as against such party, receivable in evidence.⁸ This identity of interest which determines the relevancy of the admissions includes (a) agency,⁹ and (b) proprietary or pecuniary interest,¹⁰ which includes (i) joint interest,¹¹ (ii) real as opposed to nominal interest,¹² (iii) derivative interest.¹³ Statements of one person cannot be regarded as admissions of another person merely on the allegation that the two are in collusion.¹⁴ Statements by strangers are not generally relevant.¹⁵ But to this general rule also there are certain exceptions.¹⁶ In respect of the admissions of agents, the general principle applies *qui facit per alium facit per se*. There is a legal identity of the agent with the principal. If the principal constitutes the agent his representative in a certain transaction, whatever the latter does in the lawful prosecution of that transaction is the act of the principal.¹⁷ Agency is the ground of reception of declarations by partners and joint contractors and referees.¹⁸ In respect of declarations by persons having a proprietary or pecuniary interest in the subject matter, the rule in respect of the joint interest is that the admission of one party may be given in evidence against another, when the party against whom the admission is sought to be read has a joint interest with the party making the admission in the subject matter in the thing to which the admission relates.¹⁹ Thus, where the pleader for the plaintiff deposed that the second defendant had asked him before the institution of the suit to arrange a settlement, this was held admissible against all the defendants.²⁰ This rule depends upon the legal principle that persons seized jointly are seized of the whole, each being seized of the whole, the admission of either is the admission of the other and may be produced in evidence against that other. That is applied from real property law to other matters.²¹ In the case of parties who have a real as opposed to a nominal interest, the law in regard to this source of evidence looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record.²² Lastly, in the case of derivative interest the party against whom the admission is sought to be used takes what he claims in the subject-matter from the person who made the admission, as where it is sought to read against the son an admission made by the ancestor. The ground upon which admissions bind those in privity with the party making them is (as in the case of the other above-mentioned exceptions) that they are identified in interest.²³ He (the person against whom the admission is read) stands in the shoes of the party making the admission. He can only claim what he claims, because he derives title in that

8. Taylor, Ev., s. 740.

9. Ss. 18, 20, see post.

10. S. 18, Cl. (1), see post.

11. See ib.

12. See post.

13. S. 18, cl. (2), see post.

14. Mooti Ram v. Sir Taji, 1931 All. 684; 151 I.C. 261.

15. Steph. Dig., Art. 18; Taylor, Ev., s. 740, see post.

16. Taylor, Ev., ss. 759, 765, see post, and S. 19.

17. Taylor, Ev., s. 602; Best Ev., s. 581, see post. As to admissions by agents see the judgments of Sir W. Grant in *Faulk v. Hasting*, (1804) 10 Ves. 123.

18. See post; and Introduction, ante.

19. (*In re Whiteley*, (1891) L.R. 1 Ch. 558, 563; *Chadha v. Jhau*, (1911)

39 C. 995.

20. *Meajan v. Alimuddin*, 1917 Cal. 487; I.L.R., 41 C. 130; 34 I.C. 571; 20 C.W.N. 1217; 25 C.L.J. 42; per Sanderson, C.J., and Mookerjee, J.; see also *Yagganna Obanna v. K. Jagalla Gangarath*, 1945 Mad. 361; (1945) 1 M.L.J. 378; 1945 M.W.N. 352.

21. *In re Whiteley* supra, per Kekewich, J. The declarations of partners and joint contractors are admissible both on the ground of joint interest and of agency; Taylor, Ev., ss. 598, 743; Steph. Dig., Art. 17, see post.

22. Taylor, Ev., s. 756, see post.

23. *Ib.* s. 787. See also Halsbury's Laws of England, 3rd Ed., Vol. 15, p. 299.

way, and therefore it is only fair according to legal principles, that he should be bound by the admissions of him through whom he claims."²⁴

Admissions must be unambiguous, clear and precise, not vague or ambiguous.²⁵ If an admission is capable of two interpretations, an interpretation unfavourable to the person making it should not be put on his admission.²⁶

When an admission is proved, though it is not conclusive evidence, the facts contained in it may reasonably be presumed to be true until the admission is explained satisfactorily and the presumption is rebutted.^{25, 1} The burden of proof lies on the person who has to prove a fact and it never shifts but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.¹

18. *Admission by party to proceeding or his agent* :- Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case as expressly or impliedly authorised by him to make them, are admissions.

by suit or in representative character :- statements made by parties to suits sue or sued in a representative character are not admissions, unless they were made while the party making them held that character.

Statements made by—

(1) *by party interested in subject-matter*; persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding and who make the statement in their character of persons so interested, or

(2) *by person from whom interest derived* :- persons from whom the parties to the suit have derived their interest in the subject-matter of the suit are admissions, if they are made during the continuance of the interest of the persons making the statements

SYNOPSIS

I. General:

- (a) The Section,
- (b) Statements made without prejudice.

(c) Admissions must be taken as a whole.

(d) Effect of admission in documents.

- 24. *In re Whiteley*, (1891) L.R. 1 Ch. 558, 563, per Kekewich, J.
- 24-1. *Sita Ram v. Ram Chandra*, A.I.R. 1977 S.C. 1712; (1977) 2 S.C.C. 10.
- K. S. V. Manohar*, 62 Bom.L.R. 100; A.I.R. 1961 B. 169. See also *Chandra v. Narpal*, L.R. 34 1. A. 27; I.L.R. 29 A. 184; *Nagubai v. B. Shama Rao*, 1956 S.C.R. 451; A. I. R. 1956 S.C. 593; I. L. R.

- 1956 Mys. 152.
- 25-1. *Thiru John v. The Returning Officer*, A.I.R. 1977 S.C. 1724; (1977) 3 S.C.C. 540; *S. T. Thimappa v. S. I. Prasad*, A.I.R. 1978 Kan. 25.
- 1. *Gouranga Panigrahi v. Shahadeh Panigrahi*, 34 Cut.L.T. 890 distinguishing *Kishori Lal v. Ma. Chaltibai* A.I.R. 1959 S.C. 504 not applying to cases where the initial onus rests,

2. "Statement".
3. "Party to the proceeding":
 - (a) General.
 - (i) Deposition in previous proceedings.
 - (ii) Recital in documents.
 - (iii) Confessions and plaintiffs.
 - (iv) Parties in criminal cases.
 - (v) When an admission can be used against the party making it.
 - (b) Statements by Agents
 - (i) General.
 - (a) Husband and wife.
 - (b) Admissions by agents in criminal cases.
 - (c) Admissions by attorneys, pleaders, solicitors, counsel, etc.
 - (d) Counsel's admission in criminal or income tax cases.
 - (e) Admissions by guardians.
 - (f) Admissions by guardians under Hindu Law.
 - (g) Admissions by Government servants.
 - (ii) Statements by suitors in representative character.
6. Section 18 (1): Party interested in subject-matter.
 - (a) General.
 - (b) Partners, etc.
 - (c) Principal and surety.
 - (d) Acknowledgments by guardian or manager of joint Hindu family.
 - (e) Guardian's power to acknowledge.
 - (f) Acknowledgment by joint contractors, etc.
 - (g) Acknowledgment by co-heirs.
 - (h) Acknowledgment by co-executors.
 - (i) Acknowledgment by partners.
 - (j) Acknowledgment by mortgagees.
 - (k) Acknowledgment by mortgagors.
7. Section 18 (2): Persons from whom interest is derived.
8. Admissions must qualify or affect title:
 - (a) General.
 - (b) Sales in execution, and for arrears of revenue.
9. The admission must be made during the continuance of the interest.
10. Proof of admissions.
11. Miscellaneous.

1. **General.** *a. The Section.* The section lays down the following propositions:

- (1) Statements made by a party to the proceeding are admissions.
- (2) Statements made by an agent to any such party, whom the Court regards under the circumstances of the case, expressly or impliedly authorised by him to make them, are admissions;
- (3) Statements made by parties to suits, suing or sued in a representative character, are not admissible, unless such statements were made by the party making them while he held that character;
- (4) Statements made by persons—
 - (i) who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and
 - (ii) who made the statement in their character of persons so interested,
 are admissions, if they were made during the continuance of the interest of the persons making the statements;
- (5) Statements made by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit are admissions, if they are made during the continuance of the interest of the persons making the statements.

(b) *Statements made without prejudice.* Statements made "without prejudice" should not be treated as admissions against the maker or as binding between the parties. Such statements are merely tentative.²

¹ *Kurtz & Co. v. Spence & Sons*, (1887) 57 L.J. Ch. 228, cited in *Union*

of India v. *Shew Bux*, A.I.R. 1965 C. 636.

(c) *Admissions must be taken as a whole.* The general rule is that when a statement is to be used as admission the entire statement must be taken into consideration or not at all. It is not permissible to dissect the statement, rely on one part and ignore the other part which might explain the real import of the admission.^{8,9} But when an admission consists of distinct and separate matters, then an admission relating to one matter can be relied on without reference to the admission relating to other matter.¹⁰ Although the entire statement containing the admission must be put in and considered, but the Court is not bound to believe or disbelieve the statement as a whole, and, where there is other evidence in the case, it may, in the light of that evidence, believe one part of the statement and disbelieve the other, though where there is no other evidence in the case, or the other evidence is untrustworthy, and the only material for decision is the admission, then such admission must be accepted or rejected as a whole.¹⁰

(d) *Effect of admission in documents.* Admissions in documents may be placed in two categories, namely—

- (1) those in which the admission is made by the person against whom the admission is sought to be proved; and
- (2) those in which the admission is made by a third person.

In the former case, the admission of the document means admission of facts contained in the document, though the facts are not deposited to by any one and the truth of those statements is not in any way tested. But in the latter case, to admit the admission contained in the document against the party admitting the facts, it would be prejudicial to him, and no provision of the law makes such admission admissible against a person other than the person making it, unless such person can be said to be bound by the admission.¹¹

2. "Statement". The word 'statement' is not defined in the Act. Hence the dictionary meaning of the word should be looked to in order to discover what it means. Assistance may also be taken from the use of the word 'statement' in other parts of the Act to discover in what sense it has been used therein. The word 'statement' has been used in a number of sections of the Act.

8, 9 Jwala Das v. Sant Das, A.I.R. 1930 P.C. 245; 60 M.L.J. 341; Hanumant v. State of M. P., A.I.R. 1952 S.C. 343; (1952) 2 M.L.J. 631; 1952 All.W.R. Sup. 109; 1953 Cr.L.J. 129; 1953 M.W.N. 347; Attaramb v. Attaramb, A.I.R. 1953 Cal. 530; 57 C.W.N. 778; Ishar Singh v. Gajadhar Pd., A.I.R. 1957 Pat. 174; 1956 B.L.J.R. 745; Ram Surat Devi v. Satraji Kuer, A.I.R. 1975 Pat. 109; Shiv Ram v. Shiv Charan, A.I.R. 1964 Raj. 126; I.L.R. 1964 Raj. 26.

9 Karnail Singh v. State of Punjab,

A.I.R. 1954 S.C. 201; 1954 Cr.L.J. 580; 1954 All.L.J. 209; 1954 B.L.J.R. 179; 1954 M.W.N. 319; J. Mc Giffin v. L. I. Co., A.I.R. 1978 Cal. 123.

10. See Rajah Nilmoney Singh v. Ramprasad, 1954 W.R. 100; Maling Shew Myin v. Ma Naing, A.I.R. 1923 R. 24; 4 U.B.R. 114; Shiv Ram v. Shiv Charan, A.I.R. 1964 Raj. 126; I.L.R. 1964 Raj. 26.

11. See Ram v. Subbaraj Prasad, A.I.R. 1966 S.C. 1697; (1966) 1 S.C.W.R. 974; 68 Bom. L.R. 489; 1966 M.P.L.J. 913; 1966 Mah.L.J. 881.

viz., Secs. 1, to 21 and 39, 145 in its primary meaning of 'something that is stated' and that meaning should be given to it under S. 157 also unless there is something that cuts down that meaning for the purpose of that section. Words are generally used in the same sense throughout in a statute unless there is something repugnant in the context. Hence a 'statement' means only something that is stated and the element of communication to another person is not necessary before 'something that is stated' becomes a statement under S. 157 of the Act.¹²

3. "Party to the proceedings." (a) *General.* "With respect to the persons, whose admissions may be received the general doctrine is, that the declarations of a party to the record, or of one identified in interest with him, are, as against the party receivable in evidence"¹³. Thus when a party to the suit makes a statement which is at variance with his pleading, it is open to the other party to treat that statement as an admission and use it against him¹⁴. The Court is entitled to consider admissions solemnly made by a party in the course of proceedings in the same or other suits¹⁵. Even statements made to the Police Officers can be proved as under this section, though they cannot be used as evidence of a confession.¹⁶

A party to the record is spoken of in this section as a 'party to the proceeding'. The proceeding mentioned in the section refers to the proceeding in which the matter stated by the party is in issue or is relevant to the issue and not the proceedings, if any, in which the statement has been made¹⁷. An admission in a previous suit by a person not a party to the subsequent suit is not admissible against a party to the later suit¹⁸. As to admissions by parties (when sued or suing personally) made when a minor or when holding a representative character, *ante* and as to nominal parties, guardians and next friends, *vide post*. Admissions may be made by parties at any time¹⁹ and either in a present or past litigation. It is not necessary that the prior litigation should have been between the same parties, and in this respect a distinction must be drawn between statements admissible under the present section, and

12. *Bhogilal Chumal v. State of Bombay*, A.I.R. 1959 S.C. 356; 1959 S.C.J. 240; 1959 Cr.L.J. 389; 61 Bom. L. R. 746; (1959) 1 M. L. J. (Cr.) 105; 1959 All. W. R. (H.C.) 156; 1959 Andh. W. R. (S. C.) 101.

13. *Taylor, Ev.*, S. 740; citing *Spargo v. Spargo* (1829) 9 B. & C. 935.

14. *Sampat v. Surajmal*, I.L.R. 1958 B. 797; A. I. R. 1959 B. 504; 59 Bom. L. R. 1112.

15. *Dattatraya v. Shankar*, I.L.R. 1959 B. 1144; A.I.R. 1960 B. 153; 61 Bom. L. R. 792.

16. *Govind v. P. S. P. P.*, A.I.R. 1960 C. 494.

17. *P. D. v. P. D.*, 1933 Raj. 292; 116 I.C. 665; 35 Cr. L. J. 131.

18. *Amad Khan v. Jawahar Singh*, 1923 Lah. 16; 84 I.C. 257.

19. Unless the admission is one made by a person suing or sued in a representative character in which case it must be made whilst the person

making it sustains that character, S. 18; and see *Stephen's Dig., Art. 16 v. ante*, Introduction.

20. *Hurish v. Prosunno*, (1874) 22 W. R. 303; *Obhoy v. Beejoy*, (1869) 9 W. R. 162; *Sheo v. Ram*, (1870) 14 W. R. 163; *Girish v. Shama*, (1871) 15 W. R. 437; *Bhugwan v. Mechoo*, (1872) 17 W. R. 372; *Kashee v. Bama*, (1875) 25 W. R. 27; *Forbes v. Mir*, (1870) 5 B. L. R. 529; 14 W. R. 28 (P. C.); 13 M. I. A. 438; see also cases cited *ante*. In a suit by A and B parties not entitled to the property of a deceased Hindu as his heirs against C and D, an admission by the person legally entitled to the property made in a petition filed in the suit, that by her gift of relinquishment A and B had a title to the property, was held to be evidence that such title existed anterior to the commencement of the suit; *Gour v. Mohesh*, (1871) 14 W. R. 484.

those admissible under the thirty-third second post. And so it was held that the deposition of a person in a suit to which he was not a party was, in a subsequent suit in which he was defendant, evidence against him and those who claimed under or purchased from him, although he was alive and had not been called as a witness. Admissions are not on certain occasions conclusive proof of the matter admitted. Thus, under the Mohammedan Law marriage can be presumed from the fact of the husband acknowledging the woman as his wife; but the declaration as to the status of the woman as wife is a judicial act and could not be founded on admissions but on evidence. Therefore, if there was evidence that there had in fact been no marriage at all between the parties the earlier admission becomes valueless.²¹

(b) *Deposition in previous proceedings.* The thirty-third section (post) did not apply to such a deposition, which was admissible under the present section, although it might have been shown that the facts were different from what they were stated to be in the former case.²² And an admission by a jagadar, in a suit brought by the Government to assess the lands, that the lands were comprised in a zamindari, is evidence of that fact in a suit by the zamindar to resume those lands.²³ Admissions by the parties in a former arbitration may be used in evidence in a subsequent suit.²⁴ Admissions made solemnly by a party in an earlier proceeding are of value in other proceedings relating to the same subject-matter.²⁵

(c) *Recital in document.* As regards recital of boundaries in documents when the recital is in a document *inter partes*, the recital is a joint statement made by the parties to the document and, therefore, relevant against all of them as an admission. When the recital of boundaries is in a document between a party and a stranger the recital is relevant against the party as an admission but is not admissible in his favour, unless the fact recited is deposed to in Court by the executant of the document, in which case the recital will become admissible under Sec. 157, Evidence Act, to corroborate the evidence of the executant or under Sec. 155, Evidence Act, to contradict such evidence.¹ Where a party who is an executant of a sale deed himself challenges the sale, onus to prove falsity of recitals of sale deed is on that party.² Description in a mortgage deed by the mortgagors of the land mortgaged as properties 'in our sir and khay possession' may not be regarded as admissions by the mortgagees as the deeds were executed by the mortgagors but they are certainly admissible under Sec. 13 of the Evidence Act as assertions of title, and when it is under

21. *Razia Begum v. Anwar Begum*, A. I. R. 1958 Allah. Pra. 195, 1957 Allah. L. J. 844.

22. *Soojan v. Achand*, (1874) 11 B. I. R. App. 1, 21 W. R. 114. *Ab. Mohamud Khan v. Sherah Mehtaj Bqpai*, 36 C.L.J. 186; 1921 Cal. 781; *Brajaballav Ghosh v. Akhoy Bagdi*, 1926 Cal. 705; 93 I.C. 115; 30 C.W.N. 254; *Bibi Kaniz Ayesha v. Mojtahid Hasan Khan*, 1932 Pat. 230 I.L.R. 20 Pat. 875, 200 I.C. 746.

23. *Forbes v. Mir*, 5 B.L.R. 529; 14 W.R.P.C. 28.

24. *Hemorath v. Pooorath*, (1867) 7 W. R. 249, and admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual. *Gregory v. Howells*, 809, 1 L.J. 113; *Slack v. Buchanan*, (1790) Pea. R. 5.

25. *Dattatraya v. Shankar*, I.L.R. 1950 Bom. 1144; A.I.R. 1960 Bom. 153. *Rangayya v. Jeyasammal*, 1906 M.L.J. 22, 228, 1906 2 M.L.J. 687.

2. *Mania v. Deputy Director of Consolidation*, A.I.R. 1971 All. 151.

these documents that the mortgagees claim, their probative value as against them and as against their lessees who claim under them is high.⁴ The second paragraph of the eighteenth section settles a point which appears to be one of some doubt in England.⁵ Therefore, where parties sue or are sued in a representative character (e.g., as assignees of an insolvent,⁶ executors, administrators, trustees, and the like) statements made by them before they were clothed with that character will not be admissible against them so as to affect the interest of the persons they represent.⁶ Thus the declarations of a party suing as assignee of a bankrupt made before he became such, are not admissible against him.⁷ The admissions of the executor of the donor must be treated as the admissions of the donor.⁸

The personal conduct or admissions of a trustee cannot be allowed to prejudice the case of an institution of which he is a trustee.⁹ The admissions of a previous Mahant of an institution are not binding upon the present Mahant or the worshippers, where the Mahants are nothing more than the custodians or managers of the institution.¹⁰ An admission of wakt by a mutwalli does not estop him from claiming his share in the wakt property as heritor, if the wakt is void.¹¹ An admission made by a person in a written statement filed by him as the legal representative of a deceased defendant in a suit is not binding on him in a subsequent suit filed by him as the reversioner on behalf of all the reversioners.¹² Where a person as a member of a community being interested in a plot of land being treated as a graveyard made an admission that it was not a graveyard it was held that the admission was not binding on the other members of the community as it was made by the person in his individual capacity and not in a representative capacity.¹³

Where property has been devised by will to executors, any admission by parties other than the executors to the will, will not bind the estate of the deceased.¹⁴ The representative capacity of a person who represents a minor comes to an end by the death of that minor.¹⁵ In respect of corepresentatives it seems that the admission of one executor will not bind another, at any rate, if the admission was not made in the character of executor.¹⁶ The admissions

3. *Hachar Lal v. D. Nand, Prasad*, 1956 S.C. 305; 1956 S.C.J. 279; 1956 B.L.J.R. 306; 35 Pat. 221.
4. *Taylor, Ev.*, s. 755; *Steph. Dig.*, Art. 16.
5. Merely as speaker of the plaintiff as ~~agent~~ in address of the plaintiff's title as assignee; *J. Clark v. Morris*, 1856 2 M.T.A. 263, 269.
6. S. 18, *Legg v. Thomas* (1855) 25 L.J. Ch. 125, 140, 141.
7. *Leaw v. Thompson* (1827) 1 M. and M. 51; see *Taylor Ev.*, s. 755.
8. *Dwarkanath v. Chundee*, (1865) 1 W.R. 339.
9. *Balak Ram High School v. Nanumal*, 1930 L. 579; 1 L.R. 11 Lah. 508; 128 I.C. 532; 31 P.L.R. 509.
10. *Ram Prasad v. Shiromani Gurdwara Prabandhak Committee*, 1931 Lah. 161; 1 L.R. 12 L. 497; 135 I.C. 657; 32 P.L.R. 910.

11. *Mst. Rojaya Bano v. Mst. Nazira Banu*, 1928 Cal. 130; 1 L.R. 55 Cal. 448; 105 I.C. 647; 32 C.W.N. 248.
12. *S. T. Chendikamha v. K. I. Vishwanath Chetty*, 1939 Mad. 346; 1939 1 M.L.J. 227; 1939 M.W.N. 275; 49 L.W. 273.
13. *Chand v. Chellappa Bhagwan Dei*, 1949 All. 493; 1950 A.L.J. 21.
14. *Chunder v. Ramnarain* (1867) 8 W.R. 63.
15. *Hobbs v. Judge* (1836) 11 W.R. 162.
16. *Chunder v. Ramnarain*, (1867) 8 W. R. 63 and see *Tyllock v. Dunn*, Ry. & M. 416; *Scholey v. Walton*, (1844) 12 M. & W. 510; *Fox v. Waters*, (1840) 12 A. & E. 43; *Taylor Ev.*, s. 750, Act IX of 1908, S. 21 (Indian Limitation Act); *Williams on Executors*, 1796, 1813, 1937.

of an executor are not receivable against an administrator appointed during the absence of the executor.¹⁷ Where one of several trustees had admitted that he had money of the trust estate in his hands, and it was submitted that this admission of one of them bound the rest, it was held that it would, if they were all personally liable, but not where there were only trustees.¹⁸ Under the eighteenth and twenty-first sections the admissions of a person accused in criminal proceedings will be receivable. But in England it appears to be doubtful whether in any case a prosecutor in an indictment is a party to the inquiry in such a sense as that an admission by him could be received in evidence to prove facts for the defence. Of course this does not refer to the admission of facts which would go to his reputation for credibility as a witness in the case; these may always and under all circumstances be proved by the admission of the witness himself.¹⁹

(d) *Co-defendants and co-plaintiffs.* The general rule is that an admission can only be given in evidence against the party making it and not against any other party.²⁰ An admission or even a confession of judgment by one of several defendants in a suit is no evidence against another defendant.²¹ It is a fundamental proposition that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent, convey the right, or delegate the authority to one for more than his own share in property.²² "In general the statement of defence made by one defendant cannot be read in evidence either for or against his co-defendant, neither can the answers to interrogatories of one defendant be read in evidence, except against himself, the reason being that as there is no issue between the defendants, no opportunity can have been afforded for cross-examination; and moreover, if such a course were allowed the plaintiff might make one of his friends a defendant,

17. *Rush v. Percock*, 1835, 2 M. & R. 162.

18. *Davis v. Ridge* (1837) 3 Esp. 101, and see *Skaife v. Jackson*, (1824) 3 B. & C. 421 (in which it is also said that a receipt for money is not like a receipt for land in that it is nothing more than a *prima facie* acknowledgment that the money has been paid). But a receipt may operate as a waiver. *Krish Chandra Nath v. Sheikh Chhenu*, 1915 Cal. 513 (1); I.L.R. 42 C. 546; 20 I.C. 804.

19. *Roscoe Cr. Ev.*, 16th Ed., 55; see *R. v. Arnall*, (1861) 8 Cox. 439 and note in 3 Russ. Cr. 489. As to whether the admissions of an accused may be used for purely probative purposes, that is to relieve the prosecution of the proof of facts essential to its case, see *R. v. Hurrey* (1815) 2 C. & K. 782, which was a bigamy case; it was held that an admission of the first marriage by the prisoner, made to a constable, was some, though not sufficient, evidence of the marriage and in *R. v. Savage*, (1876) 13 Cox. 178 a similar case overruling *R. v. Newton* (1843) 2 M. and Rob. 503),

an admission by the prisoner was tendered to prove the first marriage, but was rejected *vide ante*. Introduction as to admission for the purpose of the trial, see S. 58, post.

20. In re *Whitely* (1891) 1 R. 1 Ch. 558; *Parbhudas Girdhardas v. Lalabhai Khushal* 1932 Bom. 117, 12, I.C. 719, 31 Bom. 1 R. 252, *Phadjar Dev v. Mathan Lal* A.I.R. 1971 All. 494; I.L.R. (1972) 1 Delhi 717.

21. *Amritlal v. Rajoneekant*, 2 I. A. 113; 15 B.L.R. 10, 26; 23 W.R. 214; *Niamutoollah v. Himmur*, (1874) 22 W.R. 519; *Azizullah v. Ahmad*, (1858) 7 A. 353; *Kali v. Abdul* 16 C. 627 at p. 687; *Rashid ul Ghani v. Naimuddin* 1926 Lah. 721, 1 I.L.J. 304, *Mst. Bibi Kaniz Ayesha v. Mopitul Hassan Khan*, 42 Pat. 200 I.L.R. 20 Pat. 855; 200 I.C. 546; 8 B.R. 716; *Taylor, Ev.*, s. 754; *Narainee v. Nurro-hurry*, (1862) Marsh 70; W.R.F.B. 23; 1 Ind. Jur. O.S. 9; 1 Hay. 234. *Azizullah v. Ahmad*, *supra* see also *Changa v. Chaudhrai Bhagwan* Dec. 1949 All. 493, 1950 A.I.J. 21.

and thus gain a most unfair advantage. But this rule does not apply to cases where the other defendant claims through the party whose defence is offered in evidence, not to cases where they have a joint interest, either as partners or otherwise in the transaction. Wherever the admission of one party would be good evidence against another party, the defence of the former may *a fortiori* be read against the latter.²³

Apart from cases which will be presently considered,²⁴ the admission of one co-party or co-defendant is not receivable against another merely by virtue of his position as a party in the litigation: if the rule were otherwise, it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party, and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other, it must be because of some privity of title or of obligation.²⁵ An admission made by one defendant is not binding upon the others who were not represented by him and had independent rights of their own.²⁶ Similarly, the admissions or concessions of a respondent are not admissible in evidence against a co-respondent, nor *a fortiori* against the petitioner. Nor are those of parties engaged in a joint tort, or joint crime, receivable against each other, except to the limited extent, and under the circumstances, in the tenth section (*ante*), mentioned.

(c) Parties to criminal cases. In criminal cases the accused is always a party, and his admissions are admissible against him, subject of course to the provisions of Ss. 24 to 27. Even when a fact has been admitted in the statement of the accused under section 312, Cr. P. C., the prosecution has to prove the fact.²⁷

The word 'statement' in section 164, Cr. P. C. is not limited to the statement of a witness, but covers also the non-confessional statement of an accused,

23. Taylor Ex., s. 754, and cases there cited; *Harihar v. Nabalkishore*, 11 I.R. 193; *Cut. W.R.* 1913 Orissa 45. But as to cross-examination by defendant of co-defendant, see s. 137, post; as to admissions by co-defendants who are joint tenants or joint-contractors; see *Chundreshwar v. Chuni*, (1881) 9 C.I.R. 212; *Kailash v. Naka*, (1855) 11 C. 588; *Jagabandhu v. Bhagu*, (1973) 1 Cut. W.R. 809; 1 I.L.R. (1973) Cut. 553; A. I. R. 1974 Orissa 120; *Ram Pukar Singh v. State Rep.*, A.I.R. 1973 Patna 310.
24. See note post under the headings "Persons from whom interest is derived" and "Parties jointly interested in subject-matter".
25. *Ambar Ali v. Lutfi Ali*, 1918 Cal. 114; 1 I.L.R. 411; 1918 41 I.C. 116; 25 C.L.J. 619; 21 C.W.R. 255. See also *Brojaballav Ghose v. Akhoy Bagdi*, 1926 Cal. 705; 93 I.C. 115.

1. *Kishan Singh v. Lachman Das*, 1930 Lah. 238; 122 I.C. 109.
2. *Robinson v. Robinson*, 1858 1 S. & T. 362; see also *Hay v. Gordon*, (1872) 10 B.L.R. 301, 307, 308 P.C.; 18 W.R. 480; as to the question of the admissibility of evidence of respondent against co-respondent, see *Allen v. Allen*, (1894) P. 348; *Versey v. Trevelyan*, 1922 P.C. 229; 52 I.A. 372 and S. 137, post.
3. *Plumer v. Plumer and Bygrave*, (1860) 4 Sw. Tr. 257.
4. *Harevi Marim v. State*, 1968 A.I.J. 49; 1967 A.W.R. (H.C.) 789; 1967 All. Cr. R. 508; A.I.R. 1969 All. 423. A gap in the evidence of the prosecution cannot be filled by such a statement—see *Mohd. Anwarul Kadir v. Emperor*, (1904) 27 Mad. 238 following *Baksh Kumar Ghatak v. Q.I.* (1903) 26 Cal. 49.

admissions of relevant facts in which are admissible under sections 18 to 21 of the Act. Admission by accused, claiming the right of private defence, that the opposite party members were peaceful before the fight would be admissible under this section.⁵ According to Wigmore, "in a criminal prosecution, the person to whose injury the crime was done is in no legal sense a party, and his statements are not receivable except of course, by way of self contradiction as a witness."⁷ But in India, this is true only in cognizable and non-compoundable cases. In other cases instituted on a private complaint, the complainant would be deemed to be a party to the proceeding.⁸ The Home Minister speaks on behalf of the Government as its spokesman, and his answers to questions put to him in the House as Home Minister, in relation to matters dealt by him as Home Minister, are admissible in evidence as admissions made by the Government. When Government is a party to the proceedings these admissions are relevant and admissible under the Evidence Act against the Government. The Government may, of course, show that the admissions were really not admissions or that they were made under a mistake, or that they were not binding on Government for any other valid reason. But unless this is shown, the admissions must be taken in evidence against Government.⁹

(ii) When a party is on oath he is bound to tell the truth. Before the statement of a party can be used against him as his admission, the following principles should not be ignored, namely—

- (1) the statement must be considered as a whole;¹⁰ and
- (2) the Court should not pick out isolated sentences torn from their contexts.¹¹

Of course, the other essential conditions should also be satisfied.

4. **Statements by agents.** A person's authority to do an act in his stead as an agent is changeable by such acts as he does under that authority. If the scope of authority is affected by admission or denial by the agent in the course of exercising that authority. The question then arises turns upon the scope of the authority. This question frequently even in a doubtful one depends upon the doctrine of agency applied to the circumstances of the case and not upon any rule of evidence.¹² The principle upon which admissions of an agent, within the scope of his authority, are permitted to be proved is that such admissions, as well as his acts, are considered as the acts or admissions of the principal. What is said or done by an agent is said or

5. *Pingal Khadia v. The State*, 1 L.R. 1969 Cut. 809; 1969 Cr. L.J. 1255; A.I.R. 1969 Orissa 243, 249 following *Ghulam Hussain v. King*, (1950) 77 Ind. App. 65 (P.C.); 1 L.R. (1971) 2 Delhi 581.

6. *Allahdia v. State*, 1959 All. L.J. 49.

7. Wigmore, *Fv.*, s. 1076.

8. See ss. 256(1) and 249 of the Criminal Procedure Code 1973.

9. *Shibnath Banerjee v. A. E. Porter*,

1943 Cal. 377; 47 C.W.N. 802 (F.C.), on appeal. *Emperor v. Shibnath Banerjee*, 1943 F. C. 75; (1943) 2 M.L.J. 468; 1943 M.W.N. 612; 24 P.L.T. 332.

10. *Indermal v. Ramprasad*, 1969 Jab. L.J. 560; 1969 M.P.L.J. 442; A.I.R. 1970 Madhya Pradesh 40, 45 (admission in written statement).

11. *Abida Khatoon v. State of U.P.*, A.I.R. 1963 A. 260.

12. Wigmore, *Fv.*, s. 1078.

of a contract for his principal, or at the time and accompanying the performance of any act, within the scope of his authority, having the intention, and contracted with, and in the course of the particular contract or transaction in which he is then engaged, is in legal effect deemed to be such as his principal and is admissible in evidence.¹ The representation or declaration or admission of the agent does not bind the principal, if it is not made at the same time or the contract, but upon another occasion, or if it does not concern the subject-matter of the contract but some other matter, in no degree bearing on the *res gestæ*.² It does not follow that a statement made by an agent is an admission merely because it made by the principal, though it would have been one, for the admission of an agent cannot always be assimilated to the admission of the principal.³ The party's own admission, whenever made may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, or *res gestæ*.⁴ Where the agent's right to interfere in the particular matter is denied, the principal can no longer be affected by his declarations or admissions, though he acts, but they will be rejected in such case as mere hearsay. The other admissions by an agent of his own authority, and not connected with the making of a contract or the doing of an act on behalf of his principal, are made at the time he is engaged in the transaction to which they refer, and are binding upon his principal, as not being part of the *res gestæ*, and are not admissible in evidence, but come within the rule excluding hearsay. A report or account or statement by an agent of what has passed or been done or omitted to be done, not a part of the transaction but only subsequent to admissions respecting it.⁵ To be receivable as admissions, the statements must have been made in circumstances which show that the agent was expressly or impliedly authorized to make the admissions.⁶

The Court may presume agency from the circumstances in which the admission was made.⁷ The words of this section, "where the Court regards under the circumstances of the case, as expressly or impliedly authorized by him to make them" leave it open to the Courts to deal with each case that comes upon its own merits,⁸ having regard to the law, the facts, the evidence and the particular facts of each case. But, it is apprehended that the Courts will,

24 Per Bachanan, C.J., in *Franklin Bank v. Pennsylvania D. & M S.N. Co.* 11 G. & J. 28, 33 (Amer.) See *Wigmore Ev.* s. 1078.

25 Story on Agency, s. 135.

1. Steph. Dig., Art. 17; Taylor, *Ev.* s. 602. Taylor, *Ev.*, ib., and cases there cited; the authority to make admissions is at once put an end to by the determination of the agency whether or not such determination has been properly brought about; *Kalee Churn v. Bengal Coal Co.*, 21 W. R. 405. *Franklin Bank v. Pennsylvania*, supra; Narratives of, explaining or admitting, a past act are not admissible, even though the agency continues unless the agent be empowered to speak for his principal

at the time. Wharton. Cr. Ev., p. 954. For instance, an agent might be specially sent to make a statement on behalf of his principal as to what had occurred.

4. *Raja Fatch Singh v. Baldeo Singh*, 1928 Oudh 233 : 1 L.R. 3 Luck 416 : 109 I.C. 310

5. *Raja Brajsunder Deb v. Raja Rajendra Narayan Bhanj Deo*, 1941 Pat. 260 : 195 I.C. 313 : 22 P.L.T. 699 : 7 B.R. 897.

6. "The point to be regarded in this clause is not only the establishment of an agency as to which the Court must be satisfied but that there was authority given sufficient to cover the particular statement relied on as admission." Norton, *Ev.* 144.

in the application of this section, be guided by the principles laid down by the English and American cases and text-writers.⁷ The admissions are receivable in evidence without calling the agent himself to prove them.⁸

As an agent can only act within the scope of his authority, declarations or admissions made by him as to a particular fact are not admissible, unless they fall within the nature of his employment as such agent.⁹ Statements as to the specific age of a minor (apart from the fact of his being a minor) made by his agent in an application for mutation of names cannot be called admission by persons authorized to make such a statement.¹⁰ A party is not bound by a statement or admission made by his *mukhtar-i-dam*, unless it is shown to have been made within the scope of the authority conferred by the *mukhtar-nama*.¹¹ Account books, though proved not to have been regularly kept in the course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm. The fact, however, that the books had not been regularly kept might be a good reason for rejecting the account, if offered in evidence against any person other than the contractor, or his partners.¹² It is, of course, open to the contractor or any of his partners to show that the entries have been made after such a fashion that no reliance can be placed upon them; but if made by a clerk of the firm, they are relevant.¹³ An agent's reports to his principal are not, in general, receivable against the latter in favour of third persons, as admissions.¹⁴ Thus, letters of an agent to his principal, in which the former is rendering an account of the transaction he has performed for him, are not admissible against the principal.¹⁵ When, however, the principal had repined to the agent, the letters of the latter were held admissible as explanatory of the statements of the former.¹⁶

As the declarations of an agent are admissible on the ground of the legal identity of the agent with the principal, the declarations and acts of

7. *v. post*, remarks of Tindal, C.J. in *Garth v. Howard* (1832) 8 Bing 451.

8. *Exley v. Evans* (1888) 189 *supra*, if the statements of the agent are admissible, the statements of the agent's interpreter, acting as such in the agent's presence, are admissible without calling the interpreter, and it must be assumed as against the principal that the interpreter interpreted faithfully. *Reed v. Hoskins* (1885) 26 L.J. Q.B. 5; 5 E. & B. 729; admissions which consist of hearsay evidence are not receivable against the principal, *Kohl v. Jensen* (1812) 4 Taunt. 565.

9. *Garth v. Howard* (1832) 8 Bing 451; see *Venkataramanna v. Chavala* (1871) 6 Mad. H.C.R. 12; an illustration of the admission and rejection of statements upon this principle; see *Kirkstall Brewery Co. v. Furness Railway Co.* (1874) 1 R. 6 Q.B. 468; 43 L.J. Q.B. 142; *Garth v. Howard*,

supra.

10. *Shankergit v. Chinnai* 1923 Nag. 164; 71 I.C. 140; 6 N.L.J. 1.

11. *Sita Ram Tewari v. Gya Prasad*, 1923 Pat. 37.

12. *R. v. Hanman* (1877) 1 B. 610, 617; see S. 34, *post* and notes thereto.

13. *R. v. Hanman* (1877) 1 B. 610, 617.

14. *Steph. Dig.*, Art. 17; *Langhorn v. Allnutt* (1812) 4 Taunt. 511; *Re Devaki Co.* 1 R. 22 Ch. D. 593; *Cooper v. Metropolitan Board of Works* (1883) 25 Ch. D. 472; *Kahl v. Jensen* (1812) 4 Taunt. 565; *Rayner v. Pearson*, *ib.* 662; *Swan v. Miller* [1919] 11 R. 151 C.A. (Ir.); *Fairlie v. Hastings* (1804) 10 Ves. 123, though see contra *Solway* 10 P.D. 137; see *Phipson, Ev.* 9th Ed. 249; *Roscoe v. P. Evans* 20 *Evans* 190 *supra*.

15. *Langhorn v. Allnutt* (1812) 4 Taunt. 511.

16. *Coates v. Bainbridge* (1828) 5 Bing. 58.

an agent cannot bind an infant, because the latter cannot appoint an agent.¹⁷ But evidence may be given against companies of admissions made by their directors or agents relating to matters within the scope of their authority.¹⁸ Thus a letter written by the secretary of a company by order of the acting directors¹⁹ stating the number of shares held by M, was admitted on behalf of his executors in proceedings against them.²⁰ But the confidential reports of directors to a meeting of the shareholders,²¹ and admissions at a board meeting of less than the requisite number of members,²² have been held not to be receivable. The manager of a banking company may make admissions against the bank as to its practice, in making loans to customers.²³ As to admissions by the servant of companies see cases noted below.²⁴ It has been held by the Delhi High Court that an admission made by a responsible employee of a municipal corporation (municipal commissioner in this case) would be binding on the corporation unless explained. It is, however, submitted that it is too wide a proposition that all responsible employees are not entrusted or concerned with all the affairs of the corporation. So if an employee howsoever responsible makes an admission in respect of a matter of the corporation with which he does not deal in the usual course of his duties it would be difficult to say that the corporation can be bound down by such admission. The admissions of a surveyor of a corporation, respecting a house belonging to the corporation are evidence against the latter, in an action for an injury to the plaintiff's house by work done on the defendant's premises; but the report of a surveyor to the corporation as to the value of lands about to be purchased by it is not evidence either of the truth of the facts or to explain the resolutions or letters of the corporation as to the purchase.²⁵ The admission of a way-warden that a certain road is a highway and that the parish is liable to repair it are evidence against a highway board.²⁶ An admission made by a Railway Administration that certain land used as a road belonged to a District Board was held to be binding on the Government.²⁷ The admission, as to matters within the ordinary course of business (e.g. the receipt of shop goods) of a shopman are evidence against his master, but not his admissions as to a transaction outside the usual business.²⁸ An

17. *Taylor, Ex. & 602* and *v. ante Introduction*.

18. *Roscoe, N. P. Ex. 76, Lindley Company Law, 183*.

19. But, unless acting under the express order of the directors the secretary of a company cannot make admissions against the company even as to the receipt of letter; *Bruff v. Great N. Ry. Co.*, (1858) 1 F. & F. 400. See also *Barnside v. Davrell* (1849) 3 Exch. 224; *Roscoe, N. P. Ex.*, 70, 71.

20. *Meux Executor's Case*, (1852) 2 De C. M. 522.

21. *Re Devila Co.* 1883, 22 Ch. D. 593. *v. ante*.

22. *Ridley v. Plymouth Banking Co.*, (1848) 2 Exch. 11.

23. *Simons v. London Joint Stock Bank*, (1891) 1 Ch. 270.

24. *Kirkstad Brewery Co. v. Furness Ry. Co.*, (1874) L.R. 9 Q.B. 468; *Gl. W. Ry. Co. v. Willis*, (1865)

18 C.B.N.S. 748; *Mayhew v. Nelson*, (1834) 6 C. & P. 58; *Stiles v. Cardiff, S. Navigation Co.* (1864) 33 L.J. Q.B. 310; *Agassiz v. London Tram Co.*, (1873) 27 L. T. 492.

25. *Moh. Ram v. Municipal Corporation, Delhi*, (1973) 2 Serv. L. R. 7 (Delhi).

1. *Peyton v. St. Thomas' Hospital*, (1829) 3 M. & Ry. 625n.

2. *Compt. v. Met. Board of Works*, (1883) 25 Ch. D. 472.

3. *Loughborough Highway Board v. Curzon*, (1886) 55 L. T. 50.

4. *Secretary of State v. District Board, Ramgarh*, 1889 C.L. 728, 185 J.C. 434; 70 C. L. J. 126.

5. *Guth v. Howard*, 1832, 8 Bing. 411; *Schumacher v. V. & 25*, 10 M. & W. 202; *Mercedith v. Footner*, 1881, 11 M. & W. 202; *Roscoe, N. P. Ex.*, 70, 72.

admission by a person who has generally managed A's landed property, and received his rents, is not evidence against A, as to his employer's title, there being no other proof of his agency *ad hoc*.⁶ As to admissions or acknowledgments made by partners and joint contractors *vide post*.

The manager of a joint Hindu family, or *karta*, is the agent for the other members and is supposed to have then authority to do all acts for them common necessity or benefit.⁷ He fully represents the family, and in the absence of fraud or collusion, his acts are binding on the other members of the family.⁸ But he can be sued by the other members for an account, even if the parties suing were minors during the period for which the accounts are asked.⁹ In respect of the admission of debts, he may acknowledge, as he may create, debts on behalf of the family, but he has no power to revive a claim barred by limitation unless expressly authorised to do so.¹⁰

(b) *His band and wife*. The admissions of a wife merely as such cannot affect her husband. They will only bind him where she had express or implied authority from him to make them. Whether she had such authority or not, is a question of fact to be found by the Court, as in the other cases of agency. The cases on this subject are mostly those of implied authority, turning upon the degree in which the husband permitted the wife to participate either in the transaction of his affairs in general or in the particular matter in question.¹¹ So where the business is such as is usually transacted by women a wife's admissions will be received against her husband, e.g., an admission that she had agreed to pay 4s a week for the nursing of her child.¹² On the other hand, a wife's admission has been rejected to prove a slander by her husband.¹³

6. *Ev v. Peter*, (1858) 3 H. & N. 101, 27 L. J. Ex. 239, and generally as to admissions, see Roscoe, N. P. Ev. 62 et seq., as to admissions by shop assistants see Phipson Ev., 11th Ed., 335.

7. *Kota v. Bangari*, (1881) 3 M. 145, 149, in which case it is also pointed out that the position of a Polygar differs from that of a manager of a Hindu family; see also as to the *karta* and his relations to adult and minor members: *Chackun v. Ladd*, (1885) 10 W. R. 483, *Chetty v. Pearce*, (1870) 13 W. R. 75 (F. P.), *Gopal Narain v. Muddomuttu*, (1874) 4 B. L. R. 21, 32. Silence, absence of ratification of acts of *karta*: *Sudaram v. Kalidas*, (1894) 18 B. (widow manager), *Venkaiah v. Vasbhu*, (1898) 18 B. 584. (The manager must be allowed a reasonable latitude in the exercise of his powers).

8. *Pogal v. Mulla*, (1891) 16 A. 231, 233.

9. *Obhoy v. Pearce*, *supra*.

10. *Chandrasekhar v. Gopinatham*, (1881) 6 M. 109, 1 F. B. J., excluding *Kumara v. Pala*, (1878) 1 M. 385;

Kondappa v. Subba, (1889) 13 M. 189, *Blasker v. Vijalal*, (1892) 17 B. 522, *Gopal Narain v. Muddomuttu*, (1874) 14 B. L. R. 21, 49 followed in *Dinkar v. Appaji*, (1894) 20 B. 155. The manager of a joint Hindu family or the executor of a Hindu will has no power by acknowledgment to revive a debt barred by law of limitation except as against himself: *Shobhanatha v. Srinagan*, (1893) 17 M. 221.

11. See generally *Layton v. ss*, 705, 771; *Roscoe, N. P. Ev.*, 72; *Powell v. 200*; see judgment of Alderson, B., in *Meredith v. Foote*, (1813) 11 M. & W. 202, as to wife carrying on business, see *Taylor, Ev.*, s. 695, and as to admissions in matrimonial cases which differ in some respects from ordinary matrimonial causes, in so far as in the former the interests of public morality are concerned: *Pinner v. Pinner and Brygrave*, (1860) 4 Sw. & Tr. 257.

12. *Anon.*, (1721) 1 Stra. 527.

13. *Ev v. Beggs*, (1890) 2 Ir. R. 525, see *Phipson Ev.*, 11th Ed., 832.

Admission by agent in criminal case.—It has been already observed that the rules of admissibility are applicable in criminal cases only, but this is because the issues arise in criminal cases only, but in general, the rules of admissibility are the same for the trial of civil and criminal cases. Conformably to this general doctrine, the admissions of an agent may be equally received on a criminal charge against the principal. But it is a totally different question in the consideration of criminal justice, as distinguished from civil justice, as to how the person on trial may be affected by the fact when so established.¹⁴ It may involve him civilly and yet be not sufficient to convict him of a crime. Whether the fact thus admitted by the agent would affect in determining guilt and punishably with all his personal knowledge or competence would depend upon the particular rule of criminal law and not on the evidence involved.¹⁵ Thus it has been said that an admission by an agent is never evidence in criminal as it is sometimes in civil cases in the sense in which an admission by a party himself is evidence. An admission by the party himself is an admission of evidence which can be produced and supersedes the necessity for additional proof, and in civil cases the fact is carried still further for the admission of an agent made in the course of his employment, and in conformity with his duty, is as binding upon the principal as an admission made by himself.¹⁶ But this has never been extended to criminal cases. Thus, in order to make a agent criminally responsible for a letter written by his client, it is not sufficient to show that such letter was written in consequence of a statement made by him, but it must be shown that it was written in pursuance of instructions of the client.¹⁷ Where personal knowledge and authority are shown the admissions will be receivable. Hence, the admissions of a person's servant to a third party by the person, if made with reference to the subject of the suit or are admissible in evidence against him, where the evidence shows that the servant acted on his authority.¹⁸ If, in other cases, the evidence is not accepted, it is because in those cases the criminal law requires evidence of personal knowledge and authority of, and in respect of the particular act charged against the criminal liability can be established. It is, however, a matter of substantive law which may admit of real or apparent exceptions, as in the case of a tax-payer's informant who is *prima facie* criminally responsible for any fraudulent returns, though executed by his agent or servant without his knowledge.¹⁹ Where a party is charged with the commission of an offence through the instrumentality of an agent then it becomes necessary to prove the act of the agent, and in such cases where the agent is dead the agent's statement is the best evidence of the facts which can be produced. Thus on the approach made to Lord Mansfield by the House of Lords²⁰ it was decided that a receipt given by a bankrupt to a creditor by his agent, who was proved to have been authorized by Lord Mansfield, the bankrupt, to receive the business of the other, was receivable and the receiver, in order to receive all the debts, sums of money

14. And see Wigmore, Ev., s. 4, where the learned author observes that this is more worth emphasizing because the occasional appearance in works on the law of the title "Criminal Evidence", has tendered to foster the fallacy that there are some separate groups of rules, or some large number of modifications.

15. Wigmore, Ev., s. 1078.

16. R. v. Downer, [1889] 14 Cox, C.C. 486.

17. Browning v. State, 33 Mss., 48 (Amer); Wharton, Cr. Ev., s. 695.

18. Wharton, Cr. Ev., s. 695, Lord Tenterden. However, considered this case as falling within the general rule, *ib.* It has been argued generally that to impute the agent's act to the principal criminal design must be brought home to the latter, see Cooper v. Slade, 6 H.L.C. 746. Melvill v. Lord, case 1899 (1), 29 How St. Tr. 707.

and to give receipts for the same, and who was dead, was admissible in evidence against Lord Melville, to establish the single fact, that a person appointed by him as his paymaster, did receive from the Exchequer a certain sum of money in the ordinary course of business. Had Douglas been alive at the time he must have been called, and of course he might have proved the receipt of the money. In allowing this receipt of Mr. Douglas to be read nothing is proved, but that this sum was issued to him under the power of attorney from Lord Melville, but it is a totally different question in the consideration of criminal justice as distinguished from civil justice as to how he may be affected by the fact when so established, the receipt by Douglas would in itself involve him civilly, but could by no possibility convict him of a crime (per Fiskin, J.)²⁰

An admission by the father of the accused is not admissible in evidence against the accused.²¹ Anything said by the accused to a police officer which leads to the discovery of incriminating articles would be admissible, but, in the absence of proof of what the accused said, the mere discovery of the articles may raise a grave suspicion against the accused, but that will not justify a conviction.²²

(d) Admissions by attorneys, pleaders, solicitors, etc., etc. A Vakil in this country has not ordinarily any greater power to bind his client than that which is possessed by an attorney in England.²³ An attorney employed in a matter of business is not an agent to make admissions for his client, except (a) after notice, consent, and (b) in matters relating to that action.²⁴ An admission made in tort action will, however, if consistent with the client's proof be given that he authorised the communication.²⁵ The admission of the execution of the document by the attorney or the man who executed it is evidence to prove that the document was duly executed.¹

A statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence, as it must be regarded as a statement of the person on whose behalf the attorney was acting, and what is said or done by the attorney in the course of his business and within the scope of his authority is said or done by the person on whose behalf he was acting.

A pleader or solicitor, in civil cases, impliedly authorises his client to make admissions of fact consistent with his client during the actual progress of litigation, and the court is entitled to admissions of fact made by him. But a pleader is not bound by an admission on a point of law, nor precluded from asserting the contrary in order to obtain the relief to which, upon true construction of the

20. Roscoe, Cr. Ev., 16th Ed., 55.

21. *Chandrasekhar v. Emperor*, 1935 Pesh. 73; 158 I.C. 483; 36 Cr. L.J. 958.

22. *Prasad v. Emperor*, 1936 Mad. 426; 1 I.L.R. 59 Mad. 349; 161 I.C. 663; 70 M.L.J. 447; 1936 M.W.N. 110; 43 L.W. 305.

23. *Prem v. Pirthee*, (1867) 2 Agra Rep. 222; see Pearson's Law of Agency in British India, pp. 16, 153, and as to mukhtars, pp. 17, 114, ib.

24. *Wagstaff v. Wilson*, (1832) 4 B. & Ad. 339; *Ley v. Peter*, (1858) 3 H.

and N. 101, 111 per Watson, *Cordery*, The Law relating to Solicitors, (1888) 2nd Ed., pp. 31-33.

25. See footnote, ante.

1. *Bani Malho v. A. L. Jinn*, 1947 All. 110; 1 I.L.R. 1947 All. 321; 1947 A.L.J. 283.

2. *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratab Narain Singh*, 1927 Pat. 61; 1 I.L.R. Pat. 777; 101 I.C. 289; see also *Keotokey Charan Banerjee v. Smat Kumari Dabee*, 1917 Cal. 39; 37 I.C. 71; 20 C.W.N. 995 (F.B.).

now known to appear to be entitled³. A counsel's admission even on a question pure of fact is not binding on his client, if it was made under a misapprehension. Nor is an opinion expressed by a Vakil in the course of argument adversely to a fact which he undertakes to advocate, binding on his client, when it is not in accordance with the law applicable to the case; and it is clearly not binding on the other contending defendant. The admissions of fact, during litigation may be made either incidentally in reference to matters connected with the action or with a view to obviate necessity of proof. Admissions in such cases may be made in Court or chambers or by documents or correspondence connected with the proceedings and when made amount only to *prima facie* evidence⁴, thus an undertaking which is a step in the case to a person for A and B 'joint owners of the sloop' X, by the solicitor who afterwards appears for them, is *prima facie* evidence of the joint ownership of A and B⁵. So, in an action on a bill, a notice served by the defendant solicitor to produce all documents relating to the bill which was accepted by the said defendant⁶ is *prima facie* evidence of the acceptance⁷. These admissions of fact, so made by solicitors, not indeed with the express intent of dispensing with proof of certain facts, but as it were incidentally, while they are relevant to other matters connected with the action (which are generally the result of carelessness) are not regarded as conclusively admissions. But they nevertheless not infrequently raise an inference respecting the existence of facts which the adversary would otherwise have been called upon to prove⁸. Admissions, however, made by solicitor during litigation for improper purposes are not evidence against his client, since the solicitor's agency only exists for the management of the action¹⁰. Admissions made for the purpose & partly of a former trial, if not expressly limited

3. *Johnson v. Caldwell*, (1872) 18 W.R. 359, 367; *Ackjoo v. Lallah*, (1875) 23 W.R. 400, 401. See as to admissions by agent, post, under cases cited under S. 58, post; *Phipson Ev.*, 11th Ed., paras 676, 740, *Taylor Ev.*, ss. 772-774; *Steph. Dig.*, Art. 17. "Barristers and solicitors are the agents of their clients for the purpose of making admissions which are made in the actual management of the cause, either in Court or in correspondence relating thereto; but statements made by a barrister or solicitor on other matters are not admissible in evidence because they would be admissions if made by the client himself." *Societe Belge de Banque v. Rao Girdhari Lal Chaudhary*, 1940 P.C. 90; 1940 A.W.R. 86; 187 I.C. 770; 51 L.W. 715; 1940 O.W.N. 445; 6 B.R. 618; 42 P.L.R. 339; *Ram Kishan v. Om Prakash*, 1941 Lah. 347; 197 I.C. 481; *Shiva Prasad Singh v. Maharaja Sri Chandranandi*, 1943 Pat. 327; 1 L.R. 22 Pat. 220; 210 I.C. 426; 10 B.R. 259; *Punjabai v. Bhagwandas*, 1929 Bom. 89; 1 L.R. 53 Bom. 309; 117 I.C. 518; 31 Bom. L.R. 88;

see also *Mst. Behram v. Mohammad Abrar*, 1935 All. 626; 158 I.C. 97; 1935 A.L.J. 953; *Muthiah Chetti v. Krishnan Chettiar*, 1927 Mad. 852; 105 I.C. 5; 1 L.R. 50 Mad. 786; *Shankerilal v. Motilal*, A.I.R. 1957 Raj. 267.

4. *Motilal v. Sarup Chand*, 1937 Bom. 81; 167 I.C. 208; 33 Bom. L.R. 1058.

5. *Krishnasami v. Rangopala*, (1897) 18 M. 73, 83; *Kamta Prasad v. Chait Narain*, 1934 All. 531; 154 I.C. 168.

6. *Cordery*, 82; *Phipson Ev.*, 11th Ed. para 68; *Taylor Ev.*, s. 773. In criminal cases a solicitor has no implied authority as in civil cases to affect his client by admissions of fact incidentally made, *R. v. Downer*, (1880) 14 Cox, 486; *v. ante*; see S. 58 post.

7. *Marshall v. Chiff*, (1815) 4 Camp. 133.

8. *Holt v. Squire*, (1825) Ry & M. 282; *Taylor Ev.*, s. 773.

9. *Taylor Ev.*, s. 773.

10. *Petch v. Lyon*, (1846) 9 Q.B. 147; *Taylor Ev.*, s. 774; *Cordery* 82, 83, and cases there cited.

ings, the Court may put the matter in issue under the provisions of Order VIII, Rule 5 of the Code of Civil Procedure.²² A statement in pleading cannot be excluded from the proceedings before a Court of Law unless it amounts to an admission.²³

Commission on the Judiciary. Law made by an advocate will not bind a party. The idea of a "rule" to be a pure question of law, can be raised at any stage, provided that the necessary evidence is on record.²⁴

It is not intended to subject the bar from counsel as to facts amounts to an admission in order to proceed against the interest of the party. Such information will not properly form part of the record in the case.

An admission made by a counsel in the course of a proceeding can be withdrawn only in the circumstances set out as follows. It is not stopped if the other party has acted in his prejudice on the basis of the admission. It may not be allowed to be withdrawn.¹

[illegible]

744: 82 I. C. 617: 6 L. L. J. 358.

23. Raj Kumar v. Gopi Nath, 1971 All. W. R. (H.C.) 295; I. L. R. (1971) 1 All. 401; A. I. R. 1971 All. 273; Sharat Chandra Misra v. State of U. P., 1971 Serv. L. R. 624; 1971 All. L. J. 1027; 1971 Lab. I. C. 1429 (The party who had made the admission may show that it was wrong or made under misapprehension); Biswa Nath Rana v. Laxman Rana, (1971) 1 Cut. W. R. 253; A. I. R. 1971 Orissa 267 (admission is best evidence unless explained); Suraj Nath Prasad Kedar Nath v. Union of India, A. I. R. 1975 Cal. 203 (one cannot take advantage of his own statement in his own favour but the adversary can use it); Ellamalai v. Veeraswamy, 1973 M. L. W. (Cri.) 8; 1973 Cri. L. J. 28 (admission made by husband in former proceeding that she was his wife was held binding though husband resiled from it).

wari, 1966 B. L. J. R. 257; A. I. R. 1966 Pat. 235, 240.

25. Sunder Parmanand Lalwani v. Caltex (India), Ltd., 70 Bom. L. R. 37; A. I. R. 1969 Bom. 24, 31.
1. Abdul Hamid Khan v. Commissioner of Income-tax, Andhra Pradesh, (1967) 1 T. J. 66; 63 I. T. R. 738 (1967) 1 Andh L. T. 182; (1967) 1 Andh. W. R. 42; A. I. R. 1967 Andh. Pra. 211; H. Clark (Doncaster), Ltd. v. Wilkinson, (1967) 1 All E. R. 934, 936.
2. Rangappa v. Emperor, 1936 Mad 426; 1 L. R. 59 Mad, 349; 161 I. C. 603.
3. S. C. Mitter v. The State, 1950 Cal 455; 86 C. L. J. 21.
4. Raghunath v. State of U. P., (1973) 1 S. C. C. 564; 1973 S. C. C. (Cri.) 448; 1973 Cri. App. R. 157; 1973 S. C. Cri. R. 270; 1973 Cri. L. R. (S. C.) 449; 1973 Cri. L. J. 858; A. I. R. 1973 S. C. 1100; 1973 All Cr. C. 77.

The new Cr P.C. has made some departure from the hard and fast rule that admission of accused or his counsel cannot relieve the prosecution of the duty to prove the facts leading to the guilt of the accused. Under section 200 of the Cr P.C. (1973) in cases of petty offences the counsel if so authorized by the accused can plead guilty on his behalf. Under section 204 of the Cr P.C. (1973) the accused or his pleader may admit the genuineness of a document whereupon it may be read in evidence.

Unless the *vakalatnama* of a counsel is worded in such a wide terms as to enable him to make a particular admission, or to waive the rights of the client without referring the matter to him, the counsel or other lawyer, is not competent to make an admission affecting the interest of his client to waive the right which his client had. The question, in each case, would be whether the counsel had an express or implied authority to bind the client by his admission or waiver. In law a counsel cannot waive the right of his client, an assessee, to challenge the irregularity in a notice under section 34 of the Income-tax Act, 1922 (now section 149 of the Act of 1961) when the client does not in fact relinquish the right voluntarily with knowledge of the same, the knowledge of the counsel cannot be fastened on his client.⁵

(f) *Admissions by guardians*—Under the English law, the declarations of next friends or guardians are not receivable in evidence against an infant plaintiff since, though the names of these persons appear on the record, they are not really parties to the action, but merely officers of the court specially appointed to look after the interests of the infant. A solemn admission may, however, be made in a pending suit, for the purpose of that trial only, by a guardian or next friend in good faith, and will be equally admissible with like admissions by the solicitor in the cause.⁶ In India too, the guardian of a minor cannot bind him by any admissions unless it be for the benefit of the minor.⁷ In *Abdul Hye v. Banee Pershad*⁸ Pheari, J. said:

"We are very far from intending to say that the guardian of an infant defendant, if properly advised on all the circumstances surrounding the infant and his relations to the matter of the suit, cannot on his behalf admit facts essential to his adversary's case. It is however, incumbent upon the Court, which is called upon to try an issue between a person of mature years and an infant, to take care that nothing of this kind is done unadvisedly. It should take nothing as admitted against an infant party to the suit, unless it is satisfied that the admission is made by some one competent to bind the infant, and fully informed upon the facts of the matter in litigation."⁹

Though an admission in a previous suit by the guardian prejudicial to the interest of the minor is not binding on him, it could not bind him if it

5. *B. K. Gooyer v. Commissioner of Income Tax* (1960) 2 I. T. J. 324 (1966) 62 I. T. R. 109 (A. I. R. 1966 Cal. 438, 445).

6. Taylor, s. 742, see also Phipson *Ev.*, 11th Ed., p. 705.

7. *Brijendra Coomar Roy Chaudhary v. The Chairman of Dacca Municipi-*

palty (1873) 20 W. R. 225 at 224 &c. also *Surujmookhi Konwar v. Bhagwati Konwar* (1881) 10 C. L. R. 377.

8. (1873) 21 W. R. C. R. 228 at p. 229.

9. See *Surujmookhi Konwar v. Bhagwati Konwar* (1881) 10 C. L. R. 377.

was a necessary admission and was asserted to the effect of the admission.¹⁰ A *bona fide* admission by a guardian *ad litem* on the admission of a vendor that the sale for necessity was void to spite the onus of necessity in absence of legal necessity, in the case of the said guardian, is not binding. An admission by the manager of Courts of Wards is not binding on the ward.¹¹

Admission by guardian under Hindu Law. A guardian has, under the Hindu law, a qualified power of dealing with the property of an infant under his charge. It can only be exercised really in case of need, or for the benefit of the estate. The guardian can, in case of necessity, charge, or let it for a long term.¹² But the infant is not absolutely bound by the act of guardians; he can, on attaining majority, recover his property, if it has been disposed of without legal necessity, and, in the case of an unaffiliated guardian, the burden of proving legal necessity, generally speaking, rests on the person asserting it.¹³ But he will be bound by the act of his guardian in the management of his estate, or where *bona fide* and for his interest, and (2) when it is such as the infant might reasonably and prudently have done for himself if he had been of full age.¹⁴ And where a contract has been validly entered into on his behalf and there is no fraud in such contract, it may be specifically enforced.¹⁵

Even an alienation made without necessity by an unauthorized *de facto* guardian will not necessarily be set aside.¹⁶ Where a minor will be bound by the act of his guardian, then he may be affected by his declarations made at the same time and forming part of the defence in respect of the particular act which constitutes a proper exercise of the functions of a guardian. But, although a guardian may have authority to manage the estate, and possibly even to make a partition, it does not follow that he will have power to make admissions or prove transactions, so as to affect the estate of his ward.¹⁷

And in the Calcutta High Court it was held that where, in a suit by reverend fathers to set aside an alienation by their maternal grandfather as without legal necessity, an affidavit filed by their parents in a counter suit was tendered as an admission of legal necessity, nothing in this Act could make the affi-

10. *Kesha Prasad v. Parmeshri Prasad*, 1923 Pat. 276; I.L.R. 2 Pat. 414; 71 I.C. 902.

11. *Dost Mohammad v. Sher Muhammad*, 1908 Cal. 100; 10 I.C. 668.

12. *Raja v. Raja*, 1908 Cal. 100; 10 I.C. 668; *Ali*, I.L.R. 24 Cal. 853; 24 I.A. 107; 1 C.W.N. 417 (P.C.); see also *Banwarilal Singh v. Dwarkanath*, 52 I.C. 825; 29 C.L.J. 577.

13. *Hari Prasad v. Pancha*, 1908 Cal. 100; 10 I.C. 668; *Mst. Babooee*, 1908 Cal. 100; 10 I.C. 668.

14. *Jagan v. Ananda*, 1908 Cal. 100; 10 I.C. 668; *Mayne's Hindu Law*, 10th Ed., 229-241.

15. *Mayne's Hindu Law*, 10th Ed., 229, and cases there cited. As to the onus in a suit by a minor to set aside a compromise made by a guardian, see *Lekhtar Roy v. M. Habib Chand*,

1908 Cal. 100; 10 I.C. 668; 17 W. R. 117; 14 M. I. A. 393.

16. *Mir v. Fakharuddin*, (1906) 34 C. 163 (F.B.).

17. *Prasad v. Prasad*, 1915 M. I. A. 100; 12 I.C. 179; 26 I.C. 179 (Art. 60 of Limitation Act, 1963 does not apply to alienation by unauthorized guardian).

18. *Suraj v. Bhagwati*, (1881) 10 C. I. R. 100; *Prasad v. Prasad*, 1915 M. I. A. 100; 12 I.C. 179; 26 I.C. 179. It was said that a guardian of an infant has no power to bind him by admissions. *See Ram Autar v. Maheshwar*, 1908 Cal. 100; 10 I.C. 668; 17 W. R. 117; 14 M. I. A. 393.

davit relevant, for the revisioners had not derived their interest in the estate from their parents, and the latter, as their natural guardians, were in no way authorized by them to make the admission.²² As to admissions made merely for probative purpose, see Sec. 58, post.

(c) *Admissions by Government servant.*—If admissions are made with regard to any legal consequence under a misapprehension as to the true interpretation of the law, such an admission is not binding either upon the maker, or the Government, provided he seems to be a Government servant.²³ When Government servants act in excess of their legal power, their admissions, express or implied, cannot be taken upon the Government.²⁴ The observations of a Land Acquisition Officer in a proposed award as to the value of certain plots do not amount to a binding admission of that Officer.²⁵

It is always open to a party to assert that an admission on a point of law was erroneously or negligently made.²⁶ Thus the admission in an income tax case contained in the affidavit of an Income-tax Officer of the contents of the answer of the assessee petitioner, even if treated as an admission on a point of law, cannot operate as an estoppel.²⁷

5. **Statements by suitors in representative character.**—The second paragraph of the Section enacts that statements made by parties to suits, suing or sued in a representative character, are not admissions unless they were made while the party making them held that character. To make this paragraph applicable the following conditions must be satisfied, namely:—

1. statement must be made by a party to the suit,
2. such party must be suing or sued in a representative character, and
3. the statement must have been made by such party while holding that representative character.

In the case of a joint Hindu family, the admissions of the father or the managing member will not by their own force bind the other members of the family, and such admissions cannot be used against them on the ground that the father or the managing member, as the case may be, did not satisfactorily account for such admissions. The junior members can always prove that the father or the managing member acted in the name of the family. The admissions made by the father or the managing member in a representative character may be used against him, but not his admission to advance his own interests and

22. *Mahabir Singh v. Harbhajan Singh*, 1924 P.C. 164; 24 I.C. 311; (1914) 18 C.W. N. 718.

23. *Mahabir Singh v. State of Bihar*, A.I.R., 1967 Pat. 287, 294, 295; *State of Bihar v. Narain Singh*, 1961 B.L.J.R. 446, 447; *State of Bihar v. Narain Singh*, 1961 B.L.J.R. 446, 447.

24. *State of Bihar v. Narain Singh*, 1961 B.L.J.R. 446, 447.

25. *Ambalal v. Additional Special*

1. *Land Acquisition Officer*, A.I.R. 1968 Guj. 5, 10.

26. *Juttendromohun Tagore v. Ganendromohun Tagore*, 1950 I.A. (Supp. Vol.) 47.

27. *State of Bihar v. Shambhu Dayal and Co.*, I.L.R. (1967) 1 All. 387; A.I.R. 1968 All. 203; *verulung Nand Kishore Rai v. B. Ganesh Prasad Rai*, A.I.R. 1929 All. 446, 447.

acquire property for himself, without being bound to share it with the sons or other persons who are entitled to it and for whom the position is a *fidei commissa* in terms of the statute, not only the personal interests of the managing member of the family but also profoundly affects the interests of the other members.²⁵

6. Section 18 (1) Party interested in subject-matter. (a) General.—“When several persons or persons interested in the subject-matter of the suit, the plaintiff or the defendant, or any one of those persons are jointly and severally liable and follows whether they be jointly liable, or sued, provided the claims or defenses to the subject-matter, as a party may be made by the defendant in his capacity of a person jointly interested with the party against whom the claim or defense is tendered.” Thus, the representation or the representation of one or more persons or one or more persons with respect to some particular subject-matter was held to be a party interest also, in the case of a partnership of which *A*, *B*, *C* and *D* were partners and several promissory notes of the partnership were admitted to be a party interest. An assignment of one of the notes to *E* extended the party interest to *E* and his heirs of house and land was held to be a party interest to the defendants of the same value.⁴ Similarly, a statement made by a person committing the perpetration of a tortious act was held to be a party interest of co-sharers.⁵

At the same time, I was not at all sure that I was right and on being consulted by the two equally sincere but somewhat different interests of the Union was forced to be admitted to a compromise. Where the question was whether the delegates I took with me, most of whom were of a moderate opinion, or whether they were to be left behind I was very properly consulted by the members of the Convention, and the result was that I took the moderate party.

THE COURT OF COMMONS, in the House of Commons, on the 14th of June, 1840, resolved, that the following resolution be passed:—

25. Nagayasami Naidu v. Kochadai Naidu, 1 L.R. (1969) 1 Mad. 459 : 81 M.L.W. 436; A I.R. 1969 Mad. 329, 337.

1. Taylor, Ev., s. 743; cited and adopted in *Kowsulliah v. Mukta*, (1885) 11 C. 588, 590; see also *Chalho Singh v. Jharo Singh*, 1 L. R. 39 Cal. 995; 18 I. C. 61; *Meajan v. Alimuddin*, A. I. R. 1917 Cal. 487; 1 L. R. 44 Cal 150; 34 I. C. 571; 25 C. L. J. 42; 20 C. W. N. 1217; S. 18, cl. (1), ante: *Whitcomb v. Whiting*, (1781) 2 Doug 652; *Wood v. Brad-dick*, (1808) 1 Taunt 104; *Jagabandhu v. Bhagu*, A. I. R. 1974 Orissa 120; as to acknowledgment of joint debts for the purpose of the Law of Limitation v. *Post and Taylor, Ev.*, s. 600-601 and 724-

747.

2. Taylor, Ev., s. 743 and v. ante.

3. Whitcomb v. Whiting, (1781) 2 Doug. 652; 1 S. L. C. 644; Steph. Dig., Art. 17, Illus. (D).

4. *Tirukha Ram v. Murarilal*, 1955 All. 720; 158 I.C. 109; 1955 A.W.R. 735.

5. *Jogendra Krishna v. Subasini Dassi*,
1941 Cal. 541; 1 L.R. (1941) 2 Cal.
44; 197 I.C. 376; 74 C.L.J. 145;
45 C.W.N. 590.

6. Dost Muhammad v. Sher Muhammad, 1935 Lah 489; 159 I.C. 693.

7. *Yaggana Obanna v. Kutagulla Gangaiiah*, 1945 Mad. 361; (1945) 1 M.L.J. 378; 1945 M.W.N. 352; 58 L.W. 321.

8. See S. 18, cl. (2) post.

sonal representative of the deceased,²⁰ nor can the acts or admissions of the executor bind the survivors.²¹ The rule that, where there are several co-contractors, or persons engaged in one common business or dealing, a statement made by one of them, with reference to any transaction which forms part of their joint business, is admissible as against the other²² was applied in the case of *Kemble v. Sundari Dasi v. Mukta Sundari Dasi*.²³ The facts in this case were, that in a suit between a zamindar and his riyadars for rent, a person who was one of several jotedars in the mahal was called as a witness for the zamindar, and admitted the fact that an arrangement existed whereby he and his co-jotedars had agreed to pay rent to the zamindar direct. This suit was decided in favour of the zamindar. The riyadars then brought a suit against the jotedars, amongst whom was the witness above mentioned, to recover the sum which the jotedars ought to have paid to the zamindar direct and which the riyadars had been decreed to pay. The jotedars disclaimed all liability to payment to the riyadars. In this suit, the evidence given by the jotedar in the zamindar's suit was received as evidence on behalf of the plaintiff against all the defendants. It was contended that the statement of the jotedar might have been received as an admission against himself only, but not as against the other defendants; but it was held, on the principle above stated, that the evidence was admissible. As to admissions founded on derivative interest, *vide post*. In an action for negligence or trespass or in any other action for tort, the admission of one defendant will not be evidence against the others unless combination for a common object be proved; the same rule prevails in criminal proceedings, as the law cannot recognise any partnership or joint interest in crime.²⁴ The joint interest must be proved independently. An apparent joint interest is obviously insufficient to make the admissions of one party receivable against his companions, where the reality of that interest is the point in controversy. A foundation must first be laid by showing *prima facie* that a joint interest exists. Where, therefore, it is sought to charge several as partners in admission of the fact of partnership, by one is not receivable in evidence against any of the others, to prove the partnership; but it is only after the partnership is shown to exist by independent proof satisfactory to the judge, that the admissions of one of the parties are received in order to affect the others.²⁵

20. *Akers v. Lodge* (1873) 2 B. & C. 23; *Fordham v. Wallis*, (1852-53) 10 Hare 217; *Slaymaker v. Gundackers*, (1823) Ex. 10 Scrg & R. 75.

21. *Slater v. Lawson*, (1830) 1 B. & Ad. 10; *Hedderley v. Hickell* (1829) 9 Pick 42.

22. Per Garth, C. J., in *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi*, (1885) 11 C. 588, 590; citing *Taylor, Ev.*, s. 745; *Kemble v. Sundari Dasi*, (1885) 11 C. 588; *Taylor v. De La Cour*, (1813) 1 M. & S. 249.

23. (1885) 11 Cal. 588.

24. *Taylor, Ev.*, s. 745. Admissions by joint defendants in action for tort are not generally evidence, except against themselves, unless there be

proof of common object or motive; *Norton, Ev.*, 143; see S. 10, ante; and ib. as to conspirators in crime; *Taylor, Ev.*, ss. 597, 598; *Daniels v. Potter*, (1830) 1 M. & M. 50; *Roscoe, N. P. Ev.*, 68; and observations in *R. v. Hedderley* (1829) 11 East 585; nor in actions *ex contractu*, unless they relate to a matter in which there is an identity of interest; *Fox v. Waters*, (1840) 12 A. & E. 45.

25. *Taylor, Ev.*, s. 745, and cases there cited; and as to admissions as to the nature or extent of the partnership business, see *Lindley, Partnership*, 165; or as to the extent of partners' authority to bind the firm, *Agace Ex. Parte* (1792) 2 Cox, Eq. 312.

An admission by one partner made in a representative capacity is evidence against the firm.¹⁶ Where the pecuniary interest of certain persons in the subject-matter of a suit is continuing even though the firm of those persons has been dissolved, the admission of one partner is admissible against the other partners under this section. For the application of the section what is required is that there should be an identity of interest and not merely a community of interest.¹⁷

Both under the English and the Indian Acts, to be evidence against the firm, an admission or representation made by a partner (b) must be concerning the affairs of the firm and (2) must have been made in the ordinary course of business. Hence an admission made by one person, who afterwards enters into partnership with others, is no evidence against them, merely because they afterwards are partners when evidence is sought to be used.¹⁸

After *prima facie* evidence of partnership, the declaration of one partner is evidence against his co-partners as to partnership business, though the former is no party to the suit.¹⁹ Where goods are purchased or money raised for a joint adventure, and the dealing though conducted by one individual, is truly and substantially a venture of the joint adventure, the co-adventurers are liable as partners. Each member of a firm being an agent of the others for all purposes within the scope of the partnership business, admissions by one (provided the Court regards him as authorized to make the admissions) are binding on all, unless under the special circumstances of the case, an intention

16. *Thomas Bear & sons v. Rulia Ram* 1934 Lah. 625; 148 I. C. 765; See *Sohanlal v. Gulabchand*, A.I.R. 1966 Raj. 229; I.L.R. (1965) 15 Raj. 1035.
17. *Sohanlal v. Gulab Chand*, I.L.R. (1965) 15 Raj. 1035; 1965 Raj. L. W. 346; A.I.R. 1966 Raj. 229 at pp. 231, 232; *Taylor, Ev.* 12th Edn. paras 740, 743, 750, 753 and 754; *Keshavnath Shastri Dasi v. Mahadevi Sundari Dasi*, (1885) 11 Cal. 588 (admission made by one co-sharer concerning the other's share is not binding on the latter); *Ambar Ali v. Lutfi Ali*, I.L.R. 45 Cal. 105; A.I.R. 1917 Cal. 487 and *Ambar Ali v. Lutfi Ali*, I.L.R. 45 Cal. 105; A.I.R. 1918 Cal. 971; *Tikoo Ram Brahman v. Jhabur*, I.L.R. (1960) 10 Raj 6; *Dileshwar Ram Brahman v. Nobar Singh*, 48 I.C. 193; A.I.R. 1918 Nag. 41; *Harihar v. Nabha Kishore*, A.I.R. 1963 Orissa 45 (in the last three cases evidence of co-defendants was admitted). In the cases that follow there was no identity of interest; *Amrito Lal Bose v. Rajoonce Kant Mitter*, (1874) 2 Ind. App. 113 (P.C.); *Dina Nath v. Sayad Habib*, A.I.R. 1929 Lah. 129; *Narinder Singh v. C. M. King*, A.I.R. 1928 Lah. 769.
18. *Tunley v. Evans*, (1815) 2 Dowl. &

- L. 747; *Catt v. Howard*, (1820) 3 Stark 3.
19. *Roscoe, N. P. Ev.*, 71; *Nichols v. Dowdine*, (1815) 1 Stark 81; *Taylor, Ev.*, s. 743; *Lucas v. De La Cour* supra; "What admissions bind in the case of partners? Those admissions only bind the firm which relate to matters connected with the partnership. For instance, an admission by one partner that the two had committed a trespass would not bind the other, for declaration of trespass is a tort in which there was no community of interest which makes the declaration of one defendant evidence against the other." *Fox v. Waters*, (1840) 12 A. & E. 43, per Williams, J. See *Taylor, Ev.*, s. 751; and see generally as to Partnership *ib. ss.* 598–601, 743–754, 787; *Roscoe, N. P. Ev.*, 71; *Steph. Dig. Art. 17*; *Landlay, Partnership*, 128 162–166, Supp. 40; *Pearson's Law of Agency*, 428, 429.
20. *Wood v. Braddick*, (1808) 1 Taunt 105; *Roscoe, N.P. Ev.*, 71; *Taylor, Ev.*, s. 743.
21. *Karamali v. Karimji*, 1914 P.C. 132; 42 I.A. 48; I.L.R. 39 Bom. 261; 26 I.C. 915; 13 A.L.J. 121; 17 B.L.R. 103; 21 C.L.J. 122; 19 C.W.N. 337; 28 M.L.J. 515.

can be inferred that a particular act should not be binding without the direct concurrence of each individual partner.²²

An admission by a person before he became a member of the partnership is no evidence against the firm.²³ On the same principle an admission by a partner that an acknowledgment of debt made by another partner was made on the authority of the firm is not binding on him when such admission was made after the firm stopped business.²⁴ The Court will not order a partner to pay trust money into Court upon an admission that the money was received by the firm contained in the pleadings and answer to the interrogatories if he denies it, inasmuch as such admission cannot be said to have been made in the usual course of the partnership business.²⁵ Acknowledgment of liability made by a partner of the firm not in the ordinary course of business, but in accordance with a statutory provision, cannot be presumed to have been made on the authority, or on behalf, of the firm.²⁶ An admission by a partner which does not relate to the affairs of the firm or is not made in the ordinary course of business is not evidence against the firm.²⁷ Thus, when a partner *A* stands surety to a bond, his liability is personal and as the transaction is not a partnership one, the partner *B* cannot be presumed to have authority to bind partner *A* by acknowledging liabilities or payments in respect of the bond so as to save limitation against partner *A*.²⁸ Statements or representations made by a person that he is a partner in a certain firm with others, would be evidence against him and he would be liable as a partner on the ground of holding out.²⁹ But such an admission by him would not be conclusive evidence against him and it is open to him to explain the circumstances under which it was made.³⁰ Even a written agreement by certain persons describing themselves as partners is not conclusive proof of their being partners.³¹ "Enough admissions by partners bind the firm when tendered by strangers, they do not necessarily have this effect when tendered *inter se*." Thus, it has been held that, as between themselves, entries in the partnership book, made without the knowledge of a partner, well as against him, be inadmissible.³² and a similar rule holds as to directors and other members of a company *inter se*.³³ An admission made by a partner in any suit or proceeding, concerning any affair or act of the firm, is evidence against the firm under Sec. 18 of the Evidence Act

22. *Latch v. Wedlake*, (1840) 11 A. & E. 101; *Kewal-lah Sundari Dassi v. Mukta Sundari Dassi*, (1883) 11 Cal. 588; *Ex parte Agace*, (1792) 2 Cox. 312; 30 E.R. 145; *Jacob v. Morris*, (1902) 1 Ch. 816, as to acknowledgment of debt by partner giving new period of limitation *vide post*.
23. *Catt v. Howard*, (1820) 3 Stark. 3; *Ex parte*, (1844) 14 L.J. Q.B. 116; 2 Dowl. D. & L. 747.
24. *Naubat v. Sewa Ram*, 140 P.R. 1889.
25. *Hill v. Barton*, (1873) 3 Ch. 296.
26. *M. K. Raju v. P. V. Subbaraya*, 25 I.C. 22; A.I.R. 1915 M. 353; *Kessen Doss v. Khatau Makanjee*, 36 I.C. 389.
27. 84 I.C. 199 *Seth Abde Ali v. As-*

karan, A.I.R. 1924 Nag. 411.

28. See S. 28, Partnership Act, 1932.

4. *Ridgway v. Phillip*, (1834) 1 Cr. M. & R. 415.

5. *Bhaggu Lal v. De Gruyther*, 4 All. 74; *Abdullah v. Allah Diya*, 1927 L. 333; 8 Lah. 310; 100 I.C. 846; *Mohammed v. Fyeban*, 1933 Sind. 145; 1 C. 735; *Mohammad Yusuf v. Pir Mohamad*, 1922 Nag. 67; 65 I.C. 368.

6. As to the principle on which partnership books are evidence, see *Hill v. Manchester Waterworks*, (1833) 5 B. & Ad. 866.

7. *Hodgeson v. Smith*, (1884) 5 Ir. R. 1; *Stewarts case*, (1866) 1 Ch. App. 511; *Daji v. Govind*, 10 Bom. L.R. 811.

8. *Phipson, Ev.*, 11th Ed., 329.

But such an admission is distinguishable from confessing judgment.⁹ Where the cause of action for infringement of a trademark arose against the firm when the partnership was going on, but a suit for damages was brought after its dissolution and one partner disputed the claim for damages, but admitted the infringement of trademark, it was held that the admission bound the firm and made all the partners liable¹⁰ unless made collusively with the other side.¹¹ But, where a partner is shown to be hostile to another, such hostility will no doubt affect the question of credibility. Similarly, an admission cannot have any value when it is made in fraud of the copartners and in collusion with the opponent.¹² The Madras High Court has held in several cases (in conflict with the Bombay and Allahabad High Courts) that it is not enough to show that an acknowledgment of payment by a partner was an act necessary for, or usual in the course of, the partnership business, but that to bind other partners it must be proved to have been authorized by them.¹³ But, in a later case, in that High Court, it was held that where a promissory note which contained no indication that it was executed on behalf of the firm was executed by only two of three partners for money borrowed for the purposes of the partnership business, the promisee could recover also against the partner who did not execute it.¹⁴

(c) *Principal and agent*. "The admissions of a principal can seldom be received as evidence of an act on against the surety agent, his collateral undertaking. In these cases, the main inquiry is, whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*. If so, they are admissible; otherwise they are not. The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done; and therefore, he is entitled to proof of the principal's conduct, by original evidence, when it can be had, excluding all his declarations made subsequent to the act to which they relate, and out of the course of his official duty." 15

Th. Dennis Bear & Sons Ltd. v. Ruma Ram, 1934 Lah. 625 : 148 I.C. 763.

10. Ibid.

11. Taylor, Ex. 5, 749, and cases there cited.

12 Rawlstone v. Gamble, (1845) 15
M. & W. 304; Veerswamy v. Ib-
ramsa. (1909) 19 Mad. L.J. 221;
Sheik Ibrahim v. Rama Aiyar, 37
Mad. 685; Baikunt Nath v. Hira
Lal, 15 Cal. L.J. 234; see also Pala-
niappa v. Veerappa, 1918 Mad.
238 : 41 Mad. 446 : 44 I.C. 466 : 34
M. J. J. 41; Murali v. Sarup Chand
1937 Bom. 81 : 167 I. C. 208 : 38
B. L. R. 1058.

13 K. R. V. I. m. v. Seetharama 1914
Mad. 609; I.L.R. 37 M. 146: 21
I.C. 634: 25 M.L.J. 501: Wallis,
J., expressing reluctance to be
bound by other rulings as for in-
stance B. S. P. S. v. R. S. P.
S. S. P. 1914 M. 421 Mad.
d. n. O. n. Assignee, 1910) 25
M. 11.

14 *Srinivasa v. Srinivasa*, 1917
Mad. 108 : I.L.R. 40 M. 727 : 35 I.
C. 219 : 31 M. L. J. 38, following
Kannan v. Kannan 1914 P. C.
132 : 42 I.A. 48 : I.L.R. 39 B. 261 :
71 I.C. 207 : 194 I.J. 121 : 17 B.
L.R. 103 : 21 C.L.J. 122 : 19 C.
W.N. 337 : 28 M.L.J. 515 :
distinguishing *Muthu v. Visvan-
atha*, (1914) 26 M.L.J. 19 : 21
I.C. 864 : A.I.R. 1914 Mad. 657
(2) : I.L.R. 38 Mad. 660.

15. Taylor, Ev. s. 785; and v. lb., s. 786. If a man becomes surety in a bond conditioned for the faithful conduct of a clerk or collector, evidence of embezzlement made by the principal after his dismissal cannot be given in evidence if the surety be sued on the bond. Smith v. Whittingham, (1833) 6 C. & P. 101. If a collector for the principal is guilty of embezzlement, or if the principal himself, after having received the money, will, as

The reason why admissions made by the principal subsequently to the transaction do not bind the surety is that as the surety contracts with the creditor, there is no privity between the principal and himself¹⁶. So, in a suit by a creditor against the surety, the latter is not bound by any admissions or statements of the principal as to what amount is due. He is only bound to pay the amount which shall be proved against him¹⁷. Even where the principal and the surety are impleaded as co-defendants the admissions of the principal cannot ordinarily be received against the surety¹⁸. But the admission of the principal may be admissible against the surety under Sec. 19 when it is necessary to prove **the position or liability of the principal**.¹⁹

So far as one person is privy in obligation with another, i.e., is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges him in equity. Not only as a matter of principle does this seem to follow, since the greater may here be said to include the less, but also as a matter of fairness since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish. Moreover, as a matter of probative value, the admissions of a person having virtually the same interests involved and the motive and means for obtaining knowledge will in general be likely to be **equally worthy of consideration**.²⁰

(d) *Acknowledgments by guardian or manager of joint Hindu family*—Under Secs. 18 and 19 of the Limitation Act, 1908, an acknowledgment of liability made in writing signed by a party, or by some person through whom he derives title or liability, or by the party's 'agent duly authorised in this behalf,' or a payment on account of a debt or of interest on a legacy made by a party or by his 'duly authorised agent,' saves limitation against the party. Under Sec. 20 (1) of the same Act the expression 'agent duly authorised in this behalf,' in the case of a person under disability, includes his lawful guardian, committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment. An admission amounting to an acknowledgment under Sec. 18 made by the guardian of a minor appointed by the Court is binding on the minor²¹. The expression 'lawful guardian' is not limited to a guardian appointed by the Court. It means any person who is entitled to act as guardian under the personal law of the minor. Thus, under the Hindu law, on the death of the father, the mother is not only

least after his death, be received as proof against the surety, not altogether as declarations made by him, agents his interest but because the entries were made by him in those accounts which it was his duty as clerk to keep, and which the defendant had contracted that he should faithfully keep. *Wright v. George*, 1828 8 B. & C. 576, *Goss v. Watlington*, (1821) 3 B. & C. 152.

16. See Phipson, Ev., 11th Ed., p. 325.

17. Per Lush, L.J. in *Young ex parte*,

1881 17 Ch. D. 608, cited in *Rambhajan Lal v. Shree Prasad*, 5 A. L.J. 142.

18. *Gopal Das v. Gopal Bai Bai*, 28 Bom. 248; 5 Bom. L.R. 1020.

19. *Parameshwara Pattar v. Viyathen Sreedasi*, 20 I.C. 637, 1913 M.W.N. 76, 25 M.L.J. 11, see also *Aravin Chettiar v. Nanappa Gounder*, 20 I.C. 792, 25 M.L.J. 329; 14 M.L.J. 117.

20. Wigmore, s. 1077.

21. *Bageshwari v. Bindchawari*, 1932 Pat. 357; 13 P.L.T. 509.

the natural guardian but also the legal guardian, and as such she can acknowledge a debt on behalf of the minor.²²

(c) *Guardian's power to acknowledge*—Before the addition of subsection (3) to Sec. 21 of the Limitation Act, 1908 by Sec. 3 of the Indian Limitation (Amendment) Act, 1927, there were conflicting decisions on the question whether a guardian of a minor could keep alive a debt by acknowledgment of, or, by payment towards the interest or the principal of the debt. Such acknowledgments and payments are almost always made to avert an impending suit and guardians of minors and managers of their estates are since declared to be agents duly authorised in that behalf by subsection (3) of Sec. 21 of the Limitation Act, 1908 (now section 20 (c) of the 1963 Act).

The managing member of a family has, therefore, authority to acknowledge, on behalf of the family, a debt due by the family, as well as to pay interest on it, or to make part payment of the principal, so as to enable a fresh period of limitation to be computed.²³ But he is not competent to bind the other members of the joint family by a promise to pay a debt already statute-barred. An acknowledgment to save limitation must be in writing and it must be signed.²⁴ It has been held that an application by a guardian of a minor, for sanction of a grant, amounts to an acknowledgment of the grantor's title, and is binding on the minor.²⁵ A payment by a guardian must be held to be a payment by an agent duly authorised in this behalf.²⁶ A payment even by a junior member, managing the business of a joint Hindu family, would save limitation against the other members of the family.²⁷ But an acknowledgment of a debt made by a *de facto* guardian of a minor does not prevent the debt from being time barred.²⁸ The expression '*de facto* guardian' means and implies a person who is not a legal or lawful guardian, but merely, in fact, performs the functions of a guardian, and the expression 'agent duly authorised' in Secs. 18 and 19 does not include a *de facto* guardian by reason of Sec. 20.²⁹ Only a lawful guardian or manager can sign an acknowledgment for the purposes of Sec. 18, or in their absence, an agent duly authorised either by the

22. *Bechu v. Baldeo*, 1933 Oudh 132; 10 O.W.N. 188; 145 I.C. 180.

23. *Chandrasekhar v. Chandraiah*, 1882, 5 Mad. 169 (F.B.); *Ambalavana v. Gowri*, A.I.R. 1936 Mad. 871; 1936 M.W.N. 1274; *Lakshmi v. Gunnamma*, 1935 Mad. 101; I.L.R. 58 Mad. 418; 154 I.C. 1053; *Venkatachalam v. Venkateswara*, 1944 Mad. 33; 217 I.C. 61; (1943) 2 M.L.J. 60; *Kunshi Rao v. Bhagi*, 1945 Bom. 511; I.L.R. 1945 Bom. 976; 47 Bom. L.R. 470; *Bhaskar v. Varadar*, 1935 17 Bom. 742; *Har Prasad Das v. Harihar Prasad*, (1915) 19 C.W.N. 860; *Hari Mohan v. Sourendra*, 88 I.C. 1025; 1925 Cal. 1153; *Annada Charan v. Jhantu Charan*, 1935 Cal. 648; 158 I.C. 512; *Ram Autar v. Beni Singh*, 1922 Oudh 135; 68 I.C. 196.

24. *Nagmal v. Bapanglal*, 1950 P.C. 15; 77 I.A. 22; I.L.R. 29 Pat.

272; 1950 A.L.J. 130; 52 Bom. L.R. 467; (1950) 1 M.L.J. 289.

Prasanna Chaitin v. Bhandeshwari Saran, 1932 Pat. 337; 13 P.L.T. 509.

1. *Mani Devi v. Anpurna Dai*, 1943 Pat. 218; I.L.R. 22 Pat. 114; 206 I.C. 126; 9 B.R. 260.

2. *Adappa Venkatacharyam v. Venkateswara Rao*, 1944 Mad. 33; 217 I.C. 61; (1943) 2 M.L.J. 610; 1945 M.W.N. 680; 56 L.W. 570.

3. *K. Chennappa v. K. Chennappa*, 1940 Mad. 33; I.L.R. 1940 Mad. 358; 186 I.C. 749; (1939) 2 M.L.J. 884; 1940 M.W.N. 9; 50 L.W. 896 (F.B.).

4. *Dashrath Motiram v. Gajanan Keshav*, 1943 Bom. 381; I.L.R. 43 Bom. 486; 210 I.C. 532; 45 Bom. L.R. 740.

lawful guardian of the minor. Accordingly, a *de facto* guardian will not do, and an acknowledgment by him will not extend limitation.⁵

Where the minor has a separate guardian for his property, an acknowledgment by the guardian of his person cannot save limitation against the minor.⁶

1. *Joint debtors, joint contractors, etc.*—Nothing in the said sections renders operative several joint contractors, partners, executors or mortgagees discharged by reason only of a written acknowledgment signed or a payment made by or by agent of another or others of them.⁷ One of several could not make an acknowledgment or payment on behalf of the others unless authorised to do so.⁸ Where a payment made by one of the joint debtors is made, the mere presence of the others at the time of the payment cannot save limitation, unless it is proved that he made the payment or that the person making the payment was authorised by the others to do so.¹⁰

2. *Joint debtors, joint contractors, etc.*—An acknowledgment of liability by some only of the joint debtors, joint contractors, partners, executors or mortgagees does not operate to save limitation as against the others.¹¹ If at the time when the acknowledgment is made there are more than one person in existence who are jointly liable to each other as joint contractors, partners, executors or mortgagees, the acknowledgment or payment made by one would save limitation as against that person and would be of no avail against the others.¹²

3. *Joint debtors, joint contractors, etc.*—An acknowledgment by one executor of a will is not binding against the assets of the testator, but is not sufficient by itself to bind the other executors personally dischargeable.¹³

5. *Prasanna v. M. A. R.*, 1948 Nag. 203; 1 L.R., 1947 Nag. 710; 1947 N.L.J. 405.

6. *Sardambal v. Kuppusami*, 1942 Mad. 663; 203 I.C. 212; (1942) 2 M.L.J. 281; 1942 M.W.N. 539; 75 I.W. 529.

7. Sec. 20 (2), Limitation Act, 1963.

8. *Nagappa Naidu v. Duraiswami*, 1938 Mad. 111; 175 I.C. 426; 1937 M.W.N. 194; 46 L.W. 688; *Juanchandra Mukherjee v. Manoranjan Mitra*, 1912 Calcutta 251; 1 L.R. (1911) 2 Cal. 576; 201 I.C. 188; 74 C.I.J. 327; *Oudh Commercial Bank Ltd. v. Bishambhar Nath*, 1926 Oudh 601; 1 L.R. 2 Luck. 180; 96 I.C. 353.

9. *Ram Kumar Pandey v. Hirabai*, 1939 All. 230; 1 L.R. 1939 All. 258; 181 I.C. 490; 1939 A.I.J. 66 (joint judgment debtors); *Naziruddin Ahmad v. Parmanand*, 1948 Oudh 193; 1 L.R. 23 Luck. 114; 1947 A.W.R. (C.C.) 402; 1947 O.W.N. (C.C.) 623 (F.B.) (joint-

debtors). *Annada Charan Misra v. Jhatu Charan Roy*, 1935 Cal. 648; 158 I.C. 512; *Jogesh Chandra Saha v. Monindra Narain Chakravarty*, 1932 Cal. 620; 1 L.R. 59 Cal. 1128; 138 I.C. 740; 55 C.L.J. 317; 36 C.W.N. 487.

10. *Annadacharan v. Jhatucharan*, A. I.R. 1935 Cal. 648; 158 I.C. 512.

11. *Mohammad Taqi Khan v. Raja Ram*, 1936 All. 820; 166 I.C. 106; 1936 A.L.J. 1140 (F.B.); see also *Arjun Ram v. Rahima*, 14 I.C. 128; *Azizur Rehman v. Upendra Nath Samanta*, A.I.R. 1938 Cal. 129; 43 C.W.N. 18; but see *Narasimha Rama Aivar v. Ibrahim*, 1929 Mad. 419; 118 I.C. 302; 56 M.L.J. 630; 1929 M.W.N. 146; where it was held that S. 21 (2) of the Limitation Act, 1908 does not apply to co-heirs.

12. *McDonald, Re, Dick v. Fraser*, (1897) 2 Ch. 787; *Fordham v. Wallis*, (1855) 17 Jur. 228; *Astbury v. Astbury*, (1898) 2 Ch. 111.

(i) *Acknowledgment by partners*—The mere fact, that one partner is an agent of the others, does not give him authority to acknowledge liability on behalf of the firm. To bind the firm, he must have express or implied authority to make the acknowledgment. If the conduct of the partners be, or the circumstances of any particular case are, such as to justify the inference that one of the partners has authority to acknowledge a liability or pay a debt, his acknowledgment or payment would avail to save limitation as against the whole firm¹³. In order to bind the firm, the act of the partner should be done on behalf of the firm but it is not necessary that it should also purport to be so done¹⁴. A partner who has general authority to contract debts, or make payments, has implied authority to acknowledge liability¹⁵. In a going mercantile concern, a partner has an implied authority to make an acknowledgment on behalf of the firm, and this is sufficient to save limitation in spite of the provisions of Sec. 20 of the Limitation Act¹⁶. The word 'only' in sub-section (2) of Sec. 20 Limitation Act, 1908, means that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partners; it must also be shown that he had authority, express or implied, to make the acknowledgment on behalf of himself and his co-partners¹⁷, and if it is shown, then of course the acknowledgment will be binding on them all. The use of the word 'only' shows that while a partner cannot make another partner liable merely by his acknowledgment, there is nothing to prevent such liability falling on partners, if they are shown to have all joined in the settlement made by one of them¹⁸. The mere fact that persons are partners does not make one partner liable under an acknowledgment by another, but if the acknowledgment is done in the course of partnership business, it is binding on the others¹⁹. But admission of liability by a partner in his insolvency schedule does not bind the other partners²⁰. An acknowledgment by a partner after dissolution may not bind the other partners, unless the creditor had notice of such dissolution or public notice had been given of it²¹. But if the ex-

13. *Veeramma v. Veerabhadraswami*, 1973 Mad. 1140; 11 I.R. 41 Mad. 427; 45 I.C. 18; 34 M.L.J. 373 (F.B.); *Mahadeva v. Rama Krishna*, 1926 M. 114; 92 I.C. 653; 50 M.L.J. 67; *Apurva v. Ranchod Lal*, 1910 P.W.D. 86; 38 I.C. 87; C.A.I.R. 1909 B. 110; *Bengal National Bank Ltd. v. Jatindra Nath Mazumdar*, 1929 Cal. 714; 56 Cal. 556; 33 C.W.N. 412; 121 I.C. 741; *Rala Singh v. Bhagwan Singh*, 1975 Rang. 80; 11 I.R. 1 Rang. 36; 84 I.C. 391.

14. *Periambala v. Muhammad Ghouse*, 1945 Mad. 263; 1945 58 I.W. 236; (1945) 1 M.L.J. 279; 1945 M.W.N. 314.

15. *Chegamall v. Gopadaswami*, 1928 Mad. 972; 112 I.C. 491.

16. *Galsiran Das v. Jomuchan*, 1929 L. 397; 184 I.C. 754; 41 P.L.R. 90; *Prantik Lal v. Datta Dattagarsay*, (1886) 10 Bom. 358; *Dalsukhram v. Kali Das*, 26 Bom. 42; *Gadu Bibi v. Parsottam*, (1888) 10

Al. 118; 1888 A.W.N. 93; *Bengal National Bank Ltd. v. Jomucha Nath Mazumdar*, 1929 Cal. 714; 56 Cal. 556; 121 I.C. 741; 33 C.W.N. 412.

17. *Gordhandas v. Bhulabhai*, 1932 Bom. App. 138; 10 I.C. 83; 33 Bom. I.R. 673; *Gadu Bibi v. Parsottam Doongersay*, 10 Bom. 358, *gersay*, 10 Bom. 358.

18. *Kariyappa v. Rachappa*, 24 Bom. 493 (502).

19. *Datta Prasad v. Bhatnagar*, 128 Al. 491 (492); 26 A.L.J. 1036; 111 I.C. 143.

20. *K. S. v. K. M. Spinning and Weaving Co. Ltd.*, 36 I.C. 389.

21. *Dalsukhram v. Kalidas*, 26 Bom. 42; *Mahadeva v. Rama Krishna*, 92 I.C. 653; 1926 M. 114; *Bengal National Bank v. Jatindra Nath*, 1929 Cal. 714; 1 I.L.R. 56 C. 556; *Gadga Singh v. Banganga*, 126, Lah. 616; 1 I.L.R. 7 Lah. 403; 99 I.C. 723; *Rajgopal v. Kashnaji*, 8 M.L.J. 261.

partner is authorized to collect and pay debts, he can acknowledge on behalf of the firm.²² So also, if the partners have all joined in the settlement made by one of them.²³ Entries in partnership books are *prima facie* evidence against each of the partners and therefore also for any of them against the others.²⁴

(c) Acknowledgment by mortgagors. An acknowledgment of a mortgage by one mortgagor does not bind the remaining mortgagors, and cannot be used against them.²⁵ See 19 of the Limitation Act.²⁶ A statement made by the mortgagor, or a statement executed by him within sixty years of the original mortgage, in which he acknowledges the land in mortgage to him the owner, amounts to an acknowledgment which saves limitation for redemption in favour of the original mortgagor.²⁷ In a suit the plaintiff mortgagor of a house, claimed redemption of the house, and both in the trial and in the appeal the defendant mortgagor denied the execution of the suit document and its being a mortgage. The defendant's admission was decisive of the matter and he could not succeed in raising a new plea raised in second appeal that due attestation of the suit document had not been proved.²

(d) Acknowledgment by mortgagors. An acknowledgment of liability by a mortgagor, after he has parted with a part or any part⁴ of that interest to an assignee, does not bind that assignee. An acknowledgment of liability that gives a fresh start for limitation must be by the person against whom the liability is sought to be enforced. An acknowledgment in the second mortgage of the same property by the mortgagor, cannot give a fresh start for the period of limitation for redemption of the first mortgage.⁵ Co-mortgagors stand in the same position as co-contractors.⁶ An acknowledgment of payment made by one co-mortgagor would save limitation as against him, but would be of no avail as against the others.⁷ A payment by one of co-mortgagors cannot save limitation against the other, even if both are Mahomedan brother and sister.⁸

22. *Muthusami v. Shankaralingam*, 30 I.C. 675; 1915 M.W.N. 712.

23. *Kariyappa v. Rachapa*, 24 Bom. 493 at p. 502.

24. *Valiamunni v. V. V. Ramanathan Chettiar*, I.L.R. (1969) 1 Mad. 734; A.I.R. 1969 Mad. 257, 261.

25. *Baiga Singh v. Lal Choudhary*, I.L.R. 1951 Pepsu 181; 1951 Pepsu 6; see also *Jawala Prasad v. Acharya*, 34 All. 371; *Dharma v. Balmukund*, 18 All. 458; *Bhaskar v. Anand*, 1 Bom. 113.

1. *Arjo Singh v. Gopal Singh*, 3 P.L.R. 159; 1951 Pepsu 52; see also *Padmanabha v. Lekshmi*, 1953 I.C. 234; *Narasimha v. Prasad*, 1 Amma, 1954 T.C. 374.

2. *Danapani Goudo v. Hrushikesh Patil*, 178 35 Cr. L.J. 820.

3. *Bank of Upper India, Ltd. v. Robert Holmes Skinner*, 1942 P.C. 67; I.L.R. 1942 All. 660; I.L.R. 1942 Lah. 189; 1942 I.C. 740.

4. *Parvati v. P. S. Choudhary*, 144 M.C. 470; I.L.R. 1940 Mad. 872; 188

10 Cr. L.J. 113; *Narappa v. Ramalingam*, 1950 Mad. 513 (1950) 2 M.L.J. 13.

5. *Mohammad Khan v. Mohammad Singh Khan*, 1951 All. 172; 1951 L.J. 174.

6. *Dasrath Motiram v. Gajanan Kesari*, 1943 Bom. 43; I.L.R. 43 Bom. 150; 1943 I.C. 582; 45 Bom. L.R. 1943; *U.S. Murg v. J. H. H. H.*, 1939 R. 287; 184 I.C. 622; *Azizur Rehman v. Ghulam Nath Samanta*, 1940 Cal. 191; 1940 Nag. 111; 175 I.C. 426; 1937 M.W.N. 194; 46 L.W. 688.

7. *Mahomed v. Raja Ram*, 1936 All. 820; 166 I.C. 106; 1936 A.L.J. 1140 (F.B.) per contra: *Ghasi Khan v. L. S. Khan*, 1929 All. 380; 119 I.C. 347; *Achola Singh v. Dhan Singh*, 1926 Cal. 150; 90 I.C. 774.

8. *Prof. K. V. v. Mrs. Nalmeyer*, 141 Rang. 37; 194 I.C. 177.

In some cases a distinction has been made between the mortgage security, which is indivisible, and the personal covenant to pay, and it has been held that in the case of a debt secured by mortgage, the liability is indivisible; and no splitting up of the security avails to split up the liability unless the mortgagee consent to it. The payment of interest by one of the mortgagors will keep the mortgage alive so that the mortgagee would be entitled to enforce it against all or any part of the mortgaged property.⁹ But where the question which arises is a matter not of the liability on the mortgage but the liability on the personal covenant, the matter which has to be determined is whether payment by one of the joint contractors can be deemed to be the payment of the other joint contractors and that can only arise when the payment is made by the one as the agent of the other. Two joint contractors are not agents, one for the other.¹⁰ In case of joint contractors the relationship does not cease with the death of one of the contractors and the surviving contractor still remains a joint contractor with the heirs of the deceased. Since comortgagors are not joint contractors, payment of interest on a mortgage debt by a surviving mortgagor does not give a fresh start of limitation as against the heirs of the deceased co-mortgagor.¹¹

A payment made by one of the mortgagors, one of his heirs makes a payment within the period of limitation, it does not save limitation as against all but only as against him who makes the payment.¹²

Section 18 (2). Persons from whom interest is derived.—The subject of the second clause of this Section is usually included under the head of "privity" the law being that the admissions of one person are evidence against another in respect of privity between them.¹³ Statements made by persons in possession of property and qualifying or affecting their title thereto are received against a person claiming through them by title subsequent to the admission.¹⁴ Thus, where A sues B to recover a watch, which B claimed

9. *Badradas v. Pasupati*, 1933 Pat. 1 : I.L.R. 12 Pat. 93 : 140 I.C. 145 followed in *Sripati Samanta v. Lalji Sahu*, 1936 Pat. 361 : 163 I.C. 808.

10. *Bajjnath Prasad v. Satilal*, 1938 Pat. 383 : 174 I.C. 256.

11. *Azizul Rajan v. Upendra Nath Samanta*, 1938 Cal. 129 : 176 I. C. 191.

12. *Annada Charan v. Jhatu Charan*, 1935 Cal. 648 : 158 I.C. 512.

13. See Steph. Dig., Art. 16 : Taylor, Ev., 1, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

14. The word "privity" denotes mutual or successive relationship to the same object of property; and privies are distributed in several classes according to the nature of the relationship. (1) privity in law as ancestor, and coparceners, (2) privies in law as executor to testator or administrator to intestate, and

the like; (3) privies in estate or interest, donor and donee, lessor and lessee, etc. (4) privity in fact, like, ib. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

15. ib. S. 18 cl. (2), ante; Phipson, Ev., 711; *Forbes v. Meer*, 5 B. L. R. 529, 540; (1870) 14 W. R. (P.C.) 28; 15 M. I. A. 388; *Meer v. Meer*, 1871 (1) 11 W. R. 31; *Kanhai v. Meer*, 1866 (5) W. R. 268; *Nurd v. Gyadhar*, (1868) 10 W. R. 89; *Avudh v. Ram*, 1875 (1) 18 W. R. 11; *Singh v. Mohan*, 1875 (2) 23 W. R. 525; *Krishna v. Rangapada*, 1891 (1) 18 M. 73; *Anundinoyee v. Shreeb Marsh*, (1882) 445; 1865 (2) W. R. P. 1; *Gopal v. Doodar*, 1865 (2) W. R. 1; *Jagan v. Doodar*, 1862 (1) 15 W. R. 347; *Samu v. Rangammal*, (1871) 7 Mad. H.C.R. 13.

to retain as administrator of C. deceased, a declaration by C. that he had given the watch to A. was held to be evidence against B.¹⁶ In proceedings for probate of a will, a witness, who attended on the testatrix during her last illness, was asked to depose to a statement made to the witness by the testatrix as to a disposition of her ornament by will. The question was disallowed, but the Court of Appeal held that the question was improperly disallowed, since a statement by the testatrix, suggesting any inference as to the execution of a will, would be an admission relevant against her representatives and would, therefore, be admissible as evidence.¹⁷ Where execution of a mortgage deed has been proved as required by law, an acknowledgment contained therein of receipt of consideration is evidence, not only as against the mortgagor but also as against a purchaser from the mortgagor or an auction-purchaser at a sale held in execution of a decree on the mortgage, although the value of the acknowledgment as evidence may vary, and possibly it may be more weighty as against a purchaser by private contract than against an auction purchaser, but it is clearly evidence as against both.¹⁸ It has, however, been held that although recitals as regards receipt of consideration for a sale or mortgage are regarded as admissions by the vendor or mortgagor, the admission in that regard could not bind strangers who are neither parties to the transaction nor their privies.¹⁹

An assignee from a lessee is entitled to the benefit of an admission made by the lessor before he transferred his proprietary rights by sale.²⁰ In a suit to recover property claimed by a plaintiff as *chattel* lately in possession, and wrongfully ousted therefrom, it was held that statements made by the ancestors of plaintiffs and defendants were receivable as evidence.²¹ The admission by the predecessor in interest of the plaintiffs, before the property was transferred to them, that the defendants were in continuous possession of the property even after asserting a hostile title for 14 years, would be binding on the plaintiffs and conclusively prove that the defendants had acquired title by adverse possession.²²

While it is true that a statement by a party made in one litigation can be used against a person claiming under that party in another litigation,²³ yet an admission by a party to a suit does not bind a person not claiming through him. Thus, where a widow admits that her husband and his husband's brother had reunited after partition, the admission is not binding upon her daughter who is not her representative in interest as she does not

16. *Smith v. Smith*, (1856) 3 Bing. N. C. 29.

17. *Nana v. Shankur*, (1901) 3 Bom. L.R. 465 not, however, under S. 11 as the *commentary* suggests, but this section. But see also *Atkinson v. M. & S. I.R.* 18 P. 49; statements made by a testator are not admissible to prove the execution by him of a will which was held inapplicable as it was based on the fact that the English Wills Act prescribes a particular form of proof with to the will in the case cited no such rule applied.

18. *Narain v. Dilawar*, 1919 All. 448 ;

I.L.R. 41 A. 250; 52 I.C. 830; *Jamuna Prasad v. Faujdar*, 1929 Pat. 254; I.L.R. 8 Pat. 766; 10 P.L.T. 183.

19. *Venkateswari v. Venkata Narasimham*, A.I.R. 1957 A.P. 557.

20. *Kochayveed v. Marappa*, (1954) T.C. 10.

21. *Nund Pradip v. Gyathur*, (1868) 10 W.R. 89.

22. *Shashoo Nadi v. Kapoor Singh* A.I.R. 1967 J. & K. 52, 67.

23. *Jaiprakash v. Lilabai* I.I.R. 1962 B. 417; A.I.R. 1963 B. 196; 64 Bom. L.R. 322.

claim her title through her mother but through her father²⁴. The admission of execution of a document is good evidence against the executant and his representatives, but it does not bind third parties. The mere fact that the defendant purchases property from the executant of the sale-deed in favour of the plaintiff does not make him a representative of the executant inasmuch as, *vis-à-vis* the plaintiff's plot, the defendant is not his representative²⁵. One reversioner should not be regarded as deriving his interest from another in whom no interest ever vested, even though that other was his own father. So, an admission made by one reversioner does not bind another, even though that other is his son². Consent of father and grandfather to an adoption does not bind the son or grandson². An admission by a presumptive reversioner does not bind the actual reversioner.³

The declarations of an intestate are admissible against his administrator or any other claiming in his right⁴. "The ground upon which admissions bind those in privity with the party making them, is that they are identified in interest; and of course, the rule extends no further than this identity."⁵ "It is to be observed that, admissions are relevant only so far as the interest of the persons who made them or those who claim through such persons are concerned. On this principle a distinction must be made between statements made by an occupier of land in disparagement of his own title, and statements which go to abridge or encumber the estate itself. For example, an admission by a *patnidar*, or other holder of a subordinate tenure, affects the *patni* or other tenure as against him and those who derive their title from him, but it will not affect the proprietary interest as against the *zamindar* or other superior, so as to encumber or diminish his rights."⁶

8. Admissions must qualify or affect title. (a) *General*.—The admissions, to be admissible, must qualify or affect the predecessor's title, and not relate to independent matters.⁷

The cases of coparceners and joint tenants are assimilated to those of joint promisors, partners and others having a joint interest which have been already considered. Where the party by his admissions has qualified his own right, and another claims to succeed him, as heir, executor or the like, the latter succeeds only to the right as thus qualified at the time when his title commenced, and the admissions are receivable in evidence against the re-

24. *Kahammal v. Subramaniam*, 1949 Mad. 81, 1 I.L.R. 1949 Mad. 11, 61 L.W. 532; *Huthegowda v. Chennigegowda*, 1953 Mys. 49; 1 L.R. 1952 Mys. 49; 31 Mys. L.J. 80.

25. *Bulakidas v. Chann Peckan*, 1942 Nag. 84, 1 I.L.R. 1942 Nag. 66, 200 I.C. 194.

1. *Gulab Thakur v. Fadali*, 68 I.C. 566, 1921 Nag. 153; *Bhargwanath v. Sakhi*, 1 I.L.R. 22 Al. 33, 29 A.W.N. 159; *Govinda Pillai v. Thevammal*, 1 I.L.R. 28 Mad. 57, 11 M.L.J. 209.

2. *Jheli v. Khazana*, 1926 Ind. 654; 96 I.C. 749.

3. *Kali Shankar Das v. Dbirendra Nath*, 1954 S.C. 505, 1954 S.C.J. 670; (1954) 2 M.L.J. 351; 1954 M.W.N. 769; 67 L.W. 776; *Mohammad Abdul Karim Khan v. Bishen Sahai*, 1930 All. 9; 121 I.C. 68, 1929 A.L.J. 741.

4. *Smith v. Smith*, (1836) 3 Bagg. N.C. 29; *Taylor, Ev.*, s. 787.

5. *Taylor, Ev.*, s. 787.

6. *Scholes v. Chubbick*, (1843) 1 M. & Rob. 30, 1 R. & B. 188, (1843) 7 A. & E. 1, 560; *Papendrick v. Bridgewater*, (1855) 5 L. & B. 100.

7. *Howe v. Malkin*, (1878) 40 L. T. 166, and *Taylor, Ev.*, s. 789.

7. *Phipson, Ev.*, 11th Ed., p. 321.

representative, in the same manner as they would have been against the party represented. Thus, the declarations of the ancestor that he held the land as if tenant of a third person, are admissible to show the status of that person in an action brought by him against the heir for the land.⁸ In a suit, it was attempted to prove a *khatiat* by, amongst other evidence, proof of a so-called petition by the defendant's father, in which he was represented as having admitted the *khatiat*. It appeared that the defendant's father represented to certain persons that the petition was his petition and requested them to verify his signature or to identify him as one of the petitioners. It was held that the request amounted to a statement on the part of the defendant's father to these witnesses that what was contained in the petition had amounted to a statement on his part that he made the statements which appeared in the petition, and that even if the petition had not been filed, it was just as effective against the defendants as if it had been in fact filed. Where tenants of a land were asked whether their landlord was Mokurree at a given time, and the answer of that zemindar admitted the right on behalf of the landlord, who himself had a petition corroborating his signature, it was held that these admissions would bind any subsequent purchaser not being an auction-purchaser at a sale for arrears of Government revenue.⁹ The same principle holds in regard to admissions made in the course of a personal contract or dated previous to the assignment of a debt or a right, and it covers the title of the assignor and the assignee as it stood at the time of its transfer.¹⁰ But a distinction must be drawn between the case of an assignee of land or other property, and the case of an ordinary assignee of a mortgage instrument, for, whereas the former case is general, no title deed has as yet been made, the latter may be made, and here, though his assignee had notice of the declaration of the mortgagor, it is shown that it was given without consideration, and the note was held to be not admissible against the assignee, as in the instrument had been expressed for good consideration, and the assignee was not bound by it.¹¹ If such an assignee derives his title from the mortgagor, the instrument is not binding on him, and the assignee is bound by a declaration made by the mortgagor, or with the consent of him, the declaration is not binding on him, and the assignee is not bound by it.¹² There is, however, a distinction between a transfer by mortgage and a transfer by endowment, and the latter is a transfer by mortgage. In the former case, the transfer is made by a declaration, and in the latter case, it is not.¹³

an estate in land, and the revenue is not payable in cash, but in kind, and the tenant is not bound by his

8. *Coole v. Braham*, (1848) 3 Ex., 183, per Parke, B.; see *Rani v. Khagendra*, (1904) 31 C. 871.

9. *Doe v. Pettett*, (1821) 5 B. & A. 223.

10. *Mohun v. Chuttoo*, (1874) 21 W. R. 34.

11. *Watson v. Nobin*, (1868) 10 W. R. 72.

12. *Taylor, Ev.*, s. 790.

13. *Woolway v. Rowe*, (1834) 1 A. &

E. 114, 116 explaining *Barrough v. White*, (1825) 4 B. & C. 325; *Taylor, Ev.*, s. 791, *Byles on Bills*, (1891) 15th Ed., 433; *Phipson, Ev.*, 9th Ed., p. 242.

14. *Byles on Bills*, loc cit. and cases there cited.

15. *Surath Chandra Sahu v. Kripanath Choudhary*, 1934 Cal. 549; I. L. R. 61 Cal. 425; 150 I. C. 925; 38 C. W. N. 465.

acts not by his bid,¹⁶ nor by his admission¹⁷ nor by a decree against him¹⁸ and proceedings between the detaching proprietor and third parties with respect to the title to the land are not admissible in evidence in a subsequent suit brought by the auction purchaser as against him.¹⁹

It has, in some cases,²⁰ been considered that a similar rule applies to ordinary executions, *i. e.*, and that a purchaser, at such a sale, is not in privity with, or the representative in interest of the judgment debtor, so as to be affected by the admissions or bound by the estoppel of the latter. This view appears to have been based on a misapprehension of certain Privy Council decisions in which it was pointed out that there is a material distinction between a private sale in satisfaction of a decree and a sale in execution of a decree.²² In both the cases, the purchaser merely acquires the right, title and interest of the judgment debtor, and therefore a suit to enforce an interest purchased at an execution sale was held to be barred as against such purchaser since if the interest had remained in the judgment debtor, a suit to enforce such interest would have been barred as against him.²⁴ But, there is this distinction between a private sale in satisfaction of a decree and a sale in execution of a decree, that in the former, the purchaser derives title from the vendor and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, however, stating that he acquires merely the right, title and interest of the judgment debtor, acquires that title by operation of law adversely to the judgment debtor, and free from all admissions or incumbrances effected by him, subsequently to the attachment of the property sold in execution.²⁵

M. v. P. (1877) 8 W.R. 1011; *Govind Monee v. H. C. Chatterjee*, (1877) 10 W.R. 1012; *Radha v. Rakhai*, (1885) 12 C. 82, 90; *Watson v. Nobin*, (1868) 10 W. R. 72; as to the rights of the auction purchaser, see *Kooldeep v. Government of India*, (1871) 11 B.L.R. 71; *Forbes v. Meer*, (1873) 20 W.R. 44.

17. Rungo v. Rajcoomaree. (1886) 6 W. R. 197.

Ram Narsingh, (1870) 6 B. L. R.

19. Radha v. Rakhal, *supra*.

20. *Lala v. Mylne*, (1887) 14 C. 401,
111 Cal. 355, 360; *Bashi v. Enayet*, (1892)
116 Cal. 200; *see also* *see also* *see also*
see Rungo v. Rajcomaree, (1886) 6
W. R. 197; *Imrit v. Lalla*, (1872)
18 W. R. 200.

21. *Ishan v. Beni*, (1896) 24 C. 62.

22. *Dinendronath* v. Ramkumar, 8 I. A. 65; (1881) 7 C. 107, 118; Srimati Anandmati v. Dharandra, 1871 8 B.L.R. 122, 127 (P.C.).

Ad. v. is sold and bought at an execution sale is the right title and interest in the judgment debtor with all its defects; **Dorab v. Abdool**, (1878) 5 I. A. 116, 125; 6 C. 356; followed in **Sundra v. Venkatavagada**, (1893) 17 M. 228; the creditor takes the property subject to all equities which would affect it in the debtor's hands; **Megji v. Ramji**, 8 B. H. C. O. C. 169, 174, 175; **Sobhag v. Bhaichand**, 1882, 10 I. A. 200; as to the doctrine of bona fide purchaser of a legal estate for value, the respective provisions of the Transfer of Property Act and execution-sales, see **Dorab v. Abdool**, *supra* at page 116, I. A. see also **Kashin v. Ganga**, (1890) 13 A. 28; **Bashir v. Enayet**, (1892) 20 C. 236, 239; **Devi v. Venkatasubbaiah**, (1882) 6 B. 490.

25. *Dinendronath v. Ramkumar*, 8 I. A. 65; 7 C. 107; see also *Anandmayi v. Dharandra*, (1871) 8 B. L.

The Privy Council decisions only show that the rights of an execution-purchaser are in some respects different from those at a private sale. They do not afford any basis for the aforementioned broad proposition deduced from them.¹ It is true that an execution purchaser makes his purchase not from the judgment-debtor and often against his wish, and he is not bound by some of the acts of the judgment-debtor such as alienations made by the latter to defeat the decree, but that does not show that his rights are not derived from the judgment-debtor, or that he is not the representative-in-interest of the judgment-debtor, in any sense, or for any purpose. Even a purchaser at a private sale is not bound by any prior alienation made by the vendor to defeat him, but that does not show that such purchaser is not a representative-in-interest of the vendor. Because the rights of an execution-purchaser and a purchaser at a private sale are, in some respects, different, it does not follow that the execution purchaser is not to be regarded as a representative-in-interest of the judgment-debtor even in those respects in which, and for those purposes, for which, his rights are not higher than those of the judgment-debtor whose right, title and interest he has purchased.² In a previous edition of this work, it was pointed out in respect of admissions made by a judgment-debtor prior to attachment, that in so far as the purchaser acquires only the title of the debtor, he should acquire it as qualified by the latter's admissions, though certain decisions of the Calcutta High Court would appear to have held otherwise.³ The view thus taken received support from some of the earlier cases, and has since been confirmed by decisions of the Privy Council⁴ and the Calcutta High Court.⁵ The Judicial Committee have held that the equitable principle of estoppel laid down in the case of *Ram Churn Koonjoo v. McQueen*⁶ which applies to any person, is equally binding on the purchaser of his right, title and interest at a sale in execution of a decree.⁷ If such a purchaser may be estopped, he may *a fortiori* be affected

R. 122, 127 (P.C.); 4 M. I. A. 101 explained in *Sobhag v. Bhairchand*, (1882) 6 B. 193, 205; *Imrit v. Lalla*, (1872) 18 W. R. 200; *Lalu v. Kashibai*, (1886) 10 B. 400, 405; *Lala v. Mylne*, (1887) 14 C. 401, 413; *Bashi v. Enayet*, (1892) 20 C. 236, 239; in the case of *Gour v. Hem*, (1889) 16 C. 355, it was held that a purchaser at a public sale in execution of a decree is not, but a purchaser at a private sale is the representative of the judgment-debtor; followed in *Janki v. Ulfat*, (1894) 16 A. 284; but dissented from in *Ishan v. Beni*, (1896) 24 C. 62 (as to the meaning of the terms "representative" and "legal representative" see *Badri v. Jai*, (1894) 16 A. 483, *Ishan v. Beni*, (1896) 24 C. 62, 71; and S. 21 post., see also *Vishvanath v. Subrava*, (1890) 15 B. 290; referred to in *Burjori v. Dhunbai*, (1891) 16 B. 1, *Ishan v. Beni*, (1896) 24 C. 62. The case of *Lala v. Mylne*, supra, based on an erroneous interpretation of the Privy Council decisions cited, supra, and is followed by *Bashi v.*

Enayet, supra, see 24 C. 62 at p. 77 approved in *Gulzari v. Madho*, (1904) 1 All. L. J. 65 (F.B.).

2. *Gulzari v. Madho*, (1904) 26 All. 447; (1904) 1 A. L. J. 65 75, 76 (F.B.).

3. *Unnappoorna v. Nufar*, (1874) 21 W. R. 148. (The purchaser at a sale in execution of a decree is the "representative-in-interest" of the judgment-debtor within the meaning of the Evidence Act (I of 1872), S. 21 referred to in *Kishen v. Ganga*, (1890) 13 A. 28; *Imrit v. Lalla* (1872) 18 W. R. 200, "At the utmost, the statements would be nothing more than evidence, certainly they will not conclude him," per Couch, C. J.)

4. *Mahomed v. Kishori*, (1895) 22 C. 909; 22 I. A. 129; 1 C. W. N. 38.

5. *Ishan v. Beni*, (1896) 24 C. 62.

6. I. A., Sup. Vol., 40.

7. *Mahomed v. Kishori*, (1895) 22 C. 909, 919; *Ishan v. Beni*, (1896) 24 C. 62, see also *Harbhagat v. Pt. Narayan Rao*, 1924 Nag. 208; 78 I. C. 338; *Maharaj Bahadur Singh v. A. H. Forbes*, 1926 Pat. 478; 97 I. C. 205; *Lakhpatal v. Makhan*

[illegible]

- Ram, 1942 Pat. 369; 201 I. C. 786;
23 P. L. T. 342; 8 B. R. 838;
Piruji v. Amrati, 1914 Sind 233;
I. L. R. 1944 Kar. 284; Nandi
Lal v. Jogendra Chandra, 1923
Cal. 53; 70 I. C. 960; 36 C. L. J.
421.
8. Imrit v. Lalla, (1872) 18 W. R.
200.
9. I. L. R. 1914 Pat. 353;
p. 413.
10. Poresnath v. Anathurath, (1882) 9
C. 265; 9 I. A. 117, reported in
lower Court sub no. 1000; Nath Nath
v. Bishu, 4 C. 100; see Kishory
- v. Mahomed, (1896) 18 C. 188,
198, see also ibid. Appeal to Privy
Council (1897) 22 C. 909
11. Krishnabhupati v. Vikrama, (1894)
18 M. 13
12. Gajanan v. Nilo, (1901) 6 Bom. L.
R. 864.
13. Prayag v. Sidhu, (1908) 35 C. 877;
and as to the estoppel see Sarat v.
G. (1907) 10 C. W. N. 313;
Inell, (1907) 10 C. W. N. 313;
and Ganesh v. Parshotam, (1908)
33 B. 311
14. Radha v. Ramananda, (1912) 39 C.
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that he was estopped from denying the mortgagor's right to execute a prior mortgage of the property.¹⁵

A man may be estopped by an admission, but he cannot bind by his admission those who do not claim under him but who before the admission had acquired a right.¹⁶ But payment of the mortgage debt by the mortgagor and appearance in his handwriting, will give a fresh start of limitation to the mortgagee, as to a person who had purchased a portion of such mortgaged property prior to such payment.¹⁷

9. The admission must be made during the continuance of the interest. Statements whether made by parties interested,¹⁸ or by persons from whom the parties to the suit have derived their interest,¹⁹ are admissions only, if they are made during the continuance of the interest of the persons making the statement. If a person is honestly unjust that a person, who has parted with his interest, should be bound by any statement which he may choose to make²⁰ and so admissions made by a debtor whose property has been sold subsequently to such sale are not evidence against the purchaser of the property.²¹ A statement relating to property made by a person when in possession of that property, may be evidence against himself and all persons deriving the property from him, if it is a statement which a person, made by a party owner that he had conveyed to a particular person, could not possibly be evidence against third persons. If A might sell and convey to B and afterwards declare that he had conveyed to C and C might use the statement as evidence in case he sought to turn B out of possession.

An acknowledgment or admission given after the transfer of his title does not bind the transferee. The admission can be saved under Sec. 18 of the Limitation Act, 1908, if the acknowledgment has been made before the transferee has derived his title in the acknowledger. Therefore, acknowledgments made by mortgagors who have parted with all their interest to the purchaser, do not bind the purchaser. A subsequent mortgagee is bound by

15. *Tota v. Hargobind*, 1914 All. 366; I. L. R. 36 A. 141; 21 I. C. 721; 12 A. L. J. 123; see *Bakshi v. Liladhar*, (1913) 35 A. 353; *Bishambhar v. Parshadi*, (1910) 10 A. L. J. 112.

16. *Mower v. Mower*, 1887 14 Ch. D. 58, 63.

17. *Dandi v. Rastogi*, 1906 11 C. W. N. 225; *Khemum v. Gaur*, 9 C. W. N. 868; (1905) 32 C. 1077.

18. S. 18, cl. (1) ante.

19. S. 18, cl. (2) ante.

20. S. 15 ante; *Taylor, Ev.*, s. 773, 598, 599.

21. *Dix v. Williams*, 1873 1 A. & E. 733; *Khemum v. Gaur*, 1887 9 C. W. R. 268; *Taylor, Ev.*, s. 794.

22. *Khemum v. Gaur* supra.

23. *Bank of Upper India, Ltd. v. Robert Hercules Skinner*, 1942 P. C. 67; I. L. R. 1942 All. 660; I. L. R. 1942 Lah. 686; 202 I. C. 740;

1942 A. L. J. 648; 47 C. W. N. 43; (1942) 2 M. L. J. 559; 1943 M. W. N. 1; 55 L. W. 854; 9 B. R. 57 (P.C.); *Surjiram Marwari v. Barhamdeo Prasad*, (1905) 1 C. L. J. 337; *Pavayi v. Palanivela Counden*, 1940 Mad. 470 1 I. L. R. 1940 Mad. 852; (1940) 1 M. L. J. 766; 1940 M. W. N. 448 (F.B.); *Radha Kshun v. Hazarilal*, 1944 Nag. 163; I. L. R. 1944 Nag. 383; 1944 M. L. J. 229; 216 I. C. 296; *Ram Narain v. Nawab Singh*, 1947 All. 214; I. L. R. 1946 All. 375; 1946 A. L. J. 194; 202 I. C. 632; *Munshi Lal v. Hiralal*, 1947 All. 74; I. L. R. 1947 All. 11; 1947 A. L. J. 129 (F.B.); 219 I. C. 523; *Manohar Janardhan v. Yado Isinath*, 1952 Nag. 463 I. L. R. 1951 Nag. 973; 1952 N. L. J. 258; the rulings to the contrary must be deemed to have been overruled by the decision of the Privy Council.

an acknowledgment in favour of a prior mortgagee, if the acknowledgment was made before the subsequent mortgage was executed, but a subsequent mortgagee is not bound by an acknowledgment made behind his back after he has become a mortgagee²⁴. An acknowledgment by a mortgagor in favour of a first mortgagee cannot operate against a second mortgagee whose title originated before the acknowledgment has been given. The principle applies also to cases in which the mortgagor, giving the acknowledgment, retains some scintilla of interest, and is not confined to cases in which he has parted with his interest altogether²⁵. The fact, that the mortgagor had still the equity of redemption over some of the items covered by the security bond does not make his acknowledgment effective so far as the items in which he was no longer interested on the date of the acknowledgment are concerned²⁶. If the person sought to be bound by the acknowledgment or payment is a person, who has, prior to such acknowledgment or payment, acquired an interest in the property, the acknowledgment or payment will not be binding upon him, although the person making the acknowledgment or payment is at the time possessed of some interest or other in the properties mortgaged²⁷. If such evidence were admissible no man's property would be safe."²⁸

As for partners, by the very act of association, each is constituted the agent of the others and of the firm for all purposes within the scope of the partnership concern, and his acts and declarations bind his co-partners and the firm, unless he has, in fact, no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.⁴ But an admission made by a partner before the partnership, is not evidence against his co-partner.⁵ After dissolution of a partnership, the subsequent acts of the individual members are binding on themselves alone, except so far as there may be acts necessary to wind up the affairs of the partnership or to complete transactions begun but unfinished, at the time of the dissolution.⁶ Declarations and admissions made after the dissolution relating to the previous business of the firm are admissible against all the partners interested in the transaction.⁷ Bankruptcy⁸ or death will sever the joint interest; therefore, in the latter case, the admissions of the survivors will not bind the estate of the deceased,⁹ nor conversely will those of his representatives bind the survivors.¹⁰

So, also, the adjudication of a person as insolvent, though good evidence to charge his estate with debt, if made before his bankruptcy is not admissible

24. Radhakrishnan Ramani Paliwal v. Hazarilal, 1944 Nag. 163; I. L. R. 1944 Nag. 383; 216 I. C. 296; 1944 N. L. J. 229 (F.B.).

25. Munshi Lal v. Hera Lal, 1947 All. 74; I. L. R. 1947 All. 11; 229 I.C. 583; 1947 A. L. J. 129 (F.B.); see also Subbi Setti v. Lakshmi Narasamma, 1946 Mad. 88; (1945) 2 M. L. J. 556.

1. Thommen Chacko v. Narayanan, 1954 T. C. 311.

2. Naranappa Naicker v. Ramalingam Pilla, 1950 Mad. 538; 1950 A. M. L. J. 15; 63 L. W. 384.

3. Per Curiam in Clarks v. Bindabun,

(1862) W. R. (F.B.) 20; Marshall 75.

4. Taylor, Ev., S. 598.

5. Tunley v. Evans, (1845) 2 Dow & I. 347; 100 H. Wood, 1845 3 Stark 3.

6. Taylor, Ev., S. 598.

7. Pritchard v. Dupont, 1836 1 Russ & M., 191.

8. In re Wolmershausen, (1890) 38 W. R. (Eng.) 537.

9. Atkins v. Tiedgold, (1823) 2 B. & C. 23.

10. Slater v. Lawrence, 1831 1 B. & Ad. 396.

by the very fact of his doing so much, will be unable to know whether he is sound or unsound in mind.²¹ The guardian *ad litem* has the power to make admissions, provided they are made in good faith and for the benefit of the minor.²² Where an instrument or gift executed by the deceased there is a recital that the possession of the property is delivered to the donee it binds the deceased and those coming under him.²³ The acknowledgment of the subsistence of the mortgage by the mortgagor is binding on his estate who derives title to the property from him.²⁴ Under Sec. 14, Registration Act, an instrument, after registration takes effect from the date of execution and not merely from that of registration, but this does not mean that the recitals in the recorded deed bind only at the time of execution, if were made at the time when the vendor executed the deed of this title. The recitals in a sale deed are sufficient to show the mortgage made when the mortgagee and the party in the property of the mortgagor are the same. If an admission is against his successor in interest, if it is written by an acknowledged agent as against him.²⁵ But admissions concerning admissions of the facts which are not put to him under Sec. 14 can be used against him.²⁶ But an admission can be used, as against the party making it, only when the admission is taken as a whole. Hence a mere recital in a deed, e.g., that the tenant admitted surrender, is not a confession, and a confession cannot be used to contradict a witness the entire deposition is placed on record.²⁷ Where a party produces a document, containing an admission by his opponent which is admitted by opponents counsel, the admission need not be put to opponent, before it is used against him for contradiction, unless it is ambiguous or vague. A document can be used as admissions evidence under Sec. 21 without drawing in cross-examination the admission of the opponent to be admitted. An admission is not conclusive as to the truth of the matter stated therein. It is only a piece of evidence, the weight of which is to be given to it by the court. It is not binding on a party if it is made. It can be given to be made as in *Shankar v. State*, as the person to whom it was made was not acted upon it to his detriment when it might be contradicted by other evidence. A confession must be a very good piece of evidence and it can be contradicted by showing that it was due to misrepresentation, fraud, coercion, or otherwise of legal right or under duress, or otherwise.²⁸ The effect of admission is merely to start the onus of disproving

21. *Bhargava v. Ishwarachari*, (1956) 1 M. L. J. 459.
22. *Moirangthem C. Singh v. C. N. M. Devi*, A. I. R. 1957 Manipur 32.
23. *Yusuf Rowther v. Md. Yusuf Rowther*, A. I. R. 1958 Mad. 527 (529).
24. *Sankara Pillai v. Ananda Pillai*, A. I. R. 1958 Ker. 307; 1. L. R. 1957 Ker. 859.
25. *S. S. K. v. Dhanapati Dutta*, A. I. R. 1957 Cal. 59.
26. *Sardul Singh v. State of Bombay*, A. I. R. 1957 S. C. 747; 1957 Cr. L. J. 1111 (Cr.) 739; 1958 All. W. R. (Sup.) 1.
27. *Satya Vaj v. State*, A. I. R. 1958 All. 746; 1958 Cr. L. J. 1266.
28. *Dasarathi Chamar v. Balmukunda*

1. *A. I. R. 1959 Orissa 38*; 1. L. R. 1959 Cuttack 410.
3. *Ajodhya Prasad Bhargava v. Bhawani Shankar Bhargava*, A. I. R. 1957 All. 1; 1. L. R. (1956) 2 All. 399 (F.B.).
4. *Nagubai Ammal v. B. Shama Rao*, A. I. R. 1956 S. C. 593; 1. L. R. 1956 Mys. 152; see also *Srinivasan v. Union of India*, A. I. R. 1958 S. C. 419; 1. L. R. 1958 Punj. 333.
5. *Sanwal Singh v. Cantonment Board, Ambala*, 1975 Cur. L. J. 640; 78 Punj. L. R. 127.
6. *Shankar v. State*, A. I. R. 1957 Punj. 333.
7. *Shankar v. State*, A. I. R. 1957 Punj. 333.
8. *Shankar v. State*, A. I. R. 1957 Punj. 333.
9. *Shankar v. State*, A. I. R. 1957 Punj. 333.
10. *Shankar v. State*, A. I. R. 1957 Punj. 333.
11. *Shankar v. State*, A. I. R. 1957 Punj. 333.
12. *Shankar v. State*, A. I. R. 1957 Punj. 333.
13. *Shankar v. State*, A. I. R. 1957 Punj. 333.
14. *Shankar v. State*, A. I. R. 1957 Punj. 333.
15. *Shankar v. State*, A. I. R. 1957 Punj. 333.
16. *Shankar v. State*, A. I. R. 1957 Punj. 333.
17. *Shankar v. State*, A. I. R. 1957 Punj. 333.
18. *Shankar v. State*, A. I. R. 1957 Punj. 333.
19. *Shankar v. State*, A. I. R. 1957 Punj. 333.
20. *Shankar v. State*, A. I. R. 1957 Punj. 333.

them on the party making them unless a plea of estoppel can be successfully invoked. The usual rule of law is that the admissions of *ryots* that they have no occupancy rights in *ryoti* lands will have little value in the face of the statute, if they are proved as a matter of fact to be *ryoti* land. The policy of the law has been to protect the weak man against himself.⁹

Where *occupancy* is alleged that they and *others* were tenants of portions of land in dispute and some of the *others* were examined on behalf of the landlord and gave evidence that they were *not* tenants of the landlord, the provisions of section 13(b) are not applicable and the evidence is not admissible.¹⁰

Statement by husband in the suit for maintenance by wife admitting her as his wife being admission against his own interest, is relevant in subsequent suit and cannot be ignored simply because he resides from it.¹¹

The admission or making signature on blank paper is not an admission of execution of document and the onus of proving due execution is on the party who relies on it.¹²

19. *Admissions by persons whose position must be proved as against party to suit.* Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

SYNOPSIS

1. General.

3. Master and servant.

2. Admissions by strangers.

1. General. Statements, made by persons whose position or liability must be proved as against any party to the suit are admissions, if they—

(1) would be relevant as against such persons in relation to such position or liability in a suit brought by or against them and

(2) were made whilst the person making them occupied such position or was subject to such liability.

The meaning of the section is made clear by illustration

8. *Jadho Nagu Bai v. Jadho Gangu Bai*, A. I. R. 1958 A. P. 19, 20.
Mohan v. Mohammad Rowther, (1959) 1 M. L. J. 22.
 10. *Jona v. Kashinath*, A. I. R. 1971 Goa 2, 3.

11. *Ellamal v. Veeraswamy*, 1973 M. L. W. (Cri.) 8: 1975 Cr. L. J. 28.
 12. *Elharathi Nanda v. K. R. C. Chettiar*, 88 M. L. W. 265: (1975) 1 M. L. J. 5: A. I. R. 1975 Mad. 393.

2. Admissions by strangers. Statements by strangers to a proceeding are not generally relevant as against the parties,¹³ but, in some cases, the admissions of third person, strangers to the suit, are receivable.¹⁴ The admission of a third person against his own interest, when his position or liability has to be proved against a party to the suit, is relevant against the party. Thus, the admission by one co-mortgagee of the receipt of the whole mortgage debt is admissible in evidence against the other co-mortgagee.¹⁵ These exceptions to the general rule arise when the issue is substantially upon the mutual rights of such persons at a particular time, in which cases, the practice is to let in such evidence, in general, as would be legally admissible in an action between the parties themselves. Thus, the admissions of an insolvent made before the act of insolvency, are receivable, in proof of the petitioning creditor's debt,¹⁶ but, if made after the act of insolvency, though admissible against himself,¹⁷ they cannot furnish evidence against the official assignee or receiver, because of the intervening rights of creditors and the danger of fraud.¹⁸ So, his answers on public examination are inadmissible, even in subsequent stages of the same insolvency against all parties other than himself.¹⁹ In actions against Sheriffs, for not executing process against debtors, statements of the debtor, admitting his debt to be due to the execution creditor, are relevant as against the Sheriff.²⁰

3. Master and servant. A statement made by a servant is admissible in evidence against his master under this section, both as regards his position, that is to say, whether he is a servant, and also as regards his liability as such servant.²¹ The admissions of a person whose position in relation to property in suit, it is necessary for one party to prove against another, are in the nature of original evidence, and not hearsay, though such person is alive and has not been cited as a witness.²² In the case noted, plaintiffs who were two out of five brothers used to establish their right to a two-fifth share in properties which were sold in execution of a money decree against another brother *T.* and purchased by the defendant on the allegation that the properties when sold were the joint family properties of the five brothers. The defendant, whose case was that the brothers were not joint at the date of the sale, and that the properties were exclusively owned by *T.*, put in a deposition given by another

13. Steph. Dig. Art. 18; *Cocle v. Braham*, (1848) 3 Ex., 183; *Taylor, Ev.*, s. 740; *Barough v. White*, (1825) 4 B. & C., 325.

14. *Taylor, Ev.*, s. 759; see S. 19, ante.

15. *Appayya Chettiar v. Nanappa Gounden*, 20 I. C., 792; 25 M. L. J., 229.

16. See *Cocle v. Braham* (1848) 3 Ex., 183.

17. *Jarrett v. Leonard*, (1814) 2 M. & S., 265; in action by the trustees of bankrupts an admission by the bankrupt of the petitioning creditor's debt, is deemed to be relevant against the defendants; Steph. Dig., Art. 18.

18. *Taylor, Ev.*, s. 759 and cases there cited, see also *ex parte Edward, Re Tollemache* (1881) 14 Q. B. D.

19. *Ex parte Revell, Re Tollemache*, (1881) 13 Q. B. D., 720.

20. *Re Brunner*, (1887) 19 Q. B. D., 572; *Janendra Bala Debi v. Official Assignee of Calcutta*, 1926 Cal., 597; 93 I. C., 834.

21. Steph. Dig. Art. 18; *Kempland v. Macaulay*, (1791) Peck R., 66; *Williams v. Bridges*, 2 Stark 42; as to admissions of an undersheriff or bailiff against the sheriff, see *Snowball v. Goodricks*, (1833) 4 B. & Ad., 541; *Jacobs v. Humphrey*, 2 C. & M., 413; *Scott v. Marshall*, (1832) 2 C. & J., 238; *North v. Miles*, 1 Camp, 389; *Edwards on Execution*, p. 72.

22. *M. E. Moses v. Sheikh Bakridhone Chowdhury*, 39 C. W. N., 736.

23. *Ali v. Flayachandathul*, (1882) 5 M. 29.

brother A. In the statement which the nephew deposed against B. was passed in the course of which A stated that the family was not poor and the properties belonged exclusively to B. It was held that the statement of A in the previous suit was not admissible against the plaintiffs.²³

20. Admissions by persons expressly referred to by party to suit. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is, whether a horse sold by A to B is sound.

A says to B: "Go and ask C." C knows all about it. C's statement is an admission.

SYNOPSIS

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| 1. Referees. | express. |
| 2. Admissions not conclusive. | 1. Referees in criminal cases. |
| 3. Answer of referee need not be | |

1. Referees. The admissions of a third person are also receivable in evidence against the party who has expressly referred another to him for information in regard to a particular or disputed matter. In such cases the party is bound by the statements of the party referred to in the same manner, and to the same extent, as if they were made by himself.²⁴ The section contemplates the existence of two parties, first the party who refers, secondly the party who is referred, and directs the party to whom the reference is made. The principle is that when one party refers another second party to a third party for information, the first party is presumed to undertake to adopt, as his own, the information furnished by the third party. These conditions cannot be said to be fulfilled, where a witness calls for a report from a servant, regarding the conduct of another servant, who is dismissed for misconduct, where there is no express reference to the master, or to the report to be made the servant's report is not evidence in the matter.²⁵ A fire insurance company informed the plaintiff that it had appointed S. as salvager to assess the loss in its burnt and paid to the plaintiff to assist the salvager. The salvager did not supply any information to the plaintiff, and submitted his report to his employer. It was held that as the plaintiff had not received directly any information from S. the case did not fall within the scope of this section, but where an insurer appointed the insured to a salvager for certain information, the latter's report was held to amount to an admission against the insurer. In civil cases against strangers, where the defendants had written to the plaintiff that if she wished for further information as to the facts, it

23. *Nagendranath v. Life Insurance Co.* 1921 Cal. 197; 61 L. C. 544; 25 C. W. N. 89.

24. *Taylor, Ex.*, s. 760 see S. 20. ante; *Ex sce.* N. P. *Ex.*, 69; *Steph.* Dig., Art. 19; this comes very near to the case of arbitration; *ib* note xiii.

25. *M. D. G. v. Secretary of State for India in Council*, 40 C. W. N. 865.

1. *S. Bhattacharjee v. Sentinel Assurance Co., Ltd.*, A. I. R. 1955 Cal. 594.

2. *I. L. R.* (1973) 2 Cal. 392.

could be obtained from a certain merchant, the replies of the merchant were held receivable against the executors.³

In the application of this principle, it matters not under the English law whether the question referred be one of law or of fact, whether the person to whom reference is made, have or have not any peculiar knowledge on the subject, or whether the statement of the referee is adduced in evidence in an action on contract, or an action for tort.⁴

The word 'information' in the section means only a statement of fact and not a decision of any kind.⁵

In India too it is not necessary that the reference should be on questions of fact within the knowledge of the referee,⁶ but it should not be on a question of law, for an admission must relate to a matter of fact and not to a point of law.⁷ The information referred to in this section need not be information specially within the knowledge of the person referred to. It may be gathered by inspection of the lands or by referring to accounts, or by other means.⁸ The reference must be for information in reference to a matter in dispute. A reference to an outside party to decide matter in dispute, or to find out the question of costs is not a reference to that party for information in reference to a matter in dispute.⁹

Where both the parties to a suit agree to abide by the statement of a third person, the statement of that person becomes the admission of both the parties and binds them. The binding character of the agreement is based on the hypothesis that the statement of the third person is an admission under this section. Such admissions primarily are immaterial. Under Sec. 31 of the Act, they are not conclusive. They become binding solely on the ground of estoppel. The true basis of the binding character of such agreements is that the original contract to abide by the statement of a third person is perfected into an adjustment of the claim in terms of the statement made, as soon as the referee makes the statement. After that stage, neither party can resile from

3. *Williams v. Innes*, 1 Camp. 364, see also *Daniel v. Pitt*, 1 Camp. 360. Pea. Ad. Cas. 238, as to the actual capability of the rule in criminal cases, see *R. v. Millory*, 15 Cox 458. The accused told a constable that his wife would make out a list of certain property, a list afterwards made out by her and handed over to the constable. At the trial, his presence was held evidence against the latter: *Coleridge, C. J.*, however expressly referred to the evidence in opinion upon the facts. If the prisoner had been absent, as to reference by agreement to statement of others taken in his presence see *Russ. Cr.* 487 note (E.).

4. *Taylor, Ev.*, s. 761 and cases there. 1 F. 84

in cited.

5. *Ram v. Ram*, 1 I. R. 1967. *Punj.* 179, 181.

6. *Abd. B. v. Rahmat*, 1958 A. P. 304. 1958 I. I. P. 84. 1958 A. L. J. 1127 (S. B.).

7. *General* (Matters under Sec. 17).

8. *R. v. Ram*, 1 I. R. 1967. *Punj.* 179, 181.

9. *R. v. Ram*, 1 I. R. 1967. *Punj.* 179, 181. *R. v. Ram*, 1 I. R. 1967. *Punj.* 179, 181.

the agreement, because the claim has been duly adjusted, and it has become the duty of the Court not only to record it, but also to pass a decree in terms of it.¹⁰

Where the parties refer all their disputes to a person for decision and that person proceeds exactly in the manner of an Arbitrator though called a referee, the reference does not fall within the scope of this section and the reference is to all intents and purposes a reference to decide the disputes between the parties is an Arbitration. His decision is clearly not a statement of the kind referred to in the section, the word 'information' in the section does not mean a decision of any kind¹¹. Information in this section means a statement on a question of fact and not a decision of a question, therefore a referee is not entitled to make enquiries or to take evidence¹².

An offer to be bound by the special oath of a particular person, once accepted by the other party, cannot be withdrawn except on ground sufficient for exercising discretion to allow the special oath to be administered. But the party, making such an offer cannot withdraw it on frivolous grounds, after it has been accepted by the other party. He can withdraw such an offer only so long as it has not been accepted by the other party and acted upon¹³.

The parties to a suit can agree, apart from the provisions of the Oaths Act, 1969, that they will abide by the statement of a witness, including one, who is a party to the suit. Where, therefore, the defendant in a suit agrees to abide by the plaintiff's statement in the witness-box, the agreement, apart from the provisions of Oaths Act is binding on him and he cannot be allowed to resile from it. Whether the provisions of O. XXIII, R. 3, C. P. C., can be made applicable in such a case or not, the parties are bound by their agreement¹⁴.

2. Admission not conclusive. The answer of the person referred to will not be conclusive under this Act, unless the admission operates as an estoppel.¹⁵

10. *Mst. Akbar Begum v. Rahmat Hussain*, 1963 All. 841; 146 I. C. 84 at 880; *Ram Narain v. Santosh Krippl*, 1962 Punj. 344; see also *1962 All. 176*; 180 I. C. 364; 1959 A. L. J. 1; 1939 A. W. R. 7; *Narain Das v. Feroz Ghani Ram Gaur* All. 1948 All. 302; 116 I. C. 99; 1938 A. L. J. 449; *Suraj Narain v. Beni Madho*, 1937 All. 701; 171 I. C. 69; 1937 A. I. J. 1665; *Abdul Rahman v. Kallio Khan* 1965 Oudh 128; 128 I. C. 608; 1965 O. W. N. 1; *Sodhu Ram v. Ude Ram* 1967 I. L. R. (1967) 1 Patj. 218; A. I. R. 1967 Punj. 218.

11. *Sahai Ram v. Ude Ram* 1967 I. L. R. (1967) 1 Patj. 218; A. I. R. 1967 Punj. 219 at pp. 181, 183.

12. *Smt. Suman Kaur v. Som Dutta*, 1976 78 Punj. L. R. 46.

13. *Baldeo Singh v. Niras Singh* 1946

Pat. 252; 232 I. C. 210; 27 P. L. J. 22; 12 B. R. 222; *Ram Narain Singh v. Babu Singh*, 1. L. R. 18 All. 46; *Abaji v. Bala* 1. L. R. 22 Bom. 281; *Shek Khan Mahmud v. Svedali* 1931 Cal. 549; 132 I. C. 682; 35 C. W. N. 130.

14. *Bishanath Singh v. Jamna Das*, 1937 Oudh 67; 1. L. R. 12 Luck. 349; 164 I. C. 1116; 1936 O. W. N. 841.

15. See S. 31 post. See *Basant Singh v. Janki Singh*, (1967) 1 S. C. R. 1; 1967 S. C. D. 399; (1967) 1 S. C. W. R. 125; 1. L. R. 46 Pat. 175; 1967 B. L. J. R. 27; A. I. R. 1967 S. C. 341, 343 approving *D. S. Mohite v. S. I. Mohite*, A. I. R. 1969 Bom. 155 (explaining *Ramabai Shrinivas v. Bombay Government*, A. I. R. 1941 Bom. 144. See also *Bharat Singh v. Bhagwanth*, 1966 2 S. C. J. 59; A. I. R. 1966 S. C. 405, 410.

3. **Answer of referee need not be express.** To render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words, but it will suffice, if the party by his conduct has tacitly evinced an intention to rely on the statements as correct. Therefore, where a party, on being questioned by means of an interpreter, gives his answer through the same medium, the language of the interpreter should be considered as that of the party; and consequently, it might be proved by any person who heard it, without calling the interpreter himself.¹⁶

On the same principle, (though, as a general rule, the affidavits, depositions or *vera voce* statements of a party's witnesses are not receivable against him in subsequent proceedings,¹⁷ documents or testimony which a party has expressly caused to be made, or knowingly used as true, in a judicial proceeding, for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact even on behalf of strangers.¹⁸

4. **Referees in criminal cases.** The rule which makes statements made by referees admissible applies also to criminal cases. Thus, where the accused told a constable that his wife would make out a list of certain property, a list afterwards made out by her was held evidence against her husband.¹⁹ Here the list was handed over to the constable in the husband's presence, and Lord Coleridge, C. J. expressly refrained from giving an opinion upon what would have been the effect of the prisoner's absence. But the accused's absence will not exclude the evidence, and where he had asked for certain injuries to be made, facts elicited in direct answer thereto, although not further facts, or mere hearsay, are evidence against him.²¹

21. *Proof of admissions against persons making them and by or on their behalf.* Admissions are relevant and may be proved as against the person who makes them or his representative-in-interest, but they cannot be proved by or on behalf of the person who makes them or by his representative-in-interest except in the following cases :

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it

16. *Taylor v. Taylor*, 70 *How. St. Tr.* 122, 123. *Fabrig v. Fabrig*, 5 *How. St. Tr.* 122, 123.

17. The following cases are explained in *Boileau v. Rutlin*, 1848, 2 *Ex. L. R.* 8, as instances of admissions by conduct: see *Richards v. Morgan*, (1863) 4 *B. & S.* 641, 657, in which the grounds upon which such evidence is admitted are considered.

18. *Gardner v. Moulton*, 1839, 10 *A. & E.* 464; *Brickell v. Hulse*, (1837) 7 *A. & E.* 454; *Richards v. Morgan*, *supra*.

19. *Boileau v. Rutlin*, 1848, 2 *Ex. L. R.* 8, 10; 7 *A. & E.* 454; *Gardner v. Moulton*, (1839) 10 *A. & E.* 464; *Boileau v. Rutlin*, 1848, 2 *Ex. L. R.* 8, 10, as instances of admissions by conduct: see *Richards v. Morgan*, 1863, 4 *B. & S.* 641, 657; 6 *S. P. R.* 10; *Bigshawe*, (1851) 20 *L. J. C. P.* 161; 11 *C.B.* 100; *Wheeler v. Downing*, (1845) 8 *Ex. L. R.* 128; *Taylor, Ex.*, 59, 765, 784.

20. *R v. Mallory*, 1884, 3 *Q. B.* D. 33; 15 *Cox, C. C.* 458; 50 *L. T.* 429.

21. *Phipson, Ev.*, 11th Ed., 337.

were dead it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine, *B* that it is forged.

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged, but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(b) *A*, the captain of a ship is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have taken by him from day to day, and indicating that the ship was not taken out of her proper course. *A* may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) *A* is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore postmark of that day.

The statement in the date of the letter is admissible because, if *A* were dead, it would be admissible under section 32, clause (2).

(d) *A* is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) *A* is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

- s. 17 ("Admission.")
s. 3 ("Relevant.")
s. 3 ("Proof.")

- s. 14 (State of mind or body).
s. 32 (Statements by person who cannot be called as a witness).

Steph. Dig., Art. 15, Best, Ev. ss. 519-520, Norton, Ev., 151

SYNOPSIS

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| 1. Principle. | 7. "Representative-in-interest". |
| 2. Scope. | 8. Exceptions: |
| 3. "As against the person who makes them". | (a) General. |
| 4. Incriminating statements. | (b) Clause (1). |
| 5. Recitals in deeds; | (c) Clause (2). |
| (a) General. | (d) Clause (3). |
| (b) Road-cess returns. | 9. Confessions. |
| 6. Confessions and admissions in criminal cases. | 10. Miscellaneous. |

1. **Principle.** The section is an affirmation of the well-known principle that a party's admissions are only evidence against himself and those claiming through him and not against strangers, and of the rule that when in the self-serving form, it is not in general receivable, which is itself a branch of the general rule that a man shall not be allowed to make evidence for himself.²² Not only would it be manifestly unsafe to allow a person to make admission in his own favour which should affect his adversary,²³ but also such evidence has, if any, but a very slight and remote probative force.²⁴ With regard to the exceptions to this general rule, see the notes to this section and thirty second section, *post*.

2. **Scope.** Sections 17 to 20 only define admissions. They do not by themselves make the admissions therein mentioned relevant. The relevancy of admissions is primarily governed by this section.²⁵ The general rule enunciated in the section is that admissions are admissible against, but not in favour of, the person who makes them, or his representative-in-interest. If an admission is made in a document, then, despite all technicalities, it can still be em-

22. Best, Ev., s. 519; Norton, Ev., 151 and notes 10, 11, 12 of Admissions General ante; Krishnawati v. Hansraj, (1974) 1 S.C.C. 289; (1975) 1 S.C.J. 87; (1974) 2 S. C. R. 524; A. I. R. 1974 S.C. 280; 1974 Rajdhani L. R. 171; 1974 Cur. L. J. 48; 1974 Rev. Cas. 167; 1974 Rev. C. J. 164; 1974 C. W. App. J. 1 (S.C.).

23. Ibid. v. ante. p. 224.

24. The reason of the rule is obvious. If *A* says: "*B* owes me money", the mere fact that he says so, does not even tend to prove the debt. If the statement has any value at all, it must be derived from some fact which lies beyond it, for instance,

A's recollection of his having lent the money. To that facts of course *A* can satisfy, but his subsequent assertions add nothing to what he has to say. If, on the other hand, *A* had said, '*B* does not owe me anything', this is a fact of which *B* might make use, and which might be decisive of the case, Steph. Dig., Introd. 164, 165; Norton, Ev., 151; see Best, Ev., s. 519, Illust. (a) gives a double example showing how the same statement may be used against, but not for the interest of the party making it.

25. Gulab Thakur v. Fadali, 1921 Nag. 153; 68 I. C. 566.

An admission by a *karta* is binding on other members of the joint family. But the admission of any member, senior or junior, of the joint family is not binding on other members of the joint family.¹²

4. Incriminating statements. It is a general principle of law that any statement made by a man on oath may be used against him as an admission.¹³ The only principle on which an exception to this rule can be founded is the principle that a man is not to incriminate himself. That is a principle which is not open to an insolvent who, once he has been adjudicated, is bound because he has been adjudicated, to give information concerning his conduct, dealings, and affairs even though he incriminates himself thereby.¹⁴ Admissions, which would expose a man to a criminal prosecution are not admissions in his own favour, though they may, as the result of unusual circumstances, be in his favour at some subsequent time, and are admissible in evidence.¹⁵ Admissions may constitute good evidence, but their evidentiary value depends on the circumstances in which they are made; and the possibility of incorrect statements being made by ignorant persons should not be overlooked.¹⁶ If it is proved by other evidence that the facts admitted cannot be true, no court should hesitate to give effect to that conclusion.¹⁷ But a correct admission made by the accused, e.g., in his bail application, is admissible against him at the trial¹⁷ if it is not hit by law. The statement by accused in police custody to the doctor that injuries were caused by the murdered person amounts to admission of fact, and though incriminating is not a confession, so it is admissible under this section.¹⁸

When asked about his wife and children a person wrote on a paper at a time when he was not accused that they were not in this world: it is not a confession, but simply a statement of fact, and is admissible under this section. His oral statement in such circumstances regarding the manner of death of his wife and children is also admissible for the same reason.¹⁹

5. Recitals in deeds. (a) *General.* Recitals in a deed are only evidence as against the parties to the deed, or those who claim through or under them.²⁰

Recitals in a sale-deed by the owner of a limited estate that the property was acquired with funds belonging to the estate may be taken to be against

12. *Udayanath Sahu v. Ratnakar* Bet 32 Cut. L. J. 1165; A. I. R. 1907 Orissa 139, 140; *Nagendranath v. Lawrence* (Fate G.), A. I. R. 1921 Lah. 197.

13. *Jessel, M. R. in Hall, Ex parte Cooper*, (1882) 19 Ch. D. 580; 51 L. J. Ch. D. 556; 46 L. J. 589.

14. *Joseph Perry, In re*, 1920 Cal. 170; 1 L. R. 46 Cal. 986; 54 L. J. 478; 21 Cr. L. J. 78, see also *Yakub v. Union*, 62 C. W. N. 589 (value of admission in visa).

15. *Haji Mahmood Khan v. Emperor*, 1942 Sind 106, 109; 1 L. R. 1942 Kar. 64, 202; 1 C. 681; 45 Cr. L. J. 888.

16. *Jadho Nagu Bai v. Jadho Gangu*

17. *Re A. I. R. 1958 A. P. 19*; *Siva An v. State*, A. I. R. 1958 A. 740; 1958 Cr. L. J. 1266.

18. *Kunda P. Das v. State of Tamil Nadu*, 1972 Cr. L. J. 11; A. I. R. 1972 S.C. 66.

19. *State v. Agni v. Upendra Nath R. Das*, 1958 Cr. L. J. 354 (Gauhati).

20. *Shrinivas v. Mohanlal*, 1916 P. C. 34; 44 L. A. 30; 1 L. R. 41 Bom. 300; 39 I.C. 627; 19 Bom. L. R. 151; 25 C. L. J. 311; 21 C. W. N. 28; 22 M. L. J. 175; 1 M. W. N. 288; 21 M. L. J. 236. See also *Venkateswarlu v. Venkatasarasimhan*, A. I. R. 1957 A. P. 557.

the pecuniary interest of the vendor, and are therefore admissible.²¹ An entry in a bond, that no further account is outstanding against the debtor, does not bind the creditor in any way and is merely an admission by the debtor in his own interest.²² A statement which suggests an inference as to a fact in issue, cannot be proved by or on behalf of the person who made it or his representative-in-interest.²³ Neither the declaration of a transferor nor the declaration of a transferee, made in his own favour, can be admitted in evidence as against the person disputing the transfer.²⁴ Self-serving statements cannot be relevant and admissible. Thus, a mere allegation by a person, that he had made a prior statement earlier, cannot by itself be evidence of the fact that such a statement was made by him as it was a self-serving statement and would not be relevant for that purpose.²⁵ So also, when a creditor comes into Court with a claim which is capable of being regarded as a stale or time barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation. Having this, in view, the mere fact, that the statement of receipt of interest is against the pecuniary interest of the person making the admission, cannot be regarded as of great weight.¹

Entries in solicitors' books of account, regarding transactions of their clients, are neither inadmissible, nor irrelevant, nor hearsay.² But letters written by parties are evidence only against themselves.³ A previous statement by a person, before a public officer, that a certain deity had been installed by the public and signed by him, is evidence of an admission against him in a subsequent suit by him for a declaration that the deity is a family deity.⁴

Admissions made by a party are binding on him. So also, the representatives of the original executant of a document are bound by admissions made therein even as much as the executant himself. Those who sign an acknowledgment of any liability are deemed to have admitted that liability. The burden of proving that that liability did not exist, at the time when the acknowledgment was signed, is on those who make the assertion.⁵

A receipt is nothing but an admission, by the party making it, that he is receiving the money specified in the document. It is an admission against his own interest and he is bound by it, and so are those who claim through or under him. But it is not an admission against those who do not claim through him.⁶

21. *Ramappa v. Mahalakshmi*, 1922 Mad. 357; 64 I. C. 481; 1921 M. W. N. 424; 14 M. L. W. 33.

22. *Gurditta Mal v. Nabi Bakhsh*, 1923 Lch. 882; 93 I. C. 996.

23. *Salem Feroz Khan Rao v. Manda v. Narayan*, 1922 P.C. 102; 103 I. C. 26; 15 M. L. W. 404; *Manglomai Sugnomai v. Mst. Pindai*, 1926 Sind. 217.

24. See *S. Muhammad Hydar v. Motilal*, 1928 Oudh 414; 110 I. C. 26.

25. See *A. S. Venkayya v. Renukadevi Ravilamma*, 1943 Mad. 501; 1943 I. C. 1; 1943 M. W. N. 445; 56 L. W. 333.

1. *Ammalu Amma v. Narayanan Nair*, 1928 Mad. 509, 511-512; I. L. R.

51 Mad. 549; 111 I. C. 210.

2. See *Hari Ram Serowgee v. Madan Gopal Bagla*, 1929 P. C. 77; 114 I. C. 565.

3. See *Sardul Singh v. State of Bombay*, A. I. R. 1957 S.C. 747; 1957 Cr. I. J. 1325; (1957) 1 M. L. J. Cr. 739; 1958 All. W. R. (Sup.) 1.

4. *Rama Chandra v. Rajendra Narayan*, A. I. R. 1957 Oudh 104; I. L. R. 1956 Cut. 689.

5. *K. Ram v. Harphool*, 1927 Lah. 800; 105 I. C. 487.

6. *Nazir Abbas Shujat Ali v. Raja Ajamshah*, 1949 Nag. 60, 63; I. L. R. 1947 Nag. 955; 1948 N. L. J. 293.

The value of an admission made by a party against his own interest is not lost merely because it was made with a view to avoid a prosecution.⁷

(b) *Road cess return.* Road cess return, signed by one of the plaintiff's vendors and the defendant, was filed by the plaintiff's vendors. It consisted of two parts, in one of which the joint properties of the plaintiff's vendors and the defendant were set out and in the other the properties belonging to the defendant alone were mentioned. In a suit by the plaintiff for some lands, as being the joint property of his vendors and the defendant, the latter put in the road cess return in order to disprove plaintiff's allegation, by showing that the lands were included in the second part. The lower courts had relied on his return. It was contended in appeal that it was inadmissible under Sec. 60 of the Evidence Act as evidence in favour of the principal defendant. It was, however, held that the road cess return was evidence against the plaintiff claiming through his vendor, and it was none the less evidence merely because by admitting it as evidence against the plaintiff it became evidence in favour of the defendant.⁸ And, in a later case, it was held that a road-cess return filed by a temporary lessee is admissible in favour of a superior landlord⁹ and one filed by certain co-sharer is admissible against other co-sharer.¹⁰ The Road Cess Act does not stand in the way of admission of road cess returns, filed by the entire body of landlords, and the statements made by all the proprietors can be used by one of them against the other.¹¹

6. Confessions and admissions in criminal cases. A confession, being a species of admission, would be relevant, and can be proved as against the accused unless it can be shown that there is some provision of law which excludes the proof of such a confession.¹² A confession inadmissible under Sec. 164, Criminal Procedure Code, is not admissible under the provisions of this Act, such as Secs. 21 and 22.¹³ Sections 164 and 281 (old 364), Cr. P. C., must be construed together. Their effect is to prescribe the mode in which

7. *Veerhasavaradhya v. Devotees of Lingadagudi Mutt.* A. I. R. 1973 Mys. 280.

8. *Beni v. Dina*, (1899) 3 C. W. N. 343. See as to the use of these returns under Secs. 21, 22, and other provisions of the Evidence Act, 30 I. A. 177; 30 C. 1033 (P.C.); where in a suit for enhancement of the rent of talukdari tenure road-cess returns, though not conclusive, were held to be admissible in evidence as a basis on which to ascertain the assets of the taluk, and so fix a fair and equitable limit of enhancement.

9. *Sewdeo v. Ajodhya*, 39 C. 1005; 15 I. C. 284.

10. *Chalho v. Jharo*, 39 C. 995; 18 I. C. 61; distinguishing *Nusserim v. Commissioner of Mysore*, A. I. R. 1922 and following *Hem v. Kali*, *supra*.

11. *Mander R. v. Mawari v. Bhadas Mander*, 1937 Pat. 561, 562; 172 I.

C. 129; *Sadhu Saran v. Ambika Lal*, 1923 Pat. 163; 68 I. C. 676.

12. *Sidheshwar Nath v. Emperor*, 1934 All. 351, 352; I. L. R. 56 All. 730; 152 I. C. 174; 36 Cr. L. J. 45; 1934 A. L. J. 178.

13. *Nag v. Emperor*, 1936 P. C. 253 (2); 63 I. A. 372; I. L. R. 17 Lah. 629; 163 I. C. 881; 37 Cr. L. J. 897; 1936 A. L. J. 895; 38 B. L. R. 987; 64 C. L. J. 445; 40 C. W. N. 1221; 71 M. L. J. 476; 1936 M. W. N. 745; *Sardar Miya Mannu Miya v. Emperor*, 1937 Nag. 257; I. L. R. 1937 Nag. 416; 170 I. C. 868; 38 Cr. L. J. 987; 20 N. L. J. 128; *Mahfuz Ali v. State*, 1953 All. 110; I. L. R. (1954) 1 All. 45; 1954 Cr. L. J. 340; 1953 A. L. J. 193; *State v. Pabang*, 1953 Cr. L. J. 85 (Him. Pra.) (confession not recorded under Sec. 164 Cr. P. C. is not admissible as admission).

confessions are to be dealt with when made to a Magistrate during an investigation, and to render oral evidence of such confessions inadmissible¹⁴. In this respect, no distinction can be drawn between a statement made by the accused and a confession made by him. If the statement made by the accused to the Magistrate is not recorded as provided in Sec. 164, Cr. P. C., the Magistrate's evidence regarding the unrecorded statement is inadmissible¹⁵.

A confession may be made at any time, even during the trial or in the court of the committing Magistrate¹⁶. But a confession cannot be recorded by a Magistrate under Sec. 164 Cr. P. C. after the investigation has concluded and enquiry has commenced before the committing Magistrate. A confession so recorded by him cannot be taken in evidence.¹⁷

In the unreported case it has been held that a confession recorded by a Magistrate holding an inquest under Sec. 176, Cr. P. C. but not empowered to record confession under Sec. 164 Cr. P. C., is not inadmissible for non-compliance with that section¹⁸. But, in a later case, another Bench of the same Court has held that the correct interpretation of the Privy Council decision in the case of *Nazir Ahmed v. King Emperor*,¹⁹ is that no confession recorded by a Magistrate of any rank is admissible unless it conforms to the provisions prescribed in Sec. 164 Cr. P. C.²⁰ But *Nazir Ahmed v. King Emperor* refers only to admissions or confessions made after investigation had started, attracting the operation of the provisions of Sec. 164, Cr. P. C. In such a case, the confession or statement has to be recorded in due compliance with the provisions of that section. The principle is, that once an investigation has started, and the Police find that an accused would like to make a confession, that accused in police custody should be forwarded only to a Magistrate duly empowered under Sec. 164 Cr. P. C., who will record the confessional statement in accordance with the elaborate provisions of that section, to assure himself that the statement which the accused was going to make is not a tutored and enforced one. It is on this principle that the learned Judges (Mack & Chandra Reddy, JJ.) who relied on *In re Rameswami Reddy*²¹ held, that if a Magistrate holding an inquest under Sec. 176, Cr. P. C. records a confessional statement, it would not pass the review of Sec. 164 and would be admissible as admissions within Sections 18 to 21 of the Act. The decision in *Nazir Ahmed v. King Emperor*, however, says that a Magistrate not competent to act under Sec. 164, Cr. P. C., can never record a confession made to him and such a Magistrate cannot be on a worse footing than a private person who is competent to depose about extra-judicial confessions. Further even Sec. 26 of the

14. *Nazir Ahmad v. King Emperor*, A.I. R. 1936 P. C. 253 (2); *Abdul Rahim v. Emperor*, 1945 Lah. 105; I. L. R., 1945 Lah. 290; 220 I. C. 467; 47 Cr. L. J. 4 (F.B.).

15. *Legal Remembrancer, Bengal v. East Magistrate, Calcutta*, 1907 Cal. 342; I. L. R., 49 Cal. 167; *R. v. Rajani Kanto Koer*, 1 Cr. L. J. 10; 8 C. W. N. 22; *Amiruddin Ahmed v. Emperor*, I. L. R., 45 Cal. 557; 44 I. C. 33; 27 Cr. L. J. 148; 22 C. W. N. 213; A. I. R., 1918 C.

16. *Hem Raj v. State of Ajmer*, 1954

S. C. 462; 1954 S. C. J. 449; 1955 Cr. L. J. 1313; (1954) 1 M. L. J. 694; 1954 M. W. N. 468; 1954 All. W. R. (Sup.) 49.

17. *State v. Ram Autar*, 1955 All. 138, 147.

18. *In re Rameswami Reddy*, 1953 Mad. 138; 1954 Cr. L. J. 315; (1952) 2 M. L. J. 814; 1952 M. W. N. 987.

19. 1936 P.C. 253 (2), *supra*.

20. *In re Thothan*, 1956 Mad. 425; (1956) 1 M. L. J. 206; 1955 M. W. N. 1042 (2).

21. A. I. R. 1953 Mad. 138.

Evidence Act does not restrict the word 'Magistrate' therein as referring only to one empowered under Sec. 164, Cr. P. C. That being so, the decision in *In re Ramaswami Reddy* cannot be considered to have been wrongly decided. This view was taken in *In re Natesan*²³ relying on two other decisions of the Madras High Court.²⁴

If a person appears before a Magistrate and gives a statement at a time when there was no case already registered against him the statement is admissible in evidence against him.²⁴

But a Coroner need not comply with all the formalities for recording confessions under Sec. 164, Cr. P. C., and so a confession recorded by him would not be inadmissible on the ground of violating the provisions of that section.²⁵

A statement made under Sec. 164, Cr. P. C., which does not amount to a confession can be used against the maker as an admission within the purview of Secs. 18 to 20 of the Act.¹ No particular formality under the Indian law is required to enable an admission by an accused person to go in as an admission.

The Allahabad High Court has held that the rigour and multiplication of procedure relating to the recording of confession does not apply to admissions under Sec. 164 of the Cr. P. C. But according to the Himachal Pradesh High Court, if the Magistrate fails to administer the necessary warning and does not comply with the mandatory procedure laid down in Sec. 164, Cr. P. C., the confession will not amount to an admission within the meaning of Section 21 of this Act.^{3,4}

A previous deposition is admissible against the witness on his subsequent trial, unless he has brought himself within the protection of the proviso to Sec. 132 of the Act.⁵ The admission of guilt in an application, dated to a petition writer in a Magistrate's Court and afterwards presented to the Magistrate, is admissible under this section.⁶

22. 1960 Mad. 443; 1960 Cr. L. J. 1340.

23. *Arunachala Reddi v. Emperor*, (1932) M. W. N. 644; A. I. R. 1932 Mad. 500; *In re Nainamuthu Kannappan*, 1931 M. W. N. 1182; A. I. R. 1940 Mad. 138.

24. *Yendra Natesan Murthy v. Emperor*, (1965) 2 Andh. W. R. 344; 1965 M. L. J. 1 Cr. 806; 1965 Cr. L. J. 599; A. I. R. 1965 Andh. 181; 1965 Andh. L. R. 100; *Reddy v. Emperor*, 1932 M. W. N. 644; A. I. R. 1932 Mad. 500; *In re Nainamuthu Kannappan*, 1931 M. W. N. 1182; Cr. L. J. A. I. R. 1940 Mad. 138. *In re Natesan*, 1960 Cr. L. J. 443, 445.

25. *Government of Bombay v. Dushrath Ramniwas*, I. L. R. 1945 B. 614; 220 I. C. 182; 1945 Bom. 265; 47 Bom. L. R. 145; 11 B. L. 1; *Ghulam Hussain v. The King*, 77 I. A. 65; 1950 A. L. J. 805; 1950 A. W. R. 408; 52 Bom. L. R. 508; 54 C. W. N. 464 (P.C.); *Abdul*

Rahim v. Emperor, 1925 Cal. 926; 88 I. C. 1055; *Golam Mohammad Khan v. Emperor*, 1925 Pat. 536; I. L. R. 4 Pat. 327; 86 I. C. 814; *Muhamad Bakhsh v. Emperor*, 1941 S. C. 120; I. L. R. 1941 Kar. 257, 195 I. C. 458.

Nathu v. State, 1961 A. W. R. (H. C.) 757; 1971 All Cr. R. 543.

State v. Ganga, 2 S. C. 1973 Cr. L. J. 85; H. C. 1973 Cr. L. J. 107.

Abhay Kumar v. Emperor, I. L. R. 45 Cal. 720; 45 I. C. 999; A. I. R. 1919 C. 1021; *Emperor v. E. C. D. Williams*, 1920 S. C. 112; I. C. 112; *Abhay Kumar v. Emperor*, 1951 Lah. 763; 133 I. C. 55; *Nanbhoo Mahton v. Emperor*, 1936 Pat. 358; 107 I. C. 357; *State v. Ganga*, 1971 A. W. R. (H. C.) 757; 1971 All. Cr. R. 543.

Rahim Bakhsh v. Emperor, 1939 All. 181; I. L. R. 1939 All. 377; 181 I. C. 646; 40 Cr. L. J. 559; 1939 A. L. J. 107.

Although, as already stated, incriminating statements not admissible as confessions, may be admissible as admissions against interest under Secs 18 to 21⁷ it is an ordinary rule of prudence that a Court should reject an admission made by an accused under such circumstances that if the admission amounted to a confession, it would be excluded by any of the Sections 24 to 26.⁸ A statement, whether it amounts to a confession or not, made to a police officer in the course of an investigation under Chapter XII of the Criminal Procedure Code is not admissible.⁹ But incriminating statements not hit by Sec. 162, Cr. P. C. may be admissible as admissions against interest, even in criminal cases.¹⁰ Thus where in the course of a police inquiry about a theft case against a person, a woman made a statement that she had been intimate with that person and lived with him as his wife, and subsequently, she took proceedings under Sec. 188 (now S. 125) Cr. P. C., against her husband, it was held that the proceedings under S. 188 (now S. 125) did not amount to any inquiry or trial in respect of any offence under investigation at the time when the former statement was made, and that the statement was admissible as an admission, which could be used against her under this section also, and Sec. 25 of this Act could not prohibit its admission in respect of proceedings under this section.¹¹

Admissions in a document, whatever the stage at which the document is secured, can be used against the maker.¹²

Statements recorded by inquiring officers of the Customs Department under Section 107 or Section 108, Customs Act, 1962, are not inadmissible evidence in a criminal case by reason of the bar under Section 20 *pro se* or under Section 162, Cr. P. C.¹³

The entire statement made by an accused before the committing court is admissible but to rely on an admission, it must be read as a whole. It is not permissible to take into consideration only those portions of the statement which are inculpatory and reject the other portion which are beneficial to the accused.¹⁴ As to the general proposition that an admission or a confession must be read as a whole and that it cannot be split and part of it used against is too widely stated, see Section 17 *ante*, Note 5.

Even when a document has been admitted by the accused in his statement under Section 312 (now S. 313), Cr. P. C., the prosecution is bound to prove

7. *Mohammad Baksh v. Emperor*, 1941 Sind L.J. 134; 1 I. L. R. (1941) Kar. 201; 129 I. C. 458.

8. *Ibid.*

9. See *Pakula Narayanaswami v. Emperor*, 1939 P. C. 47; 66 I. A. 66; I. L. R. 18 Pat. 234; 43 C. W. N. 473.

10. *Akal Sahu v. Emperor*, 1948 Pat. 62; I. L. R. 26 Pat. 49; 230 I. C. 157. In *U. B. Tiros*, 1941 Mad. 713; 197 I. C. 81; 54 L. W. 81; *Muhammad Baksh v. Emperor*, 1941 Sind L.J. 134; 1 I. L. R. (1941) Kar. 201; 129 I. C. 458; *Pakula Narayanaswami v. Emperor*, 1939 P. C. 47; *supra*, see also *Nga Ba Kyaing v. Emperor*, 1936 Rang. 181; 162 I. C. 6; *Alahwasani Darya Khan v. Emperor*, 1940 Sind 53; 1 I. L. R. (1939

Kar. 201; 129 I. C. 458; *Emperor v. Muhammad v. Manikswami*, A. I. R. 1966 M. 342; (1966) 1 M. L. J. 540; 1966 Cr. L. J. 1275; see also *Queen v. Tilkhoan*, 1884 (1884) 9 Bom. 13 (1).

12. *Neminath Appayya v. Jamboorao*, 1 M. L. J. 442; A. I. R. 1966 Mys. 154, 159.

13. *Collector of Customs Madras v. Kotumal*, 1967 Cr. L. J. 1007; A. I. R. 1967 Mad. 253; (1967) 1 F. B. 1 following *Bocher Jett Sivani v. State of Mysore*, 1966 2 S. C. W. R. 154; (1966) 2 S. C. A. 77; A. I. R. 1966 S. C. 1746.

14. In re *Pagoti Sanjay Rao*, (1968) 2 Andh. W. R. 86; 1968 M. L. J. (Cr.) 453; 1968 Cr. L. J. 1345, 1351.

it if it is not to fail.¹⁵ The principle is that a gap in the prosecution evidence cannot be filled up by the statement of the accused under Sec. 312 (now S. 313), Cr. P. C.¹⁶

An admission by the accused that he was driving the truck at the time of the accident, can be used to support the prosecution witnesses to prove the accused to be the owner of the truck.¹⁷ The statement of accused that the deceased had gone to his house and since then was not seen alive is an admission and as such admissible.¹⁸

For proving the contents of a document it is essential that a person having knowledge of those contents must appear before the court to give evidence in that regard.¹⁹

7. "Representative-in-interest." No definition has been given of this somewhat vague expression.²⁰ Whatever scope may be given to these words, it is apprehended that they will, generally speaking, include most of the privies in blood, law or estate, of which mention has been made in the notes to Secs. 17-20 *ante*. A purchaser at an ordinary execution sale is in privity with, and the representative-in-interest of, the purchaser, within the meaning of this section, so as to be bound by his admissions.²¹ Where the execution of a mortgage deed is admitted and the deed contains a clause of admission by the mortgagor relating to the passing of consideration, the admission is evidence against the mortgagor, and then representative-in-interest under this section.²²

In a joint Hindu coparcenary, a son does not derive title in the coparcenary property through his father, and the sons cannot be said to be the representatives-in-interest of their father.²³ A statement made in a previous suit, against the interest of the maker, is admissible in evidence in a subsequent suit against his successor-in-interest as an admission, even though the latter, without calling the maker as witness even though he is alive.²⁴

15. *Hari v. Mukherji v. State*, 1968 A. L. J. 466; 1967 A. W. R. (H.C.) 789; A. I. R. 1969 All. 423, relying on *Mohideen Abdul Kadir v. Emperor*, 1944 27 Mad. 335 which followed *Basant Kumar Ghatak v. Queen Empress*, 1905, 20 Cal. 49.
16. *Mohideen Abdul Kadir v. Emperor*, *supra*.
17. *Maharao v. Narayan*, 1966 A. C. J. 1; 1975 W. L. N. 442; 1975 Raj. L. W. 529; A. I. R. 1966 Raj. 71.
18. *Mohd. Singh v. State*, 1975 W. L. N. 373 (Raj.).
19. *Maharao Shri Mahan Sinhji v. State of Gujarat*, 10 Guj. L. R. 870; A. I. R. 1969 Guj. 270.
20. See remarks in *Ishan v. Beta*, 24 C. 62, 72; 1 C. W. N. 36 (F.B.); *Unnoporna v. Nafur*, (1874) 21 W. R. 148, as to the meaning of the terms "representative" and "legal representative." See *Badri v. Jai*, 16 A. 483, 487; *Stroud's Judi-*

cal Dictionary, 10th ed., Chaitra kelan v. Govind, 17 M. 186; 4 M. L. J. 59 and ante notes to Secs. 17-20 "Sale in Execution."
21. *Ramesh Chandra v. McQueen*, 18 W. R. 166; 11 B. L. R. 46; *Pratap Narayan v. Hossein v. Kishori Mohun Roy*, 22 I. A. 101 (P.C.); *Harbhagat v. Pandit*, 1906 18 Cal. 206, 18 I. C. 338.
22. *Pratap Narayan v. Hossein*, *supra*; *Singh, Ramji v. State*, 1975 W. L. N. 373; *Gad an Chetti v. Veerappa Chetti*, 1915 Mad. 1156; 26 I. C. 899.
23. *Jagmohan Lakhmichand v. Ranchoddas*, 1946 Nag. 84, 87; I. L. J. 101 (P.C.); *N. L. J.* 630; but see *Pratap Kishore v. Gyanendranath*, 1951 Orissa 313.
24. See *Pratap Kishore v. Hari Kison*, 1957 Cal. 515; 173 I. C. 427; 41 C. W. N. 1089.

Though admissions may be proved against the party making them, it is always open to the maker to show that the statements were misstaken or untrue, except in the special cases in which they operate as estoppels.²

8. Exceptions. (a) *General.* The section proceeds to specify those cases in which an exception is permitted to the general rule, and admissions in a person's own interest are admissible in evidence.

(b) *Clause 1.* The first clause is considered under the thirty second section, post, which must be read in conjunction with it. Illustrations (b) and (c) refer to this clause. Under Sec. 32, a statement relating to the existence of any relationship by blood, marriage or adoption between the persons as to whose relationship the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised, is relevant. Therefore since a wife has special means of knowledge about her marriage, a statement by her that she is the wife of her husband is admissible in evidence and can be proved if the statement was made before the controversy arose.^{1,3}

(c) *Clause 2.* The second clause has received no illustration in the Act, probably because it has already been sufficiently treated of in the fourteenth section (ante) under the head of facts, showing the existence of any state of bodily feeling, and in illustrations (k), (l) and (m) thereto, which, together with the notes therein should be here consulted. The fourteenth section merely declared that such facts are relevant. The present clause shows that such facts or statements may be proved on behalf of the person making them notwithstanding the general rule that persons cannot make evidence for themselves by what they choose to say.³

Where a husband, accused of murder of his wife, stated to police that the wife provoked him, the statement could be used by him to show an extenuating circumstance to mitigate the offence.⁴

Where the religion of a deceased person is a fact in issue, any solemn declaration made by him as to his religion made in a formal document, is relevant as an admission and is entitled to weight in deciding the question.⁵

(d) *Clause 3.* The third clause provides that a fact which is relevant under the sixth section, ante, or some of the sections following it, shall not be rejected simply because it assumes the form of an admission.⁶ Admission made by defendant in his deposition in prior proceedings about the continuance of plaintiff's cause of action, can be used in a subsequent civil suit under this section, when in the same deposition he had admitted that there were litigations going on between his father and the grandfather of the plaintiff.⁷

25. See Ss. 31, 115, post.

1-2. *Mst. Bashiran v. Mohammad Hussain*, 1934 South 201 1 I. R. 150 Luck. 615; 193 I. C. 161.

3. *Norton, Ev.*, 152.

4. In re *Thakdasan*, 1923 Cr. L. J. 1041 (Mad.).

5. *Leong Hohe Waing v. Leon Ah*

Foon, 1930 Rang. 42; 1 I. L. R. 7 Rang. 720; 121 I. C. 796.

6. See *Followes v. Williamson*, (1829) M. & M. 306; v. ante, Ss. 8 and 14 and notes thereto. *Jankiraman v. Koshalyanandan, A.* 1 I. R. 1961 Pat. 293, 297; 1960 B. L. J. R. 717.

This clause, being an exception to the general rule, should be strictly construed. It is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance as part of the *res gestae*, as a statement accompanying, or explaining, a particular conduct, but it cannot be held that a statement which is inadmissible in evidence under the general rule can be made admissible as such by reference to this clause.⁸

Admissions in one's own favour have been admitted as being relevant under Secs. 21 and 11 also.⁹

Documents in which there was clear assertion of the rights of the plaintiffs regarding cultivation and possession of the disputed lands are admissible under Section 13 (b), read with Section 21 (3) of the Act. They are relevant to the determination of the question of permanent tenancy.¹⁰

Illustrations (d) and (e) refer to this clause. "Care must likewise be taken not to confound self-serving evidence with *res gestae*. The language of a party accompanying an act, which is evidence in itself, may form part of the *res gestae* and be receivable as such."¹¹

It was held in the undermentioned case¹² in which the second and the fourth defendants sold a *jote* to the first defendant and subsequently colluded with the plaintiff and denied a partition which had taken place, as well as the sale, that the statements previously made by them which went to show that there had been a partition, and they had changed their attitude were admissible under the third clause of this section and the second clause of the eleventh section of this Act. Where in a prior sale-deed, executed in favour of the plaintiff and M, the widow of G, the plaintiff was described as the adopted son of G, but in a subsequent will executed by M it was stated by M that she had no son, the admission in the first document was not avail, if in fact the adoption had not been satisfactorily established.¹³ In a suit against an insolvent and the Official Assignee for sale of mortgaged property the onus is on the plaintiff to prove that title deeds in his possession after the insolvency were deposited with him as security before the adjudication. Evidence of admissions by him, at an earlier date than the adjudication, to the effect that the deeds were then in his possession, is inadmissible in his favour under this section, not being within any of the exceptions to inadmissibility named in this section. An erroneous omission to object to such evidence does not make it admissible.¹⁴ Any statement as to rent payable for a holding made by a person in a sale certificate, which was obtained by him as purchaser of the holding, at a sale in execution of a decree against the former tenant, being in the nature of an admission, cannot be used as evidence on his behalf as such a

8. *A. G. Paschall v. E. B. Paschall*, Nixon, 1930 Oudh 441; 128 I. C. 721; 7 O. W. N. 683.

9. *Sayeruddin v. Samiruddin*, 1923 Cal. 878; 2 I. C. 983—relevant under Section 11 (2). *Ram Bhargose v. Rameshwar Prasad*, 1938 Oudh 26; I. L. R. 13 Lucknow 697; 171 I. C. 481—relevant under S. 11 (1). *Raghunath v. Bindeshwari Nandan*, 1924 All. 526; 82 I. C. 582 relevant under Ss. 11 (2), 13 (b).

10. *Amarendra Prasad Singh v. Jaginadha Patro*, 34 Cut. L. T. 1131, 1142.

11. *Best, Ev.*, s. 520.

12. *Chandrasekhar v. Mahalakshmi*, 25 Cal. 220; 1907 I. C. W. N. 91.

13. *Mst. Deep v. Ebrahim*, A. I. R. 1957 Raj. 261; 1957 Raj. L. W. 254.

14. *Miller v. Matho*, 1893 19 A. 76; 23 I. A. 106 (P.C.).

statements made by a party within the exceptions to this section.¹⁵ An admission by ryots that they have no occupancy rights in the ryot lands will have little value if the Government say that they are ryot lands, because the policy of the law is to lean against the strong.¹⁶ An admission must be taken as a whole.¹⁷ A statement of examination can be tacked on to the answers in cross-examination.¹⁸ A statement cannot be split up.¹⁹

9. **Particulars.** A statement is subject to the special provisions relating to admissions contained in the twenty-fourth, twenty-fifth, and twenty-sixth sections.

A party to a suit or documents can be permitted under this section to use them as evidence in the case without drawing the attention of the opponent to them in cross-examination. The rule of fairness in Sec. 145 that a witness who has been cross-examined on oath should be given an opportunity to explain is not to be used against him to render his explanation inadmissible. A statement at a point of ambiguity or dispute, should also be admissible. **Persons who enter the witness box.** But, the omission to follow the provisions in the case of a party who is examined as a witness, does not make his statement, which is otherwise relevant under this section inadmissible.²⁰ See also Note 14, 15 under the heading 'Effect of Section 145' where this matter is fully discussed.

10. **Miscellaneous.** The section enacts that admissions are relevant and may be proved by or on behalf of the persons who make them, or their representatives, in relation to the facts admitted by or on behalf of the persons who make them, and by or on behalf of their representatives in interest, except in certain cases, to which Section 14 of this Act lays down restrictions. Admissions are not conclusive in all matters admitted but they may operate as estoppels. The law concerning admissions is admissible in evidence is against the persons who make them, and though, under certain circumstances, they operate as estoppels against others, they are not conclusive proof of the matters admitted, and the burden of proving the contrary by the makers thereof, or the persons against whom the admissions are to be proved, is, for example, by proving that they were not competent to make them, or in ignorance of facts admitted, or under such other circumstances, but they are admissible in evidence against the maker, the extent of which must however be clear and unambiguous.²¹

15. *Shankar v. State of Madras*, 1962, 31 Cr. 380.

16. *Marian v. A. S. M. Rowther*, (1959) 1 M. L. J. 22; 72 L. W. 257.

17. *Dasarathi v. Balmukunda*, 1 L. R. 1959 Cut. 410; A. I. R. 1959 Orissa 38.

18. *C. R. Narasimhan v. M. G. Natesa Chettiar*, 1 L. R. 1959 Mad 669; A. I. R. 1959 M. 514.

19. *R. v. Bhairab*, (1898) 2 C. W. N. 14; *Madan v. R.*, 14 Cr. L. J. 723; (1922) 4 P. L. T. 581; a statement of accused as witness in a previous case has been

held admissible under this section; *R. v. Banarsi*, 1924 All. 381; 1 L. R. 46 All. 254; 77 I. C. 829.

20. *Seethamma v. Hanumanthovajjulu*, (1959) 2 Andh. W. R. 7; *Arjun Mahton v. Monda Mahtain*, A. I. R. 1971 Pat. 215; *Veerhasavaradhya v. Devotees of Lingadagudi Mutt*, 1973 Mys. 280.

21. *Satyadeo Prasad v. Chunderjoti*, A. I. R. 1966 Pat. 110; 1965 B. L. J. R. 800.

22. *Rom Prasad v. Kalyani*, 1972 Raj. L. W. 522; 1972 W. L. N. 784; A. I. R. 1973 Raj. 208.

What party I insert admits to be true may reasonably be presumed to be so and until the presumption is rebutted, the fact admitted must be taken to be established.²³

Although a statement made by an accused to a Magistrate during the course of investigation into the very crime of which he is accused cannot be admitted in evidence unless the provisions of Section 145 Cr. P. C. are sufficiently complied with, yet such a statement is admissible in evidence under this section unless it falls within the mischief of the succeeding sections such as Sections 23, 24 and 29-34. Where the person who lodges the first information report regarding the commission of the crime is himself subsequently accused of the offence committed, and the report lodged by him is not corrected but is an admission by him of certain facts which have a bearing on the question to be determined by the Court as to instance, how and by whom the offence has been committed, or whether the statement of the accused in the Court denying the correctness of a statement made by him is relevant to the first information report is admissible to prove against him. It is not relevant to the offence under this section. In other words, where the report is an admission by the accused of certain facts which have a bearing on the question to be determined by the Court as to instance, how and by whom the offence has been committed, the statement of the accused in the Court denying the correctness of a statement made by him is relevant to the first information report is in the nature of a confession on no part of it was corrected.

Even though the statement of a party to a crime is not admissible in evidence as supporting the evidence against him, words uttered by him to the disciplinary authority that did not vitiate the inquiry proceedings are admissible before the enquiry officer is admissible.⁴

Mere withdrawal of a complaint does not destroy the effect of an admission made in the plaint so long as such admission is not withdrawn and the drawer is not confronted with it under Section 145 post.⁵

An admission of a party in his pleading can be withdrawn in subsequent proceedings unless he can show that it was made under a mistake of fact.⁶

23. *Revappa v. Madhava Rao*, A. I. R. 1960 Mys. 97.

24. *In re Natesan*, A. I. R. 1960 Mad. 443.

25. *Faddi v. State of Madhya Pradesh*, A. I. R. 1964 S.C. 1850; 1964 Jab. L. J. 252; 1964 M. P. L. J. 519; 1964 Mah. L. J. 519; (1964) 2 Cr. L. J. 1744.

1. *Sankaran v. State of Kerala*, I. L. R. (1965) 2 Ker. 33; A. I. R. 1965 Ker. 248; *Faddi v. State of M. P.*, *supra* and *Dal Singh v. King-Emperor*, A. I. R. 1917 P. C. 25 relied on; I. L. R. (1970) 2 Delhi 854.

2. *Jalam Singh v. The State of Rajasthan*, 1975 W. L. N. 623; *Badri v. State of U. P.*, 1973 All. Cr. C. 201; 1973 Cr. L. J. 1478 (All).

3. *Ram Subhak Ojha v. The Com-*

missioner of Police, 12 Fac. L. R. 50; (1966) 2 Lab. L. J. 22; A. I. R. 1967 Cal. 381, 382 distinguishing *Jagdish Prasad Saxena v. State of Madhya Bharat*, 1961 Jab. L. J. 414; A. I. R. 1961 S. C. 1070 where no formal inquiry was held before passing an order of dismissal.

4. *Md. Yusuf v. State of Rajasthan*, 1976 Raj. Cr. C. 299.

5. *Mahammal Serai v. Adibar Rahman Sheikh*, 72 C. W. N. 867; A. I. R. 1968 Cal. 550, 553; see also *Chandrakanto v. Ram Mohini Debi*, A. I. R. 1956 Cal. 577.

6. *Sharat Chandra Misra v. State of U. P.*, 1971 Serv. L. R. 624; 1971 All. L. J. 1027; 1971 Lab. I.C. 1429.

in the absence of any confession, the court is bound to consider this section.⁷

It is not necessary that the statement made by the accused should be the question of fact, and the court should not, and long should not, be asked to consider the possibility of the statement being true. If, on the other hand, the statement is found to be false, the court is bound to consider the whole evidence was before the trial court.⁸

The court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false, and the court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false.

The court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false, and the court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false. It is a mere incorporation of a ground in the memorandum of appeal.¹⁰

The court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false, and the court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false. It is not binding on the principal in a subsequent suit.¹¹

The court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false, and the court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false. It may be that the statement is not conclusive.¹² It is not binding on the principal in a subsequent suit.¹³ It is not binding on the principal in a subsequent suit.¹⁴

The court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false, and the court is not bound to consider the statement made by the accused under section 21 of the Evidence Act, 1973, if the statement is found to be false. It is not binding on the principal in a subsequent suit.¹⁵

7. Natesan In re, (1968) 1 M. L. J. 304 following *Fach v. State of Madhya Pradesh*, (1964) 5 S. C. R. 312; (1965) 1 S. C. J. 201; 1965 M. L. J. (Cr.) 93; A. I. R. 1964 S.C. 1850.

8. *Govinda v. Chumabai*, 13 Law Rep. 681; A. I. R. 1968 Mys. 309 following *Kishan Lal v. Mt. Chaitanya*, A. I. R. 1959 S.C. 501.

9. *Sabha, Dayallagh*, A. I. R. 1969 All. 218, 258, admission in Income-tax assessment proceedings.

10. *Nrusinghanath Deb v. Banamali Panda*, A. I. R. 1970 Orissa 218, 219.

11. *Luxmi Narayan v. State Bank of India*, 1969 Pat. 585, 590.

12. *Ghaziram Majhi v. Omkar Singh*, 34 Cut. L. T. 328 at p. 336;

Prem Ex Serviceman Coop. Tenant Farming Society Ltd. v. State of Haryana, (1974) 2 S. C. C. 319; 1974 C. W. App. J. 185 (S.C.); 1971 *Punj. L. J.* 272; 1974 *U. J.* (S.C.) 366; A. I. R. 1974 S.C. 1121.

13. *Pullangoda Rubber Produce Co., Ltd. v. State of Kerala*, (1971) 2 S. C. W. R. 630; 1972 *U. J.* (S.C.) 366; A. I. R. 1972 S.C. 1121.

14. *Laxmavva v. Hanamappa*, (1967) 1 Mys. L. J. 553, at pp. 554, 555.

15. The statement must be used as a whole or not at all is widely stated, see section 17 ante, Note 5.

A signed copy of the document may be produced in evidence in support of a petition by the petitioner for the purpose of proving the genuineness of the document in connection with the petition. The document may be produced in evidence in support of the petition for the purpose of proving the genuineness of the document in connection with the petition.

An admission in writing of the facts stated in the document may be produced in evidence in support of a petition for the purpose of proving the genuineness of the document in connection with the petition. The document may be produced in evidence in support of the petition for the purpose of proving the genuineness of the document in connection with the petition.

If the genuineness of a document produced in evidence is in question, the court may require the production of the original document. If the genuineness of a document produced in evidence is in question, the court may require the production of the original document.

- a. 17 ("Admission.")
- s. 3 ("Document.")
- e. 3 ("Relevant.")
- a. 58 (Facts admitted.)
- e. 63 ("Secondary Evidence.")

ss. 65,66 (Rules as to giving of secondary evidence).
s. 67 (When admission is in evidence of genuineness).

SYNOPSIS

1. Principle.

The principle upon which such evidence is receivable has been stated to be that what a party himself admits to be true may reasonably be presumed to be so and that therefore such evidence is not open to challenge. The principle upon which such evidence is receivable has been stated to be that what a party himself admits to be true may reasonably be presumed to be so and that therefore such evidence is not open to challenge.

15. *N. Krishna v. Lakshmi Ammal*, 1971 Ker. L. T. 182, 183.

16. *Priya Bala Ghosh v. Suresh Chandra Ghosh*, (1971) 2 S. C. D. 439; *Kanwal Ram v. Himachal Pradesh Administration*, 1966 Mad. W. N. 19; 1966 Cr. L. J. 472; 1966 All. W. R. (H. C.) 99; 1966 M. L. J. (Cr.) 157; 1966 S. C. D. 171; (1966) 1 S. C. J. 210; (1966) 1 S. C. W. R. 61; A I R. 1966 S. C. 614, for effect

of admission of marriage.
17. *Taylor v. Taylor*, 1, 326; 55, 70, 64, 91, post.

18. *Taylor v. Taylor*, 1, 410, and cases there cited; *Roscoe v. N. P. Taylor*, 63; *Best v. Taylor*, 55, 525, 526; and see *Martukarappa v. Rama*, (1896) 3 Mad. H. C. R. 158, 160.

19. *Shuter v. Pender*, (1840) 6 M. & W. 661, per Parke, B.

that it is or is not genuine, even though such admissions involve a statement of the contents of a document, may be received². This section does not, it is apprehended, exclude admissions which the parties agree to make in the trial, in which case it becomes unnecessary to prove the fact so admitted³.

Notwithstanding the admission of the contents of a contract, a question about the validity of the contract arising on its face can be raised⁴.

23. Admissions in civil cases when relevant. In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation. Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under Section 126.

s. 17 ("Admission")
s. 5 ("Relevant")

s. 3 ("Evidence")
s. 126 (Professional Communications.)

Steph. Dig. Art. 20, Taylor, Ev., ss. 775, 795, 798, 799, Roane N. P. Ev. 62, 63, Powell, Ev. 9th Ed. 421; Phillips Ev. 326, 328, Cordery's Law Relating to Solicitors, 2nd Ed., 83.

SYNOPSIS

1. Principle.
2. Scope.
3. Admissions without prejudice.

4. Negotiation for compromise.
5. Admissions before arbitrator

1. Principle. Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice,⁵ are excluded on grounds of public policy. For without this protective rule, it would often be difficult to take any steps towards an amicable compromise or adjustment and, as Lord Mansfield has observed, all men must be permitted to buy their peace, without prejudice to them, should the offer not succeed, such offer being made to stop litigation without regard to the

2. Norton, Ev., 153.

3. See, post, Cunningham, Ev. 186, cf. Ibrahim v. Pasvata, (1871) 8 Bom. H. C. A. C. 163.

4. Union of India v. B. C. Nawa (Bros). Pvt., Ltd., A. I. R. 1961 Cal. 620; Agricultural Produce Market Committee v. Contractor Munshi, (1968) Guj. L. R. 1082.

5. In re River Steamer Co., (1871) L. R. 6 Ch. 822, 827, per James, L.J., the words "without prejudice" mean, "I make you an offer; if you do not accept it, this letter is not to be used

against me" ib. 831, 832 (cited in Mahendray v. Gombichan, (1898) 23 B. 177, 180. "Now if a man says his letter is without prejudice, that is tantamount to saying, 'I make you an offer which you may accept or not as you like; but if you do not accept it will not have effect at all' per Mellish, L.J., see also Walker v. Wilsher, (1889) 23 Q. B. D. 335, 337; per Lindley, L.J. Hari Krishna Agarwala v. K. C. Gupta, 1949 All. 440, per Malik, C. J.

question of the law of evidence. But even in the case of a letter, the law of evidence is not so much to be rid of the action.

2. *State of mind.* But even in the case of a letter, the law of evidence is not so much to be rid of the action. But even in the case of a letter, the law of evidence is not so much to be rid of the action.

3. *Admission of guilt.* But even in the case of a letter, the law of evidence is not so much to be rid of the action. But even in the case of a letter, the law of evidence is not so much to be rid of the action.

6. Taylor, Ev., s. 759 and see ib. ss. 774, 796, 797 and cases there cited; Roscoe, N. P. Ev., 62, 63; Steph. Dig., Art. 20; Powell, Ev., 500; Phillips, Ev., 326.
7. Per Bowen, L. J. in Walker v. Wilsher, (1889) 23 Q. B. D. 335.
8. Abbas Pacha v. Queen Empress, L. R. 25 Cal. 736; 2 C. W. N. 484.
9. Roscoe, N. P. Ev., 62; Paddock v. Forrester, (1841-42) 3 M. & G. 903; Houghton v. Houghton, (1872) 15 Beav. 278, 421; Wilker v. Wilsher, (1889) 23 Q. B. D. 335.
10. Paddock v. Forrester, supra; Re Harris, (1875) 44 L. J. Bkey. 33. "It is not necessary to go on putting 'without prejudice' at the head of every letter", ib; Walker v. Wilsher, supra 337.
11. Peacock v. Harper, (1878) 26 W.R. (Eng.), 109. In this case a second letter 'without prejudice' was held to protect previous letter not expressed to be "without prejudice"

- on the ground that the second letter to be taken as a postscript to the former.
12. Grace v. Baynton, (1877) 21 Sol. Jour. 631, See Re Daintrey, Ex-parte Holt, (1893) 2 Q. B. 116. In the case of Hicks v. Thompson, Times, 19th Jan., 1857 a lawyer's clerk sued for breach of promise of marriage, sought to exclude his love letter because he had headed them all "without prejudice."
13. Kurtz v. Spence, (1888) 57 L. J. Ch. 238; 58 L. T. 438.
14. Waldrige v. Kennewon, (1794) 1 Esp. 143; see also per Lord Kenyon, C. J. in Turner v. Railton, 2 Esp. 474.
15. Walker v. Wilsher, supra, 337; in re River Steamer Co. 1871 L. R. 6 Ch. 822.
16. Per Lindley L.J. in Walker v. Wilsher, (1889) 23 Q. B. D. 335 at p. 337

printed form and issued by a Station Master under the rules of the Railway, does not become inadmissible because it contains the words "without prejudice"—These words only reserve the right of the Railway and the customer to challenge the accuracy of the certificate by leading evidence to prove that the damage was higher or lower (as the case may be) than stated in it. It is, therefore, admissible as *prima facie* evidence of the quantum of damage.²³

The privilege conferred by the section may be waived. Where letters marked "without prejudice" were filed by the plaintiff and the defendant's counsel admitted them it was held, that the admission implied that the privilege was withdrawn and the letters were free to be used as evidence.²⁴ In the case last cited, it was also held, that the letters were not inadmissible as there was only a desire on the part of the defendant to have the privilege attached to the letters and there was nothing to show that the plaintiff also agreed to respect the privilege. It is respectfully submitted that this loses sight of the distinction between the two parts of the section. The letters in question being marked "without prejudice", the case falls under the first part of the section, and to render the letters inadmissible it is not necessary that both parties should agree to respect the privilege.

An admission contained in a draft of a compromise deed filed in Court has to be excluded where the document provides that the parties to it would be free to repudiate any condition of the proposed compromise by which, in their opinion, their rights are prejudicially affected.²⁵

4. Negotiation for compromise. "Perhaps also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice or to make a concession,¹ will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appears to have been made under the faith of a pending treaty into which the party has been led by the confidence of an arrangement being effected."² But in the absence of any express, or strongly implied, restriction as to confidence, an offer of compromise is clearly admissible and may be material as some evidence of liability,³ although it may not be proper to enquire into the terms offered,⁴ though it must still be borne in mind that such an offer may be made for the sake of purchasing peace and without admitting liability to the extent of the claim⁵ and it would be unfair to hold them, if the compromise

23. *Union of India v. Nathi Mal Mahabir Prasad*, 100 A.I.R. 49, at pp. 497, 498; *Balchand Badri Prasad v. Union of India*, 100 A.I.R. 107 Cal. 656. In the Allahabad case *Kurtz v. Spence*, 1885, 11 J. Ch. 238, 241 relied on in *Union of India v. Shew Bux*, A.I.R., 1965 Cal. 636 was distinguished as an English case. The court distinguished between the two cases, saying that the English case was concerned with a dispute between two parties, while the Indian case was concerned with a dispute between a party and the Government.

24. *Thomson v. Austen*, (1823) 2 D. & R. 358.

25. *Thomson v. Austen*, (1823) 2 D. & R. 358.

R. 358.

2. *Wallbridge v. Kennison*, (1794) 1 Esp. 143; *Taylor, Ev.*, s. 795.

3. *Wallace v. Small*, 1830, 1 M. & M. 446; *Watts v. Lawson*, ib 447 n. *Nicholson v. Smith*, (1822) 3 Stark R. 129; *Taylor, Ev.*, s. 795; *Firm Bulaki Ram Amarnath v. Bhagat Ram*, 1929 Lah. 548, 95 I.C. 363.

4. *Hurling v. Jones*, 1855, 1 L. & C. 100, see also *Thomas v. Morgan*, (1835) 2 C. N. & R. 496.

5. *Meeran v. Alkuddin*, 41 C. 180, 34 I. C. 571; 25 C.L.J. 42; (1917) 20 C.W.N. 1217; A.I.R., 1917 C. 487. *Letters Patent applied for by Sanderson C. J. and Mookerjee, J.*

falls through.⁶ Much depends upon the circumstances of the case.⁷ Admission of cruelty in a letter written during negotiations for compromise in a proceeding for restoration of conjugal rights may be privileged, disentangling the other party to use it as admission.⁸

5. **Admissions before arbitrator.** The rule does not apply to admissions made before an arbitrator, for though in this last case, the proceedings are said to be before a domestic forum yet the parties are, at the time, contesting their rights as adversely as before any other tribunal.⁹ The rule enunciated in this section does not apply to admissions made before an arbitrator. In the absence of an express or implied understanding between the parties that the evidence of the conversation during the period when negotiations for settlement of the claim are being carried on, before the arbitrator is not to be tendered, such conversation cannot be held to be privileged and must be held to be admissible in evidence.¹⁰ It has, however, been held that nothing which passes between the parties to a suit in an attempt at arbitration or compromise should be allowed to affect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court. No presumption can be raised against a party to a suit from his refusal to withdraw from the determination and submit to arbitration.¹¹ It has also been held that where negotiations are being conducted with a view to settlement it should be taken that these negotiations are being conducted "without prejudice", and that it is not open for one of the parties to give evidence of an admission made by another.¹² An admission before an arbitrator is admissible in evidence, but the Court dealing with the facts can attach such weight as it thinks proper to such admission. This section does not apply to such admission.¹³

24. *Confession caused by inducement, threat or promise when irrelevant in criminal proceedings.* A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise¹⁴ having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to be reasonable for supposing that by making it he

7. See also observations of Lord St. Leonards in *Jorden v. Money*, (1854) 5 H.L.C. 185: "when an attorney goes to an adverse party with a view to a compromise, or to an action, you must always look with very great care at his evidence of what then occurred."

8. *Smith v. K...*, *Chandray Singh*, 1972 Cur. L.J. 577; 73 Punj. L.R. 726; A.I.R. 1973 Punj. 18.

9. *Deod Lloyd v. Evans*, (1827) 3 G. & P. 219; the admissions may be proved by the arbitrator; *Gregory v. Howard*, (1800) 3 Esp. 113; *Taylor v. Es.*, ss. 798, 799; *Roscoe, N.P.*

Ev., 63; as to incriminating answers, see a. 132, post.

10. *Gangaram Kanhaivalal v. Pooran Gulab*, 1954 M.B. 58, 59; see also cases cited therein.

11. *Mahabeer v. Dhujjoo*, (1873) 20 W. R. 172.

12. *Shilcharandas v. ...* (1936) 150 I. R. 1936 All. 51; 160 I. C. 76; 1935 A. W. R. 1486.

13. *Punjab Singh v. Ram Autar*, 1920 Pat. 811; 52 I.C. 348; 4 P.L.J. 676.

14. For prohibition of such inducements, etc. see the Code of Criminal Procedure, 1973, Sec. 316.

would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

s. 17-22 ("Admission").

s. 3 ("Relevant").

s. 3 ("Court").

s. 28 (Confession after removal of impression caused by inducement).

s. 30 (Presumption as to document purporting to be a confession).

Steph. Dig., Arts. 21-23; Taylor Ev., ss. 862-906; Best, Ev., 551-553; 3 Russ. Cr. 410-419; Powell Ev. 9th Ed., 104-116; Phipson, Ev., 11th Ed., 349-367; Wills Ev., 3rd Ed., 309-311; Norton, Ev., 154-171; Cr. P. Code, 1898 ss. 163, 343; Cr. P. C. 1973, ss. 163, 346; Roscoe Cr. Ev. 16th E., 38-56. A Treatise on the Admissibility of Confession and Challenge of Jurors in Criminal Cases in England and Ireland by Henry H. Joy, Clarendon's Law of Confessions, Wigmore, Ev., s. 822 et seq.

SYNOPSIS

1. General:
 - (a) The Section.
 - (b) "Confession".
 - (c) Judicial and extra-judicial confessions.
 - (d) Confession consisting of several parts.
 - (e) Admissibility of confessions in evidence and weight to be attached to them. Soliloquies.
 - (f) Voluntary confessions.
 - (g) Involuntary confessions.
 - (h) Retracted confessions.
 - (i) Extra-judicial confession, if valid, can be acted upon.
2. Scope and extent of Sections 24 to 30 and relevant provisions of Cr. P. C.
3. Principle of this section.
4. Conditions for validity and admissibility of confessions.
5. "Appears to the Court".
6. Burden of proof. Procedure in recording confessions.
7. Evidentiary value of confessions.
8. Retraction of confession. effect of.
9. Corroboration, necessity of.
10. "By an accused person."
11. "Caused by any inducement, threat or promise."
12. Relevancy, question of law.
13. Confession to whom.
14. Confession after prolonged custody.
15. Presumption about voluntariness.
16. "Person in authority".
17. Inducement etc. must have reference to the charge.
18. The advantage to be gained or the evil to be avoided.
19. "Sufficient to give the accused grounds".
20. (a) Partial rejection of a confession: (i) Confession contradicted by confession; and (c) Confession contradicted by medical evidence.
21. Magistrate not following precautions under Sec. 164, Cr. P. C.
22. Judicial confession, admission of.

1. **General.** *The Section.* The main object of the Section seems to pose the question that if a confession is caused by inducement, threat or promise when it may be deemed to be irrelevant in criminal proceedings? The Section lays down that—

a confession made by an accused person is not valid in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority, and such inducement or threat or promise as, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable, for suppressing truth or making false statement, if he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

In answering the above question, each and every one of the above expressions has to be considered.

dict. Confession. Confession is a direct admission or acknowledgment of his guilt by a person who has committed a crime.¹⁵ In *People v. Noyima*, 196 N.Y.2d 1001, 1003 (1991), the Privy Council had occasion to define the term "confession" and observed: "No statement that contains self-exculpatory matter can amount to a confession if the exculpatory statement is of some fact which might negate the offence alleged to be confessed. Moreover a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a purely incriminating fact, even a conclusively incriminating fact, is not of itself a confession."

The correction received the approval of the Supreme Court in *Tal-ander Kano v. State of Punjab*¹⁷ and *Devabir Singh v. The State of Madhya-Pradesh*.¹⁸ See also the undernoted cases.¹⁹

A confession or admission is evidence against the maker unless its admissibility is excluded by some provision of law. Except as provided by Section 27, *proof* of a confession to a police officer is absolutely protected under Section 25, *proof* of a confession in the course of an investigation is also protected by Section 25, *proof* of a confession made to any other person by him while in the custody of a police officer is protected by Section 26, *proof* unless it is made in the *uninterrupted* presence of a Magistrate.

In *Sullivan v. Louisiana*, 508 U.S. 7 (1993), the Supreme Court has con- sidered a statement made by a person stating or suggesting the inference that he has committed a crime. In *Ashcroft v. Iqbal*, 556 U.S. 263 (2009), it was said that a confession must be defined as an admission or confession by a person charged with the crime. If an admission of the facts is to be used against the defendant at trial, it should be tendered in evidence, and if a part of the confession is exculpatory, and part incriminatory, the prosecution cannot use only the incriminatory part of it, and the defense is entitled to insist that the entire confession, including the exculpatory part, must be tendered in evidence. But the Supreme Court has observed that the propo- sition that a statement which contains any admission or confession must be

¹ See, e.g., *The Law of England*, Vol. 1, p. 108; 1 Car. & Youssuf Dar, 1973 CrL J. 955 (J. & K.).

16. A.I.R. 1939 P.C. 47; 40 Cr. L.J. 364; (1939) 1 M. L. J. 756; Pati Sonra v. State, (1970) 36 Cut. L. T. 774; Lokanath v. State, 1966 Cr. L.J. 1180; A I R. 1966 Orissa 205, 206 (admission not amounting to confession).

17. 1953 S. C. R. 94, 104; A. I. R. 1952 S. C. 354, 357; 1953 A. L. J. 18; 1953 M. W. N. 418; I. L. R. 1953 Punj. 107; 1 B. L. J. 30; 1953 Cr. L. J. 154.

18 (1976) 2 S.C.C. 302; 1976 S. C. C. (Cri.) 278; 1976 Cri. A. R. (S.C.) 140; 1976 S.C. Cri. R. 235; (1976) 3 S. C. R. 672; 1976 Cri. L. I.

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1975 Cr. L. J. 1350 (Sikkim);
(1972) 1 Cut. L. R. 253
(Orissa); Kanda Padayachi v. State
of Tamil Nadu, 1972 Cri. L. J.
11: A. I. R. 1972 S.C. 66.

20. *Aghnoo Nagesia v. State of Bihar*,
A I R. 1966 S.C. 119 at p. 123.

21. (1965) 2 S. C. A. 367; 1966 S. C.
D. 245; (1966) 1 S. C. J. 193; (1965)
2 S. C. W. R. 750; 1965 A. W.
R. (H.C.) 648; (1965) 1 Andh.
L. T. 430; 1966 B. L. J. R. 865;
1966 Cr. L. J. 100; 1966 M. L. J.
(Cr.) 134; 1965 M. W. N. 216;
A. I. R. 1966 S. C. 119.

22. (1965) 2 S. C. A 367; A. I. R 1966 S. C. 119.

considered as a whole and the court is not free to accept one part while rejecting the rest is too widely stated²³. In *Blagyaan Singh Rani v. State of Harayana*,²⁴ the Supreme Court has again said that it is permissible to believe one part and reject another part of a confession. What is necessary is that the whole confession be tendered so that the Court may reject the exculpatory part and take inculpatory part into consideration if its correctness is corroborated by other evidence. The decision enumerating the wide proposition aforesaid can not be considered to be laying down the correct law. It was held by the Cuttack High Court in the undernoted case that court cannot accept only the inculpatory part and reject the exculpatory portion that the accused acted in the exercise of right of self defence.¹ But in a later case the same High Court held that if the exculpatory portion is found to be inherently improbable, after rejecting that portion regarding murder having been committed in self-defence, the Courts may act on the inculpatory portion and this seems to be correct approach in view of the decision of the Supreme Court in *N. M. Kant Jha v. State of Bihar*.²

A confession admitting in terms an offence and substantially all facts constituting that offence does not by the addition of a plea of justification become self-exculpatory.⁴

A statement made to Custom Officers acting in exercise of their powers to a confession can be used as an admission against the maker within the purview of Sections 18 to 21 of the Act.⁵

Before he was accused of any crime a person in answer to a question of a witness stated that his wife and children were not in this world. This is simply a statement or at the best an admission of fact and not a confession as such not hit by section 24, because an admission of even a gravely incriminating circumstance is not a confession.⁶

A statement made under Section 164, Cr. P. C. which does not amount

23. *N. M. Kant Jha v. State of Bihar*, (1969) 2 S. C. R. 1033; I. L. R. 48 Pat. 9; (1969) 1 S. C. A. 537; (1969) 1 S. C. C. 347; (1969) 1 S. C. J. 844; (1969) 1 S. C. W. R. 1149; 1969 B. L. J. R. 731; 1969 M. P. W. R. 590; 1969 M. L. J. (Cr.) 456; 1969 A. L. J. 638; 1969 A. W. R. (H.C.) 549; A. I. R. 1969 S. C. 422; see section 17 and suggesting the decision in *Haramant v. State of Madhya Pradesh*, A. I. R. 1952 S. C. 343; *Palvinder Kaur v. State of Punjab*, A. I. R. 1952 S. C. 354 and *Narain Singh v. State of Punjab*, (1964) 1 Cr. L. J. 730 (S.C.).

24. (1976) 2 S. C. J. 464; (1976) 3 S. C. C. 101; (1976) S. C. C. (Cri.) 373; 1976 Cri. A. R. 204; (1976) Cri. L. J. 1379; A. I. R. 1976 S. C. 1797.

25. See for instances, *Jairam Ojha v. State*, 34 Cut. L. T. 141; 1969 Cr. L. J. 765; A. I. R. 1968 Orissa 97, 99, *Pagoti Sanyasi Rao*, In re,

1962 2 Andh. W. R. 80; 1968 Cr. L. J. 1345; 1968 M. L. J. (Cr.) 453, 461. But see *Jaswant Singh v. State*, I. L. R. (1965) 15 Raj. 968; 1965 Raj. L. W. 441; 1966 Cr. L. J. 451; A. I. R. 1966 Raj. 83, 88 which correctly states the principle.

1. *State of Orissa v. Rama Mudali*, 39 Cut. L. T. 44; 1973 Cr. L. J. 1326 (Orissa).

2. (1976) 1 Cr. L. J. (Or.) 73; *Orissa v. Khandu Saha v. State*, (1967) 41 Cut. L. T. 945; 1976 Cri. L. J. 414.

3. A. I. R. 1969 S. C. 422.

4. *Buda Kisani v. State*, I. L. R. 1965 Cut. 369; (1965) Orissa J. D. 198 at pp. 206, 207; 31 Cut. L. T. 804.

5. *Gulam Mohammad Khan v. Emperor*, A. I. R. 1925 Pat. 536; *Abdul Rahim v. Emperor*, A. I. R. 1925 Cal. 926; *Muhamad Bakhsh v. Emperor*, A. I. R. 1941 Sind 129.

6. *State of Assam v. V. N. Raj Khosla* 1975 Cr. L. J. 554.

under Section 171-A, Sea Customs Act, 1878 (now Section 103, Customs Act, 1962) does not stand at par with a confession.⁷

a. Judicial and extra-judicial confessions. Confessions may be divided into two classes, viz., judicial and extra-judicial. Judicial confessions are those which are made before a Magistrate or court in the course of judicial proceedings. Extra-judicial confessions are those made by a party elsewhere than before a Magistrate or court. In short, extra-judicial confessions are generally those made by a party to or before a private individual which includes even a police officer in his private capacity. It includes a confession to a Magistrate who is not expressly empowered to receive confessions. Section 164, Cr. P. C., on a Magistrate so empowered, does not apply to a confession made by a party when Section 164 does not apply.⁸

A Police Inspector does not exercise the same powers as a police officer-in-charge of a station in the context of the provisions of the Criminal Procedure Code.⁹ Hence, extra-judicial confession made to a Police Inspector is admissible in evidence as it does not attract the bar of Section 164 enacted under Section 2 of the Cr. P. Act, 1973 and a confession made to the present section.¹⁰

b. Confession consisting of several parts. A confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the possession of the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is related in such a manner that it attaches to each part of it, it is not admissible as evidence, one or more parts and to admit it as evidence as a non-confessional statement. Each part may disclose some incriminating fact, that is some fact which, by itself or along with other admitted or proved facts, suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a continuous statement, partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact in the statement, is part of the confession.¹¹

Sometimes a statement which is a statement may not amount to an admission of an offence but the statement read as a whole may amount to a confession. Each and every admission of an incriminating fact contained in the confessional statement is part of the confession.¹²

c. Admissions made by a person who is not a party to the offence. A confession is a statement made by a person who is a party to the offence and the weight to be attached to it. The Act makes admissions and confessions exceptions to the hearsay rule. It places them in the category of relevant evidence, presuming, on the ground that as they are statements made against the

7. *H. H. Advani v. State of Maharashtra*, (1970) 1 S. C. R. 821; (1970) 2 S. C. A. 10; (1970) 2 S. C. J. 192; 1970 M. L. J. (Cr.) 490; A. I. R. 1971 S. C. 44, 56.
8. *R. v. Copinath Kollu*, 13 W. R. Cr. 69.
9. See *State of Punjab v. Barkat Ram*, (1962) 3 S. C. R. 338; (1962) 2 S. C. A. 321; (1962) 1 Cr. L. J. 217;

A. I. R. 1962 S. C. 276.
10. *State of Mysore v. D. C. Nanjappa*, 1968 M. L. J. (Cr.) 226; (1968) 1 Mys. L. J. 457 at pp. 461, 463.
11. *Aghnoo Nagesia v. State of Bihar*, (1965) 2 S. C. A. 367; A. I. R. 1966 S. C. 119.
12. *Ibid.*

interest of the person making them they are probably true. The probative value of an admission or a confession does not depend upon its communication to another. Communication to another is not a necessary ingredient of the concept of confession. A statement, whether communicated or not, admitting guilt is a confession of guilt¹³. Therefore, a confessional *voir dire* is a direct piece of evidence. It may be an expression of conflict of emotion, a conscious effort to still the pained conscience, an argument to find excuse or justification for his act, or a penitent or remorseful act of exegeration of his part in the crime. The tone may be soft and low, the words may be confused, they may be capable of conflicting interpretation depending on witnesses. Generally, they are the utterances of a confused mind. But before such evidence can be accepted it must be established by cogent evidence what were the exact words used by the accused. Even if so much is established, prudence and justice demand that such evidence should not be made the sole ground of conviction. It may be used only as corroborative piece of evidence.¹⁴

(c) Voluntary confession.—As to extrajudicial confession, two questions arise—

- (1) were they made voluntarily? and
- (2) are they true?

As the section enacts, a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, 1. Having reference to the charge against the accused person, 2. proceeding from a person in authority, and 3. sufficient, in the opinion of the Court to give the accused person grounds which would appear to him to be reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. And it would not be involuntary, if the inducement, etc.—

- (a) does not have reference to the charge against the accused person, or
- (b) it does not proceed from a person in authority; or
- (c) it is not sufficient, in the opinion of the Court to give the accused person grounds which would appear to him to be reasonable for supposing that by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

13. *Sahoo v. State of U. P.*, (1966) 2 S. C. J. 172; 1965 S. C. D. 809; (1965) 2 S. C. W. R. 464; (1965) 2 Andh. L. T. 215; 1966 M. P. L. J. (Cr.) 558; 1966 M. L. J. (Cr.) 558; 1966 Cr. L. J. 68; A. I. R. 1966 S.C. 40 at p. 42; Taylor, 11th Edn., Vol. 1 at p. 596; Best, 12th

Edn. at p. 596; Plapson, (1970) 11th Edn., para. 815, p. 366; Citing *R. v. Simons*, (1834) 6 C. & P. 540; *Babi v. State of M. P.*, 1966 M. P. L. J. (Notes) 9.

14. A I R. 1966 S.C. 40 at p. 43.

15. *Viran v. State*, A. I. R. 1961 J. & K. 11.

Whether or not the confession was voluntary would depend upon the facts and circumstances of each case judged in the light of this section.¹⁶ In the absence of any evidence to show that any threat, promise or inducement was made to the accused when he made the confessional statement, his confession cannot be one other than free and voluntary¹⁷ provided it is made in a fit state of mind.¹⁸ The law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise.¹⁹

The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, may be considered before deciding whether the Court is satisfied that in its opinion the impression caused by the inducement (threat or promise or any) has been fully removed.²⁰ So, when the accused confesses his guilt on being asked twice or three, or on being asked to produce stolen articles, the confession cannot be held to be the result of persuasion in the absence of anything to the contrary.²¹

A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt.²² It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. *Perseus*. So as Taylor points out: "Deliberate and voluntary confessions are, when it clearly proved, one among the most effectual proofs in law. Therefore both in England and in India convictions have been sustained on capital cases on voluntary and unsuspected confessions, where there has also been a corroborative proof of the *veritas facti*." *Will's Criminal Statute*, Evidence. But at the same time no portion of evidence has invited so much careful scrutiny as the law of confessions. It is due to two factors:

First, confessional statements are often made for various reasons. To quote Taylor: "The prisoner, oppressed by the gravity of the situation may have been induced by a variety of hope or fear to make an untrue confession and the same statement may have been given from a motive of ambition to obtain an influential position, from a desire to be rid of life from a reasonable belief that a confession will do so, or from any other cause." A law officer, however, should not be too ready to give the value of a confession or even the admissibility of a confession, without first ascertaining the facts. It is not, however, intended to state that there are no genuine incentives to confessions which have been set out in several of the judgments. *Harvey* (1) in *Bell Chandra*

16. *Veggappa Shetty, In re.* (1970) 1 Mys. L. J. 149, 160.

17. *Ratan Gond v. State of Bihar*, 1959 S. C. R. 1336; 1 L. R. 37 P. 1109; A. I. R. 1959 S. C. 18; 1959 Cr. L. J. 108; 1959 B. L. J. R. 1959 A. L. J. 35; 1959 M. L. J. 1959 M. L. J. Cr. 109.

18. *Aher Raja Khima v. State of Saurashtra*, (1955) 2 S. C. R. 1285; 1956 S. C. A. 410; 1956 S. C. J. 213; 1956 A. W. R. (Sup.) 60; 1957 Andh. L. T. 92; 1956 Cr. L. J.

421; 9 Sau. L. R. 109; A. I. R. 1956 S. C. 217 at p. 221.

19. See *Vali Isa v. State*, A. I. R. 1963 Guj. 135; 1963 Guj. L. R. 1052; *Sarwan Singh v. State of Punjab*, A. I. R. 1957 S. C. 637; 1957 Cr. L. J. 1011; 1957 All. W. R. (Sup.) 99; 1957 M. P. C. 781; (1957) 1 M. L. J. (Cr.) 672.

20. *Strimanta v. State*, A. I. R. 1960 C. 519.

21. *R. v. Warwickshall*, (1783) 1 Leach 263.

Magistrate gave 34 hours for reflection, confession is not inadmissible.³
See following cases also.⁴

The second factor is, that it is undoubted that confessions are frequently brought about by 'third degree method' employed by the police. The term connotes in the public mind the tort by extraction or extortation of confession from person in police custody by methods of violence or by the use of threats or improper inducement.⁵

The use of third degree methods for extracting confessions is certainly prevalent all over the world in varying degrees from the more brutal practice in the United States of America to the more refined forms in the United Kingdom. In India in the past the use of third degree methods for extracting confession was very widely prevalent.

Precautions have since been taken, but in spite of all these precautions, it is doubtful whether the evils associated with confessions can be completely eradicated.

(g) *Involuntary confession* — An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of the harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary.⁶ Where an accused person persists before the Committing Magistrates court and the Sessions court that he was tortured by the police and his confession was retracted, the confession cannot be said to be voluntary.⁷ What is required is the likelihood of police influence for treating the confession as not voluntary. If the police are in any way connected with the administration in such manner as to create an impression in the mind of an under trial prisoner that he is under police control, it would be correct to treat his confession as not voluntary. The position is different when the jail is merely guarded by the police and they have nothing to do with its administration or control.⁸ Though sufficient time was given to an accused for deliberation as required by the Criminal Rules of Practice, yet if it is apparent from the answer given by the accused that he had not completely got over the warning and the inducement offered by the police, the court will not accept the statement as voluntary.⁹ Where one of several

3. *Kadrake Suana v. State*, 1977, 47 Cut. L.T. 945; 1976 Cri. L.J. 414.

4. 1972 Cut. L.R. (Cri) 554; *Kuma v. State*, 1975 Cut. L.R. (Cri.) 404 (Orissa); 1 L.R. (1971) 21 Raj. 209; *State v. Shankarea*, 1977 Cri. L.J. 684 (Raj).

5. Cited in Wigmore on Evidence, Vol. 2, p. 196, Paras 263-64.

6. *Amrut v. State of Bombay*, 1 L.R. 1960 B. 664; A.I.R. 1960 B. 488.

7. *A.N.T.O. Thapa v. State*, 1967 Cr. L.J. 1023; A.I.R. 1967 Manipal 11, 19.

8. *Mingular Mallik v. The State*, 32 Cut. L.T. 1011; A.I.R. 1967 Orissa 24 at 26. See also *Aher Raja*

Kumar v. State of S.M. Pura, 1966 2 S.C.R. 1285; 1956 S.C.A. 440; 1956 S.C.J. 243; 1957 Andh. L.T. 92; 1956 A.W.R. (Sup.) 60; 1956 Cr. L.J. 426; (1956) 1 M.L.J. (S.C.) 135; 9 Sau L.R. 109; A.I.R. 1956 S.C. 217, at pp. 221, 222 (Threats to accused in jail custody amounts to evidence of access of police to him. Thus it is reasonable that confession was not voluntary).

9. *Page v. State of R.C. In re*, 1966 2 Andh. W.R. 86; 1968 Cr. L.J. 1345; (1968) 1 M.L.J. (Cr.) 453, 457.

(9) *Examination of the confession*. If valid, can be relied upon. An extra judicial confession, if voluntary, and true and not in a state of duress, can be relied upon by the Court along with other evidence in favor of the accused? The confession will have to be proved like any other fact. The value of the evidence is to be measured like any other evidence. It rests upon the veracity of the witnesses to whom it has been made. The court requires the witness to whom the confession was made to give the actual words used by the accused as nearly as possible. This is not invariable, but the court can accept the evidence even if the substance was given. It is for the Court, having regard to the credibility of the witness, his capacity to understand the language in which the accused made the confession, to accept the evidence or not. The Court should accept and act upon the confession if it is made voluntarily by the accused immediately after the crime to strangers visiting the accused with every token of truth, grief and repentance even if in a moment. But it must be ac-

2. Mulk Raj v. State of U.P., 1960 A.I.R. 1219; A.I.R. 1959 S.C. 902, 905; 1959 Cr.L.J. 768 (Cr.) I J. 1959 (Punjab); 1960 Cr. L.J. 1959 (Punjab) v. The State of Punjab, 1960 A.I.R. 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1

cepted and acted upon as a whole.³ The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence.⁴ An extra-judicial confession is most often a very weak type of evidence but in certain circumstances it may be of more probative value than it usually is.⁵ It would be wrong to generalise that extra-judicial confession is a weak type of evidence because its probative value actually depends on the credibility of the witness who comes to prove it. So a confession made to a 2nd Class Magistrate though not under section 164, Criminal P.C. may be relied upon unless considered probable that it was tutored by police.⁶

It cannot be called a weak evidence if it withstands the following tests

- (1) is the witness proving the confession generally credible;
- (2) is his relation with the accused such that the latter could confide in him;
- (3) is there any motive for the witness to implicate the accused falsely (the witness might be trying to save himself or someone else by laying the blame on the accused);
- (4) is the confessional statement consistent with other facts and circumstances brought on record.⁷

The attempt of prosecution to support its case by a false story adversely affects the credibility of the evidence regarding extra-judicial confession.⁸ Extra-judicial confession inconsistent with medical evidence should not be relied

In re Ramayee, A.I.R. 1960 M. 187; Shankar Pandit v. State of Rajasthan, 1970 W.L.N. (Part I) 744; 1971 Raj. L.W. 486 (when there is no other evidence against him); Padmeswar Phukan v. State, Assam L.R., (1971) Assam 293; 1971 Cri. L.J. 1595.

1. State of Orissa v. Machindra, A.I.R. 1964 Orissa 100; Joseph v. State of Kerala, 1966 Ker. L.T. 649; 1966 M. L.J. (Cr.) 698; (1975) 2 Cri. L.T. 119 (H.P.) (and upon the facts and circumstances of each case); Santosh Kumari v. State, (1973) 3 Sim. L.J. (H.P.) 103; 1 L.R. (1973) H.P. 211; 1973 Cri. L.J. 1651 (When the other evidence is scanty, contradictory and discrepant and the witness was a person whose antecedents and integrity were not free from doubt, confession held not proved) Hanuman v. State, 1974 W.L.N. 95; 1974 Raj. L.W. 159; Shankar Pandit v. State of Rajasthan, 1970 W.L.N. (Part I) 744; 1971 Raj. L.W. 486 (When such confession was made to superior officers who were responsible military officers having no reason to tell a lie against the accused, it was relied upon).

5. State of M.P. v. Gangabai, 1971 M.

P.W.R. 443, 447; Jagta v. State of Haryana, 1974 Cri. L.J. 1010; 1974 Cri. L.R. (S.C.) 472; 1974 S.C.C. (Cri.) 657; (1974) 4 S.C.C. 747; (1975) 1 S.C.R. 165; A.I.R. 1974 S.C. 1545; State of Punjab v. Bhajan Singh, 1974 Pun. L.J. (Cri.) 399; 1974 Cri. L.R. (S.C.) 595; 1974 Cri. App. R. (S.C.) 254; 1974 U. J. (S.C.) 597; 1974 S.C. Cri. R. 384; (1974) 2 S.C.W.R. 563; 1975 Cri. L.J. 282; 1975 Cur. L.J. 52; (1975) 2 Cri. L.T. 36; A.I.R. 1975 S.C. 256 (the evidence did not inspire confidence); Ismail Ibrahim v. State, 1975 Cri. L.J. 1335 (Goa); Sanatan Bindhani v. State, (1972) 98 Cut. L.T. 428 (may afford corroboration to evidence of child witness).

6. Nika Ram v. State of H.P., 1971 Sim L.J. (H.P.) 190; 1972 Cri. L.J. 204 (Him. Pra.).

7. Prabhakar v. State, 74 Bom. L.R. 299; 1972 Mah. L.J. 583; 1973 Cri. L.J. 246 (Bom.); A.I.R. 1966 S.C. 40 distinguished, and A.I.R. 1957 S.C. 381; A.I.R. 1959 S.C. 18 and A.I.R. 1971 S.C. 1871 relied on).

8. Jagta Singh v. State of Haryana, Supra.

upon as it would appear not to be true^{8, 9}. Extra judicial confession made to a person not in authority, if free from suspicion and having a ring of truth may be acted upon⁹. Extra judicial confession made by the accused (a constable or border security force) to the uncle and cousin of his wife, the inspector and the commandant of the force that he had stabbed his wife to death was relied upon by the Supreme Court, because confession was not made to a person in authority, it was free from legal infirmities and the evidence of the uncle and cousin of the wife was considered reliable in the circumstances of the case, although that was the only evidence against the accused¹⁰. In *Hurriyat v. State of U. P.*,¹¹ the Supreme Court observed that extra judicial confession if proved to have been made truly and voluntarily can be made the basis for conviction. Also in other cases,¹² the Supreme Court has observed that if the Court believes the witness to whom extra judicial confession has been made and is satisfied that confession was voluntary, conviction can be founded on that evidence also, and that the evidence of such confession is not to be treated as tainted evidence and if corroboration is needed it is only by way of abundant caution. Therefore, it is submitted that the cases in which a contrary view has been taken are no longer good law.

Extra judicial confession are not usually considered with favour but that does not mean that such a confession coming from a person who has no reason to state falsely and to whom it is made in circumstances which tend to support his statement, should not be believed¹³. A conviction can be based on an extra-judicial confession if it is found to be reliable and corroborated by other evidence¹⁴. But as pointed out above, corroboration is only a rule of caution and in appropriate circumstances conviction can be founded on the reliable evidence of extra-judicial confession.¹⁵

For other cases; see the undermentioned cases.¹⁶

8-1. *Union Territory of Mizoram v. Vanalallawama*, 1977 Cr. L. J. 1831.

9. *Dhumble v. State of Mysore*, 1969 2 S.C.C. 81; 1970 2 S.C.W.R. 122; 1970 S.C. Cri. R. 565; (1971) 1 S.C.J. 721; 1971 Mad. L.J. (Cri.) 336; 1971 Cri. L.J. 1314; (1971) 1 S.C.R. 215; 1970 Cri. App. R. (S. C.) 327; A.I.R. 1971 S.C. 1871.

10. *Darshan Lal v. State of Jammu & Kashmir*, (1975) 1 S.C.W.R. 391; (1975) 4 S.C.C. 53; 1975 Cr. L.J. 714; 1975 S.C. Cri. R. 183; 1975 Cri. App. R. (S.C.) 186; 1975 Cr. L. R. (S.C.) 1258; 1975 U.J. (S. C.) 364; A.I.R. 1975 S.C. 898.

11. A.I.R. 1977 S.C. 203; 1976 S.C.C. (Cri.) 817; 1976 Cr. L.J. 1758; (1976) 2 S.C.C. 812.

12. *Mughar Singh v. State of Punjab*, A.I.R. 1975 S.C. 1320; 1975 1 S.C.W.R. 624; 1975 Cri. L.J. (S.C.) 365; 1975 S.C.C. (Cri.) 470; 1975 Cr. L.J. 1102; 1975 Cut. L.J. 484. *Praja Singh v. State of Punjab*, A.I.R. 1977 S.C. 221; 1977 Cr. L.J. 1941; (1977) S.C.C. (Cri.) 614; (1977) 4 S.C.C. 452.

13. *Ram Singh v. State of U.P.*, 1962

Supp. (2) S.C.R. 203; 1962 S.C.D. 733; 1962 (2) S.C.J. 136; 1962 A. I.J. 32; 1962 A.W.R. (H.C.) 25; 1962 Cr. L.J. 9; 1962 M.L.J. (Cr.) 429; A.I.R. 1967 S.C. 152, 154.

14. *Mung Lee v. State of Rajasthan*, 1970 Raj. L. W. 1; *Gangu Munda v. State of Orissa*, 1975 Cut. L. R. (Cr.) 44; 37 Cut. L. T. 595; (1971) 1 Cut. W. R. 836.

15. *Moba Singh v. State*, 1975 W. L. N. 53 (Raj). Existence of dead body and other articles found in the hand of accused, which pointed out, and the fact that deceased had visited the accused at the time he may have been taken to death fully corroborate the confession. *Dhumble v. State of Rajasthan*, 1975 Raj. L. W. 250; 1975 W.L.N. 52 (Raj). *Haraman v. State*, 1974 W. L. N. 95; 1974 Raj. L.W. 159.

16. *Mee Bala v. State, Assam*, I.R. 1971 Assam 19; 1971 Cr. L.J. 100; *Karuna v. State of U.P.*, *Kash I.J.* 90; 1974 J & K I.R. 82; 1974 Cri.L.J. 839 (J. & K.); *Karuna-karan*, In re, 1974 M.L.W.

2. Scope and nexus of sections 24 to 30 and relevant provisions of Cr. P. C. In *State of U. P. v. Deoman Upadhyaya*,¹⁶ then Lordships of the Supreme Court have analysed the scope and nexus of sections 24 to 30 as follows:

Section 24 of the Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offence. Sections 24 to 30 of the Act deal with admissibility of confessions, i.e., of statements made by a person stating or suggesting that he has committed a crime. By section 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By section 25, there is an absolute ban against proof at the trial of a person accused of an offence of a confession made to a police officer. The ban, which is provided under section 24 and complete under section 25, applies equally, whether or not person, against whom evidence is sought to be led in a criminal trial, was at the time of making the confession in custody. For the ban to be effective, the person need not have been accused of an offence when he made the confession. The expression 'accused person' in section 24 and the expression 'a person accused of any offence' have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in *Talab Naryan Swami v. Emperor*¹⁷ by the Judicial Committee of the Privy Council, section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. The adjective phrase 'accused of any offence' is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not preclude a condition of that person at the time of making the statement for the applicability of the ban.

In *Amar Nath v. State of Bihar*,¹⁸ the Supreme Court has observed:

"The law relating to confessions is to be found generally in sections 24 to 30 of the Evidence Act and sections 162 and 164 of the Code of Criminal Procedure. Sections 17 to 41 of the Evidence Act are to be found under the heading 'Admissions'. Confession is a species of admission, and is dealt with in Sections 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides: 'No confession made to a police officer shall be proved as against a person accused of an offence'. The terms of section 25 are impera-

(Cri.) 190; 1975 M. L. J. (Cri.) 106; (1975) 1 M. L. J. 209; 1975 Cri. L.J. 798; *State of Orissa v. Jagadhar alias Raidhar Harijan*, 1975 Cut. L. R. (Cri.) 433; I. L. R. (1975) Cut. 1557; *Krishna Chandra Das v. State of Orissa*, (1974) 40 Cut. L. T. 650; 1975 W.L.N. (U.C.) 235 (Raj.); 1972 Cut. L. R. (Cri.) 587 (Orissa); *Ambika Dei v. State*, (1974) 40 Cut. L. T. 1177; 1974 Cut. L. R. (Cri.) 334; *Herbetus Oram v.*

State, (1971) 37 Cut. L.T. 477; (1971) 1 Cut. W. R. 960; *Mohasingsh v. State*, 1975 W. L. N. 373 (Raj.).

17. A.I.R. 1960 S.C. 1125, 1129; (1960) 2 S.C.A. 371; 1960 A.L.J. 732; 1960 Cr. L.J. 1504; 1960 All. W.R. (H.C.) 568.

18. L.R. 66 I.A. 66; I.L.R. 18 Pat. 234; 180 I.C. 1; A.I.R. 1939 P. C. 47.

19. (1965) 2 S.C.A. 367; A. I. R. 1966 S.C. 119; 1965 M.W.N. 216; 1965

nive. A confession made to a police officer *under any circumstances* is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation had begun. The expression 'accused of any offence' covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by section 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by Sec. 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by sections 24, 25 and 26. It provides that when any fact is proved to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso, and in cases falling under sub-section (3), and it specifically provides that nothing in it shall be deemed to affect the provisions of section 27 of the Evidence Act. The words of Section 162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under section 164 of the Code of Criminal Procedure subject to safeguards imposed by the section. Thus, except as provided by section 27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under section 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by section 162 of the Code of Criminal Procedure and a confession to any other person made by him while in the custody of a police officer is protected by section 26 unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them."

Section 151 of the Code of Criminal Procedure, 1973 provides for the recording of the first information. The information report as such is not substantive evidence. It may be used to corroborate the informant under section 157 of the Evidence Act or to contradict him under section 115 of the Act, if the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under section 8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under section 21 of the Evidence Act and is relevant.²⁰ But a confessional

ALL W.R. 111; 1965 B.I.R. 865; 1966 M.P.L.J. 49; 1966 Mah.L.J. 115; 1966 M.L.J. (Cr.) 134

20 See *Faddi v. State of Madhya Pradesh*, Cri. Appeal, No. 210 of 1963 dated 24-1-64; A.I.R. 1964 S.

C. 18; 1964 Lab.L.J. 979; 1964 M.P.L.J. 609; 1964 Mah.L.J. 519; 1964 (2) Cr. L.J. 744—explaining *Nisar Ali v. State of U.P.*, A.I.R. 1957 S.C. 366 and *Dal Singh v. King-Emperor*, 44 I.A. 137; A.I.R. 1917 P.C. 25.

first information report to a Police Officer cannot be used against the accused in view of section 25 of the Evidence Act.

A proof of the confession being excluded by provisions of law, such as sections 24, 25 or 26 of the Act, the entire confessional statement in all its parts, including the admissions of inculpatory facts, must also be excluded, unless proof of it is permitted by some other section, such as section 27. Little substance and content would be left in sections 24 and 26 if proof of admissions of inculpatory fact in a confessional statement were permitted.²¹

If the confession secured by inducement, threat or promise, as contemplated by section 24, the whole of the confession is excluded by this section, which excludes proof of all the admissions of inculpatory facts contained in a confessional statement.²² Similarly, sections 25 and 26 bar not only proof of admissions of an offence by an accused to a police officer or made by him while in the custody of a police officer, but also admissions, contained in the confessional statement, of all inculpatory facts relating to the offence.²³

Sections 24 to 30 refer to the confessional statements as a whole, including not only the admission of the offence but also all other admissions of inculpatory facts relating to the offence. Section 27 partially lifts the ban imposed by sections 24, 25 and 26 in respect of so much of the information, whether it amounts to a confession or not, as relates distinctly to the facts discovered in consequence of the information if the other conditions of the section are satisfied. Section 27 distinctly contemplates that an information leading to a discovery may be a part of the confession of the accused and thus fall within the purview of sections 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, section 30 permits the Court to take into consideration against a co-accused a confession of another accused affecting not only himself but the other co-accused. Section 30 thus shows that a confession affecting other persons may form part of the confession.²⁴

If the information is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by section 25. The confession includes not only the admissions of the offence but all other admissions of inculpatory facts relating to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of section 25 is lifted by Section 27.²⁵

A confessional first information report given by an accused is not receivable in evidence against him. Even if a part of the report is properly severable from the strictly confessional part, the severable parts cannot be tendered in evidence. The entire confessional statement is hit by section 25 and save and except as provided by section 27 and save and except the formal part identifying the accused as the maker of the report, no part of it can be tendered in evidence.¹

21. *Aghnoo Nagesia v. State of Bihar*, (1965) 2 S.C.A. 367; A. I. R. 1966 S.C. 119; 1965 M. W. N. 216.
22. *Ibid.*

23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
1. *Ibid.*

Section 27 is concerned with information received from a person arrested or in custody of a police officer or other officer. On the question whether a person is entitled to refuse to provide information which may be used as evidence against him, the accused is concerned to have submitted himself to the custody of the police officer within the meaning of section 21, there is conflict of opinion.² But if it can be held that the accused was constructively in police custody, the information contained in the first information report relating to the offence in question in consequence of the information is admissible in evidence.³

Section 27 is founded on the principle that even though the evidence, relating to the offence, consists of statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be proved to be untainted, and is, therefore, declared provable in so far as it so fully relates to the fact thereby discovered. Even though, section 27 is in one part, it applies to section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of fact. By section 27, even if a fact is depicted to as discovered in consequence of information received, only that much of the information is admissible as so strictly relates to the fact discovered. By section 26, a confession made in the presence of a Magistrate is made provable in its entirety.

Section 102 of the Code of Criminal Procedure also enacts a rule of evidence. This section prohibits but not so as to affect the admissibility of information to the extent permissible under section 27 of the Evidence Act, use of statements by any person to a police officer in the course of any investigation under Chapter XIV of the Code of 1898 (Chapter XII of the Code of 1908) in any enquiry or trial in which such person is charged for any offence under investigation at the time when the statement was made.

On an analysis of sections 24 to 27 of the Act, and the relevant sections of the Code of Criminal Procedure, the following material provisions emerge:

(a) Whether a person is in custody or outside, a confession made by him to a police officer or the making of which is procured by any inducement, threat or promise, made in reference to the charge against him and proceeding from a person in authority is not provable against him in any proceeding in which he is charged with the commission of an offence.

(b) A confession made by a person whilst he is in the custody of a police officer, to a person other than a police officer, is not provable in a proceeding in which he is charged with the commission of an offence, unless it is made in the immediate presence of a Magistrate.

² See the observations of Shah, J. and Subba Rao J. in *State of U.P. v. Deoman Upadhyaya*, (1961) 1 S. C. R. 14; A.I.R. 1960 S.C. 1125; 1960 All. L.J. 733; 1960 Cri. L.J.

1504; 1960 All. W.R. (H.C.) 568. *Aghnoo Nagesha v. State of Bihar*, (1965) 2 S. C. A. 367; A.I.R. 1966 S.C. 119; 1965 M.W.N. 216.

(c) That part of the information given by a person whilst in police custody, whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.

(d) A statement, whether it amounts to a confession or not, if made by a person when he is not in custody, to another person, such latter person not being a police officer, may be proved, if it is otherwise relevant.

(e) A statement made by a person to a police officer in the course of an investigation of an offence under Chapter XIV of the Code of Criminal Procedure of 1898 (Chapter XII of the Code of 1973) cannot, except to the extent permitted by section 27 of the Indian Evidence Act, be used for any purpose at any enquiry or trial, in respect of any offence under investigation at the time when the statement was made, in which he is concerned as a person accused of an offence.

A confession made by a person, not in custody, is, therefore, admissible in evidence against him in a criminal proceeding unless it is procured in the manner described in section 24 or is made to a police officer. A statement made by a person, if it is not confessional, is provable in all proceedings unless it is made to a police officer in the course of an investigation, and the proceeding in which it is sought to be proved is one for the trial of that person for the offence under investigation when he made that statement. Whereas information given by a person in custody is, to the extent to which it distinctly relates to a fact thereby discovered, *not* provable by section 27, yet by section 16, of the Code of Criminal Procedure, such information given by a person, not in custody, to a police officer in the course of the investigation of an offence is not provable. This distinction may appear to be somewhat paradoxical. Sections 25 and 26 were inserted not because the law presumed the statements to be untrue, but because, owing to the tainted nature of the source of the evidence, the law refused them from being received in evidence.

When a person not in custody provides a police officer investigating an offence with information leading to the discovery of a fact having a bearing on the offence, which fact is not in dispute, it may be proved in a proceeding for the trial of that person for the offence. Section 16 of the Code of Criminal Procedure does not prohibit a police officer from using information so provided to him by a person not in custody, provided the person is sufficiently identified by a police officer as the person who gave the information, and the information is relevant against him, provided he has submitted himself to the custody of the police officer within the meaning of section 27 of the Indian Evidence Act. Except in such cases, the information in which a person may give information voluntarily, or even himself before a police officer who is investigating an offence, may not be used against him, and even if a statement in this sort is made by a person, it may not be proved against him.

1. Legal Remembrancer v. Lalit Mohan Singh, 1 L.R. 49 Cal. 167; A.I.R. 1922 Cal. 342; 22 Cr. L.J. 562; Santokhi Beldar v. King Em-

peror, 1 L.R. (1933) 12 Pat. 241; A.I.R. 1933 Pat. 119; 34 Cr.L.J. 349; 112 I.C. 474.

The Deputy Superintendent of Customs and Excise is not a police officer within the meaning of section 25 *post*. A statement made by an accused to such an officer is not let by that section and is admissible in evidence unless the accused can take advantage of the present section.⁵

3. Principle of this section. The ground upon which confessions, like other admissions, are received, is the presumption that no person will voluntarily make a statement which is against his interest unless it be true.⁶ But the force of the confession depends upon its voluntary character.⁷ The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been improperly procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed.⁸ There is a danger that the accused may be led to incriminate himself falsely. The principle upon which confessions are excluded, is that it is, under certain conditions, untrustworthy testimony.⁹ Under certain stresses, a person, specially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is, at the time, the more promising of two alternatives between which he is obliged to choose, that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.¹⁰ The rule, excluding evidence of statements made by a prisoner when induced by hope held out or fear inspired by a person in authority, is a rule of policy.¹¹ A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it.¹² It is not that the law presumed such statements to be untrue, but from the danger of receiving such evidence that Judges have thought it better to reject it for the due administration of justice.¹³

Moreover, the admission of such evidence naturally leads the agents of the police, while seeking to obtain a confession for activity and zeal, to harass

5. *Badku Joti Savant v. State of Mysore*, (1966) 3 S.C.R. 698; (1966) 2 S.C.A. 77; (1967) 1 S. C. J. 701; (1966) 2 S.C.W.R. 154; 1967 M.L.J. (Cr.) 38; 1966 Cr. L. J. 1353; A.I.R. 1966 S.C. 1746, 1750; *The Superintendent, Central Excise, Bangalore v. U. N. Malaviya*, (1968) 1 Mys L.J. 17, 19; (1967) 10 Law Rep. 46; 1967 M.L.J. (Cr.) 509.
6. *Taylor, Ev.*, s. 865; *Phillips and Arn., Ev.*, 401; *Best, Ev.*, 524; *Wills, Ev.*, 102; *R. v. Turner*, (1910) 1 K. B. 346.
7. *Taylor, Ev.*, ss. 872, 874 see remarks in *R. v. Thompson, L. R.* (1893) 2 Q.B. 12 at p. 15.
8. *Russ. Cr.* 412; per Littledale, J., in *R. v. Court*, (1836) 7 C. & P. 486; but in *R. v. Baldry*, (1852) 2 Den. C. C. 430 Lord Campbell, C. J. said: "The reason is not that the law supposes what he will state will

- be false but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury." But see also Lord Campbell's dictum in *R. v. Scott*, (1856) 1 D. & B. 37, 48, and *Taylor, Ev.*, s. 874; *R. v. Nabadwip Goswami*, (1868) 1 B. L. R. O. Cr. 15, 22, 25; *R. v. Thomas*, (1836) 7 C. & P. 545.
9. *Wigmore, Ev.*, s. 822; *Sukhan v. Emperor*, 1929 Lah. 344 at 347; 1 L. R. 10 Lah. 283; 115 I. C. 6; 30 Cr. L. J. 414 (F.B.).
 10. *Wigmore, Ev.*, s. 822.
 11. *Ibrahim v. King Emperor*, 1914 P. C. 155 at p. 160; 23 I. C. 678; 15 Cr. L. J. 326; 18 C. W. N. 705; 1 L. W. 989.
 12. *Rex v. Warickshall*, (1783) 1 Leach C. C. 263; 2 East P. C. 658.
 13. *Reg. v. Baldry*, (1852) 2 Den. C. C. R. 430; 21 L. J. M. C. 130; 5 Cox. C. C. 529; 16 Jur. 599.

and oppress prisoners in the hope of wringing from them a reluctant confession.¹⁴

The reports show that many confessions are induced by improper means; and that innocent people often accuse themselves falsely without any apparent reason. Conspiracies to ruin people by false charges are not an uncommon thing.¹⁵

4. Conditions for validity and admissibility of confessions. Confessions, like other admissions, are relevant and admissible, unless rendered inadmissible by some circumstance of an invalidating character declared by law as, for instance, they are invalid or false within the purview of any of the sections of this Act, or are hit by any other provisions of law. Thus, a confession is inadmissible, if—

(a) it is made by an accused person to a person in authority, and

(b) it appears to the Court that it has been caused or obtained by reason of any inducement, threat or promise proceeding from the person in authority, and

(c) the inducement, threat or promise has reference to the charge against the accused person, and

(d) such inducement, threat or promise is, in the opinion of the Court, such that it appears to it that the accused in making the confession believed or supposed that he would, by making it, gain any advantage or avoid any evil of a temporal nature, in reference to the proceedings against him.¹⁶ They must be voluntary,¹⁷ and true,¹⁸ and they must not be the result of persuasion.¹⁹ Further they must not be made under any inducement etc. proceeding from a police officer or any other person in authority. A statement by accused, before arrest and investigation, to a Magistrate which is exculpatory but contains features which are in the nature of admissions, may be relied upon against the accused.²⁰

5. Appears to the Court. The use of the word 'appears' shows that this section does not require positive proof (within the definition of the third section) of improper inducement to justify the rejection of the confession, such word indicating a lesser degree of probability than would be necessary if proof had been required.²¹ A confession may appear to the Court to have been the result of inducement on the face of it, apart from direct proof of that fact, or a Court might, in a particular case, fairly hesitate

14. Taylor, *Ev.*, s. 874.

15. *Queen-Empress v. Dada Anna*, 1 L. R. 15 Bom. 452, 461.

16. *Laxman v. The State*, 1 L. R. 1965 B. 648; A. I. R. 1965 B. 197; 67 Bom. L. R. 317. See also *Pyarelal Bhargava v. State of Rajasthan*, (1963) 1 S. C. R. 689; 1963 S. C. D. 341; 1963 A. L. J. 459; 1963 A. W. R. (H.C.) 374; 1963 B. L. J. R. 407; 1963 (2) Cr. L. J. 178; A. I. R. 1963 S. C. 193 at p. 196. *Rakshobh Bhargava v. State*, (1969) 55 Cut. L. T. 517, 1969 Cr. L. J. 993 A. I. R. 1969 Orissa 190 at pp. 193, 194.

17. *Mulk Raj v. State of U. P.*, A. I. R. 1959 S. C. 902; 1959 Cr. L. J. 1219; 1960 All. W. R. (H.C.) 118.

18. *In re Ramayee*, A. I. R. 1960 M. 187.

19. *Sri Manta v. State*, A. I. R. 1960 C. 519.

20. *In re Y. Narasimha*, A. I. R. 1966 A. P. 131; (1965) 2 Andh. W. R. 344.

21. *R. v. Basvanta*, 25 B. 168; 2 Bom. L. R. 761. On this and what follows see the able article by Lex in 2 Bom. L. R. 157, as also an article by another contributor at p. 217.

to say that it was proved that the confession had been wholly obtained, and yet might be in a position to say that such a confession must have been the case.²²

The crucial word in the expression "the making of the confession appears to the Court to have been caused by any inducement" is "appears". The appropriate meaning of the word "appears" is "seems". Therefore the test of proof, that there is such a probability of probability that a prudent man would act on the assumption that the thing is "true", is waived under Section 21-N. 5, and a lesser degree of probability is laid down as the criterion. The standard of a prudent man is not completely displaced, but the standard is a probability, not a certainty. Even in the case of proof permitted does not require a probability, but a probability. A *prima facie* opinion, based on a number of circumstances, may be accepted as the standard laid down in other words, on the evidence in the circumstances, in a particular case is not proved to the Court that there was a threat, inducement or pressure, or that the confession was not voluntarily made. This deviation from the strict standards of proof seems to have been designedly accepted by the Legislature with a view to exclude forced or induced confessions, which, sometimes, are extracted and put in. It is not possible to lay down an inflexible standard for magistrates or Courts, for, in the ultimate analysis, it is the Court which is called upon to exclude a confession by holding, in the circumstances of a particular case, that the confession was not made voluntarily.²³ The word "appears" imports a lesser degree of probability than proof of threat or pressure on the accused. He must, however, point out some evidence or circumstances on which a confession or pressure may be grounded or reasonably be based.²⁴ A confession by the accused that he was threatened, tortured or that a bribe was offered to him cannot be accepted as true without more.²⁵

The section does not require proof as defined in Section 3. Well-grounded conjecture is sufficient. And if there is doubt, then the prosecution must satisfy the Court that the confession was voluntary.²⁶ To reject a confession it is not necessary that there should be positive proof to establish

22. *R. v. Basvanta*, 25 B. 168; 2 Bom. L. R. 761; see also *Ragha v. R.*, 1925 All. 627; 89 I. C. 903; 26 Cr. L. J. 1431; 23 All. 1; 118 I. C. 111; *Mst. Kagan v. State of Mysore*, 1965 Pepsu 38; *Nazir v. Emperor*, 55 All. 91; 143 I. C. 67; 34 Cr. L. J. 489; 1932 A. L. J. 111.

23. *Pyare Lal Bhargava v. State of Rajasthan*, (1963) 1 S. C. R. 689; 1963 S. C. D. 341; 1963 A. L. J. 459; 1963 A. W. R. (H.C.) 374; 1963 B. L. J. R. 1; 1963 2 Cr. L. J. 173; A. I. R. 1963 S. C. 1994 at p. 109; *State of Mysore v. D. C. Nanjappa*, (1968) 1 Mys. L. J. 161; 462 Crim. L. D. C. Nanjappa v. State of Mysore, 1971 S. C. Cr. R. 374.

24. *Roshan Lal v. Union of India*, A.

I. R. 1965 Him. Pra. 1.

25. *Hem Raj Devilal v. State of Ajmer*, 1954 S. C. R. 1133; 1955 S. C. A. 50; 1954 S. C. J. 449; 1954 A. W. R. 180; 1954 1 Cr. L. J. 1; 1954 1 Cr. L. J. 1313; A. I. R. 1954 S. C. 462; *Harbans Lal v. State*, 1967 Cr. L. J. 1; A. I. R. 1967 Him. Pra. 10.

26. *R. v. Panchkari*, 1925 Cal. 587; I. L. R. 52 Cal. 67; 86 I. C. 414; 26 Cr. L. J. 782; 29 C. W. N. 300; *Mst. Begum v. State of Pepsu*, 1965 Pepsu 38; *Mst. Kagan v. Emperor*, 1965 S. C. 1994 at p. 109; *Nag*, 147; 49 Cr. L. J. 561; 1948 N. I. J. 1; *State of Mysore v. D. C. Nanjappa*, 1971 S. C. Cr. R. 374.

that the confession has been obtained by use of threat, persuasions, etc. Any thing from the barest suspicion to positive evidence would be enough for a confession to be discarded.⁵ If circumstances create a probability in the mind of the Court that the confession was improperly obtained, it should exclude it from evidence.⁶ If it appears to the Court from the circumstances of a particular case that the confession has not been made voluntarily, it must reject it as irrelevant. Such circumstances should be presumed to exist, in cases where an accused person in police custody makes a confession.⁷

6. Burden of proof. Procedure in recording confessions. In England, the case-law has not been uniform. On the one hand it has been held that a confession is presumed to be voluntary, unless the contrary is shown,⁸ and the result that it is *prima facie* admissible, and can only be excluded, when it is proved or made to appear that the confession was not voluntary. On the other hand it has been held that the material question is, whether a confession has been obtained by improper inducement, and the evidence on this point being in its nature preliminary is addressed to the Judge who should require the prosecutor to show affirmatively to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, should reject the confession.⁹ In *R v. Thompson*⁷ the headnote of the report states the decision to be that in order that evidence of a confession by a prisoner may be admissible it must be affirmatively proved that such confession was free and voluntary, and this view has been adopted in *Roscoe on Criminal Evidence*.⁸ No doubt, the Court stated that the test by which the admissibility of a confession may be decided was had it been proved affirmatively that the confession was free and voluntary.⁹ But the proposition in the headnote appears, when the whole case is considered, to be too broadly laid down. In this case, it is stated, that there was ground for suspicion,¹⁰ and Cave, J. who delivered the judgment of the Court, says later on,¹¹ "I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt that the prisoner's statement was free and voluntary."

In *Ibrahim v. Emperor*¹² their Lordships of the Privy Council reviewed the case-law, and observed :

"It has long been established, as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless

⁵ *Raghu v. Emperor*, 1925 All. 627 at p. 637 (F.B.) per Mukherji J. 89 I. C. 903.

⁶ *Narain v. Emperor*, 1933 All. 31. T. L. R. 1933 143 I. C. 67. 54 Cr. L. J. 19. 1932 A. I. J. 1125. *Pratt v. Attorney-General*, 1943 Mal. 1943 Cal. 625; 1. L. R. (1943) 1 Cal. 487; 209 I. C. 550; 45 Cr. L. J. 155.

⁷ *Thompson v. The King*, 1939 Rang. 219; 182 I. C. 705; 40 Cr. L. J. 691.

⁸ *R. v. Williams*, 3 Russ. Cr. 497; see also *R. v. Clewes*, (1830) 4 C. & P. 221, *R. v. Swathins*, (1831) 4 C. & P. 548; *Roscoe, Cr. Ev.*, 16th Ed., 47.

⁹ *R. v. Warringham*, (1851) 2 Den. C. C. 44n where Parke B., said to counsel for the prosecution: "You are bound to satisfy me that the confession which you seek to use against the prisoner was not obtained from him by improper means." *Taylor, Ev.*, s. 872.

¹⁰ (1893) 2 Q. B. 12.

¹¹ 16th Ed., p. 47.

¹² *R. v. Thompson* (1893) 2 Q. B. 12 at p. 17.

¹³ *Ib.* at p. 17.

¹⁴ *Ib.* at p. 18.

¹⁵ 1914 P. C. 155; 1914 A. C. 599; 23 I. C. 678; 15 Cr. L. J. 326; 18 C. W. N. 705; 1 L. W. 989.

(3) The accused is remanded to the sub jail with instructions to the Sub-jail Superintendent who is generally the Stationary Sub-Magistrate himself to keep the prisoner separate from other prisoners and cut off all access to the police investigating the case²⁵ and normally one day's time is given for reflection.

(4) On the appointed day, when the accused is produced after the interval Court and during working hours, the Magistrate once again asks him if he wishes to make a confessional statement and if the accused says 'yes', he is once again warned that he is not bound to make a confessional statement and that if he does so it might be used as evidence against him and that it is not intended to take him as an approver and if the accused still states that he wants to make a statement, the Magistrate puts to him the questions set out in the Criminal Rules of Practice of the Madras High Court¹ and similar orders of other High Courts and records the questions and answers. If the Magistrate is satisfied both from the answers and the demeanour of the accused that the statement of the accused is going to make will be a voluntary and not a tutored or enforced one, the Magistrate records this satisfaction of his in continuation thereof and proceeds to take down the statement in the narrative form, see Rule 85 of the Criminal Rules of Practice. The questions, assurances and the answers may conveniently be appended to the memorandum prescribed by Sec. 161 (4), Criminal Procedure Code². The confessions must be recorded in the language in which it is received, or if that is not practicable in the language of the Court, or in English.

(5) After recording the statement the Magistrate reads it and if necessary gets it interpreted to the accused and if it is admitted by him to be correct, his thumb impression or signature is got affixed thereto. The Magistrate then signs the record and certifies it as prescribed and appends the memorandum prescribed under Sec. 161 Criminal Procedure Code, to the foot of the statement. The entire record will thus consist of (i) note regarding the warning given to the prisoner and the time given for reflection on his first production in pursuance of requisition to record confessional statement; (ii) note regarding the warning given to prisoner when produced after interval, the questions put to him and the answers given by him; (iii) the note of the Magistrate that he is satisfied that the confession was going to be made voluntarily; (iv) the confessional statement in the narrative form; (v) the certification of the deposition; and (vi) the memorandum appended to the foot of the statement. The accused who has either made a confessional statement or declined to make one should be returned to the jail and not sent back to police custody.

These rules which at first sight may appear complicated and grandiose, are based upon sound reasons as has been pointed out in the case-law on the subject. Jeremy Bentham has pointed out: "If the laws were constantly accompanied by a commentary of reasons, they would be more

²⁵ R. 85 Criminal Rules of Practice, Madras, 1903, Part I.

1. Rule 85 (1) and (2).

Rule 85 (3) Part I, Part Criminal Rules of Practice, and S. 281 (1), Criminal Procedure Code.

his production of the confessional statement being recorded, and the Magistrate should ensure that the investigating police in the case have no access to the accused prior to the confession and intended to prevent unfair practices and pressure being brought on the accused to confess.¹⁰

In *Pratt v. Attorney-General* to be put, the Madras High Court and other High Courts have each promulgated a questionnaire which would seem to cover the points in the Code. The Magistrate would not merely repeat the questions to the accused but must intelligently know the spirit and make sure that the accused fully understands that the confession will be given in evidence against him and that there was no intention, if there were more than one person, of taking him as an approver and that he has not in any way been coerced, threatened or promised and that he has a real motive. Like, confession is given in the face of the overwhelming evidence against him and he confesses. In recording the confessional statement in the Court the Magistrate should be administered to the confessing accused. But the confession is a voluntary and true one. The accused giving a confessional statement may be questioned, so far as may be necessary, to enable the Magistrate to ascertain what facts he is willing to state to understand exactly what he is saying and how far he intends his confession or admission to go. If the statement contains any ambiguity it is the duty of the Magistrate to question the accused and give the accused a chance to make his statement intelligible. If a confession is of great weight, it can be recorded notwithstanding the cause of questioning by a Magistrate, if the accused confesses that he was beaten by the police, the Magistrate must examine his wounds and report.¹¹ If in the later stages of recording the confessional statement the accused starts complaining of ill-treatment by the police, the Magistrate must pause in this matter and satisfy himself first about the voluntariness of the statement.¹²

The question of irregularity of confessions lawfully recorded, has been made obsolete by the provisions of Sec. 534 of the Criminal Procedure Code, 1908 as amended by the New Code. That section provides for remedying defects in evidence and irregularities under Sec. 104 and 105 of the Code under Sec. 364 of the new Code. But every defect cannot be remedied under that section. Wherever an irregularity is alleged to have been committed in recording a confession the Court should consider the nature of the irregularity alleged and decide whether the same can be cured by examining the Magistrate under Sec. 534 of the Code of 1908, Section 403 of the new Code. If the Magistrate has not even purported to act under Sec. 104, when it was of force, Sec. 364 of the old Code (Sec. 403 of the new Code) cannot

10. *Pratt v. Attorney-General*, A. I. R. 1934 Oudh 151 and *Gurubaru v. The King*, A. I. R. 1949 Orissa 67; I. L. R. 1949 Cut. 207.
11. *Karam Ilahi v. Emperor*, A. I. R. 1947 Lah. 92; 225 I. C. 544.
12. *N. M. v. Emperor*, A. I. R. 1937 Nag. 220; I. L. R. 1937 Nag. 101.
13. *Abdul Jalali Khan v. Emperor*, A. I. R. 1930 All. 746; 128 I. C. 593.

14. *N. M. v. Emperor*, A. I. R. 1937 Nag. 220; I. L. R. 1937 Nag. 101.
15. *Chavadappa v. Emperor*, A. I. R. 1945 Bom. 292; 221 I. C. 86.
16. *Barhma v. Emperor*, 228 I. C. 21; A. I. R. 1947 Cutt. 101. *Baru Musalavva v. The State*, 1953 M. W. N. 434 at p. 456 (Ramaswami J.).

be invoked to render the Magistrate's evidence admissible.¹⁷ Any defect, in recording a statement which had been duly made, can be cured under Sec. 533 of the old Code (Section 463 of the new Code), by calling further evidence to prove that it had been duly made. This section is not in any way controlled by the provisions of Sec. 161, Evidence Act, and therefore, even if, in a case, where a statement is required by law to be reduced to the form of a document, and it has not been duly recorded, can be given in proof of that statement. This would meet a case where although Sec. 164 or Sec. 304 (Section 281 of the new Code) requires that certain things should be recorded by a Magistrate, and he has omitted to do so, the Court can admit the statement by calling oral evidence to prove that the statement had in fact been duly made. But there is a safeguard in the section that a statement which has not been recorded in accordance with law cannot be taken in evidence if the error has injured the accused as to his defence on the merits.¹⁸

If the defects in the record cannot be cured under Sec. 533 of the old Code (Section 463 of the New Code) no secondary evidence can be given of a confession under Sec. 160 of Section 535 of the old Code (Section 463 of the New Code) will not render a confession taken under Sec. 304 admissible, where no attempt has been made to conform to the provisions of the latter section.²⁰

Under Sec. 304 of this Act, whenever any document is produced before any Court purporting to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate, the Court's duty is to find that the document is genuine, that any statement or confession contained therein was in fact made by the person or persons under which it was taken purporting to be made by the person or persons named therein and that such evidence, statement or confession was duly taken. But in order to bring the section into operation, the Magistrate must have had jurisdiction to record a confession and he could have no jurisdiction if the provisions of Sec. 164, Cr. P. Code, had not been complied with.²¹ The presumption under Sec. 80 would ordinarily not arise, if the statement or confession had not been 'taken in accordance with law'.²² A confession recorded by a Magistrate, without conforming to the provisions of Sec. 164 or Sec. 304, New Section 281 of the Code of Criminal Procedure is inadmissible in evidence.²³ All that Sec. 80 says is that the Court will presume

17. *Rangappa v. State*, 1954 Bom. 235; I. L. R. 1954 Bom. 484; 56 Bom. L. R. 115.

18. *Mohammad Ali v. Emperor*, 1934 All. 81; I. L. R. 56 All. 302; 147 I. C. 390 (F.B.); see also *Baliram Singh v. Emperor*, 1939 Nag. 295; 184 I. C. 274; 1939 N. L. J. 442; *Nga Thla Maw v. Emperor*, 1937 Rang. 350; 164 I. C. 162; *Ranjit Singh v. State*, 1952 H. P. 81; 1952 Cr. L. J. 1720.

19. *R. v. Ashby* (1885) 11 M. 484; *Jai Narayan v. R.*, (1890) 17 C. 862.

20. *Nazir Ahmad v. Emperor*, 1936 P. C. 253 (2); 63 I. A. 372; I. L. R. 17 Lah. 629; 163 I. C. 881; see also *Bala Majhi v. State of Orissa*, 1951 Orissa 168; I. L. R. 1951 Cut. 65 (F.B.); *R. v. Visram*, *supra*; *Jai Narayan v. R.*, *supra*; latter case

dissented from in *R. v. Visram*, (1896) 21 B. 495, 501.

21. *Emperor v. Kommoju*, 1940 Pat. 163; I. L. R. 19 Pat. 301; 188 I. C. 57, per Meredith, J., followed in *Punia Mallah v. Emperor*, 1946 Pat. 169; I. L. R. 24 Pat. 646; 228 I. C. 51; but see *Emperor v. Jamuna*, 1947 Pat. 111; I. L. R. 25 Pat. 612.

22. *Mohammad Ali v. Emperor*, 1934 All. 81; 56 All. 302; 147 I. C. 390 (F.B.); *Rangappa v. Emperor*, 1954 Lah. 247; I. L. R. 16 Lah. 912; 161 I. C. 339.

23. *In re Thothan*, 1956 Mad. 425; *State of Orissa v. Jayadhar*, 1975 Cut. L. R. (Cri.) 433; *Shital Singh v. State*, 1975 Cri L. J. 690; *State v. Lohang Shorap*, 1973 Cri. L. J. 85 (Him. Pra.).

that the confession was duly recorded and that the circumstances under which the confession was recorded were such as have been set down in the record made by the Magistrate. It says nothing about there being any presumption regarding the voluntariness of the confession.¹ The certificate recorded by a Magistrate at the foot of the confession is not conclusive, and facts may be proved which may lead the Court to think that the confession was not voluntary.²

A confession duly recorded by the Magistrate, with the prescribed certificate appended to it, may be presumed to be voluntary and as such admissible, but this admissibility is subject to the restrictions contained in Sec. 24, Evidence Act.³ However, under the wording of Sec. 24 of the Evidence Act and also to the provisions of Sec. 80, to certain recorded confessions, and arising under Sec. 80 of the Act, the law and generally recognized view is, that a confession duly recorded by a Magistrate with the proper certificate appended to it will be admissible in evidence subject to the provisions and restrictions contained in Sec. 24, that under the latter section, it was founded on conjecture, reasonably based upon circumstances, as used in the evidence, is sufficient to exclude the confession, because it would be idle to expect the accused to prove the inducement, threat or promise, for, in most cases, such proof cannot be available.⁴ Where a Sessions Judge was having regard to all the evidence, of opinion that a confession had been induced by torture but left it to the jury for consideration, regarding the matter, in his opinion it was worthless, it was held, that the Sessions Judge misunderstood the effect of the provisions of Sec. 80, and that it was a proper course of law to leave the confession for the jury's consideration.⁵

It is the duty of the Magistrate to satisfy himself that the confession is not excluded by this section.⁶ But it appears to have been the opinion of Sir

24. *Emperor v. Thakur Das*, 1943 Cal. 625, 627; 1 L. R. (1943) 1 Cal. 487; 209 I. C. 550; 45 Cr. L. J. 155.
25. *Nar Singh v. Emperor*, 1922 Oudh L. R. 24; 21 Cr. L. J. 561.
1. *Nar Singh v. Emperor*, 1924 Cal. 636; 1 L. R. 61; Cal. 399; 152 I. C. 41; 35 Cr. L. J. 1479; 38 C. W. N. 129.
2. *Emperor v. Panchkari Dutt*, 1925 Cal. 587; 1 L. R. 52; Cal. 67; 86 I. C. 411; 26 Cr. L. J. 782; 29 C. W. N. 300.
3. *Basid Sheikh v. King*, 1950 Cal. 721; 1 L. R. 1; 100 I. C. 1; 100 Cr. L. J. 1.
4. *R. v. Jadub*, 27 C. 295; 4 C. W. N. 129; *R. v. Baswanta*, (1900) 2 Bom. L. R. 761; see Circular of Bombay High Court (Bombay Government Gazette, 1900; Part I, p. 919); *R. v. Cunna*, 22 Bom. L. R. 1247; requiring Magistrates before record-

ing confessions to satisfy themselves by all means in their power including the examination of the bodies of the accused, that confessions are voluntary; see *R. v. Gunesh*, (1865) 4 W. R. 101; where the prisoner retracted his statement when read over but he was compelled to make it, and the Sessions Judge without making any inquiry or taking evidence upon the point submitted the prisoner's statement to the jury as a confession, it was held that the Judge was wrong in so doing and that he should rather have charged the jury not to accept the statement as a confession. As regards the Sessions Court it has been held that it is not necessary for a Sessions Judge to read out to prisoners confessions made by them before a Magistrate and ask them if they have any objection to the reception of their confession; *R. v. Misser*, (1870) 14 W. R. Cr. 9.

Michael Westropp in *R. v. Kashinath*,⁵ that not only the committing Magistrate, but also the trying court, ought to make needful enquiries, where allegations are made in a regular and proper manner to the Sessions Court that a confession before a Magistrate was improperly induced, a procedure which was followed in the English Courts so far back as the 12th century.⁶

It is to be noted, however, that such certificates are often not worth much as evidence of the absence of inducement. Assuming that a prisoner has been induced to confess, he will not unlikely assure the recording Magistrate that his confession is quite voluntary, knowing that he will leave the Magistrate's presence in the custody of the police, and remain in their charge for many days to come.⁷

In the case of extra-judicial confessions, there is no such *prima facie* evidence as that afforded by the certificate. In both cases, however, there is to be considered the effect of the word "appear" in this section. This, as already stated, does not connote strict "proof". Still, although very probably a confession may be rejected on well-grounded conjecture, there must (unless the onus lies upon the prosecution) be something before the Court on which such conjecture can rest.⁸ The mere bald assertion by the prisoner that he was threatened, tutored or that inducement was offered to him, cannot be accepted as true without more.⁹ It is not the law that an extra-judicial confession is of inferior category. Its probative value is high when it is made voluntarily by the accused immediately after the crime with every token of truthfulness and repentance, even if it be momentary.¹⁰ But it is subject to one immunity that the actual words are not preserved, the only medium is recollection.¹¹ If it be reduced to writing the rule is that the Court may act upon it even if it be resiled from, if, in its opinion, its general trend is substantiated by some evidence which would tally with what is contained in it.¹² An extra-judicial confession cannot, however, be relied upon, where made in the presence of a person who subsequently turns approver. As an approver is no better than an accomplice, his testimony on the extra-judicial confession needs independent corroboration.¹³

Questions may arise, does the onus lie upon the prosecution in all cases to prove that a confession is voluntary, before it can be used in evidence? If this be the law in England, which is doubtful, it has been held that such a rule does not prevail in this country. In the absence of evidence, it is no

5. 8 Bom. H.C.R. 126; 138 Cr. C. 126.

6. See also Michael Westropp, *History of English Law*, 4th ed., pp. 650, 651, see also *R. v. Kashinath*, 25 B. 748, 749 in L. R. 122; *Rangappa v. State*, 41 Bom. L. R. 1954; 48 Bom. 484; 1955 Cr. L. J. 887; 56 Bom. L. R. 115.

7. See remarks of Westropp, C. J. in *R. v. Kashinath*, 8 Bom. H. C. R. 126.

8. *R. v. Barwanta*, (1900) 2 Bom. L.

R. 761, 765.

9. *Hemraj v. The State of Ajmer*, 41 S. C. 462, 1955 Cr. L. J. 118, 1154 S. C. J. 449, (1954) M. L. J. 194, 154 M. W. N. 368.

10. *Ramayee, In re. A. I. R.* 1960 Mad. 185.

11. *Chinnasami, In re. A. I. R.* 1960 Mad. 462.

12. *Angnu v. State*, 1960 All. L. J. 28.

13. *The State v. Dehnu, A. I. R.* 1957 Him. Pr. 52; 1957 Cr. L. J. 691.

THE FACT OR PROMISE, WHEN IRRELEVANT IN CRIMINAL PROCEEDINGS

to be presumed that a statement objected to on the ground of its having been induced by illegal pressure is inadmissible¹⁴.

The decision of the question whether the prosecution is to adduce formal proof of voluntariness of the confession or the defence is to adduce formal proof of the involuntariness of the confession is as pointed out by Horwath, J., in *Raja Chandra Pabanna v. Emperor*,¹⁵ an academic one. In order to make a confession irrelevant under section 24 of the Evidence Act it must appear to the court to have been caused by inducement, threat or promise etc. It is for the Judge to decide the voluntariness of a confession and, in given cases, it is for him to direct the jury as to its truth. The word 'appears' indicates a lesser degree of probability than the word 'proof' as defined in section 3 of the Act. It was designedly used by the Legislature in the interest of the accused who is often in custody. In such cases it is well nigh impossible for him to adduce positive proof in support of inducement, promise or threat offered to him by the police. Therefore, it has been repeatedly held that a well-grounded suspicion based on facts and surroundings in a case is enough to exclude the confession from consideration. It is for the court to decide whether the confession was voluntarily made or not. This conclusion is arrived at by the Judge on a full consideration of all the circumstances of the evidence of a given case and is dependent on the action and reaction of the efforts of both sides to make a confession appear one way or the other.

The remarks of Horwath, J. in *Raja Chandra Pabanna v. Emperor* are pertinent :

The Indian Evidence Act does not put the onus of proof on either side. Section 11 makes confession a defence and says that it may be proved against the person who makes it. Section 24 does not say a confession which amounts to a confession and is not a promise or threat etc. The wording of Sec. 24 suggests that it refers to a case where an accused may have been induced to make a confession by a person in authority. A confession would be relevant under Sec. 24, Evidence Act without any formal proof of its voluntariness made by the statement. It has generally been the practice of the Courts in this Presidency to require from the prosecution formal evidence that a confession was voluntary. There is a considerable variation of opinion on this point and the accused always questioned by the Court about his confession. It is customary for the Court to consider the suggestions made in cross-examination and the statement of the accused and for the Court then to decide whether there is anything in those suggestions or in the

14. *R. v. Balvant*, (1874) 11 Bom. H. C. R. 137, 138; *R. v. Dada*, (1889) 15 B. 452, 480; *R. v. Bhairon*, (1880) 3 A. 338, 339. A prisoner alleging that a confession was unduly extorted should offer some proof of his statements to the Courts. So, an accused retracting a confession alleging that it was caused by ill-treatment by the police, has, it is

15. *R. v. Balvant*, (1874) 11 Bom. H. C. R. 137, 138; *R. v. Dada*, (1889) 15 B. 452, 480; *R. v. Bhairon*, (1880) 3 A. 338, 339. A prisoner alleging that a confession was unduly extorted should offer some proof of his statements to the Courts. So, an accused retracting a confession alleging that it was caused by ill-treatment by the police, has, it is
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evidence which would lead it to suspect that the confession was not voluntary. The discussion whether formal proof by the prosecution of the voluntary nature of the confession is necessary is an academic one since the prosecution sets out the circumstances under which the accused was questioned."

In this connection, the observation of Jagannadhradas, J. (as he then was) in *Bala Maya v. State of Orissa*¹⁸ may be referred to:

"The terms in which Sec. 24, Evidence Act, is couched seem to indicate that in the case of an ordinary confession, there is no initial burden on the prosecution to make out the negative, viz. that the confession sought to be proved or admitted is not vitiated by the circumstances stated in the section. It is the right of the accused to have the confession excluded and equally the duty of the Court to exclude it even *suo motu*, if the vitiating circumstances 'appear'."

The position is that confessions other than what may be called police-confessions are admissible subject to their being excluded by the "appearance" of vitiating circumstances mentioned in Sec. 24. A magisterial confession can be proved only by the record of that confession and that the record cannot go in against the accused at the trial, unless it is one that is made in substantial compliance with the provisions of Sec. 164 Cr. P. C., including the fair belief of the recording Magistrate as to the voluntary character of the confession arrived at on a judicial approach. But once the record goes in, it is for the accused to make out or for the Court to find the appearance of vitiating circumstances mentioned in Sec. 24 in order to exclude it. It is also to be noted that even in the matter of finding whether or not there has been substantial compliance with the terms of section 164, prosecution has the initial advantage of relying on the presumption of Sec. 80, Evidence Act and of the corresponding provisions of Sec. 53 Cr. P. C. of 1898 (Section 463 of the Code of 1973).

7. Evidentiary value of confessions. Confessional statements may be classified into—

- (a) made by persons not in custody, and
- (b) made by persons in custody.

Confessional statements made by persons not in custody are admissible in evidence against such persons in criminal proceedings unless

- (a) they are procured in the manner described in this Section, or
- (b) made to a police officer.

Confessional statements made by persons in custody, except those in the presence of a Magistrate, are not provable except to the limited extent permitted by Section 27 of the Act as to discovery of the information, whether confessional or otherwise, which, strictly speaking, is to a fact thereby discovered and no more.¹⁹

18. A. I. R. 1951 Orissa 168; 53 Cr. L. J. 1743 (F.B.); I. L. R. 1951 Cut. 65.
19. *Punja Maya v. State of Gujarat*, A. I. R. 1965 Guj. 5; relying on State

of U. P. v. Deoman Upadhyaya, (1961) 1 S. C. R. 14; A. I. R. 1960 S. C. 1125; 1960 All. L. J. 733; 1960 Cr. L. J. 1504; 1960 A. W. R. (H. C.) 568.

Hasty confessions made to persons having no authority to examine are the weakest of every substance of all evidence. Words are often misreported through ignorance, forgetfulness or malice and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative evidence by which proof of plain facts may be controverted. Such confessions are spoken to by persons who have a motive to implicate the accused. It is dangerous to the extreme to act on a confession put into the mouth of the accused by a witness who had strong motive for implicating someone else in the crime and uncorroborated from any other source. Some material corroboration should be required to such confessional statements if the Court holds them to be voluntary and true. Subject to the above, the confession of an accused person is substantive evidence and a conviction can be based thereon. If a confession is not hit by sections 24, 25, 26 or 27 of this Act, or by section 164 Criminal P. C., it would be admissible in evidence and it believed good enough to form the basis of conviction on any charge.¹ However, the Court must be satisfied that the maker of confession were not influenced by pressure, threat, promise or inducement.²⁵

Confessional statement of a confessed cannot be treated as substantive evidence but can be used to confirm the conclusion regarding the guilt of the accused arrived at upon other evidence.¹

An extrajudicial confession is usually subject to infirmities. The evidential value of such confession depends upon the particular facts and circumstances of each case. Once the offence is established by the prosecution by independent evidence, the confession can be taken into consideration to find out who the offender is. In the circumstances of a case it may not be safe to rely on the judicial and extrajudicial confessions.

Short variations in the description etc. do not affect the evidential value of a confession.⁴

The confessional statement of an accused person must be put to him in his examination under section 342, Cr. P. C., 1898 (Section 340 of the New Code). If this is not done and there is no other evidence against the accused person, his conviction cannot be sustained in law.⁵

20. In re Muthukarunga Konar, A. I. R. 1959 M. 177.

21. Harold White v. The King, A. I. R. 1945 P. C. 181.

22. Ratan Gond v. State of Bihar, 1959 S. C. R. 1336; I. L. R. 37 Pat. 1409; A. I. R. 1959 S. C. 18; 1959 Cr. L. J. 108; 1959 B. L. R. 1; 1959 All. L. J. 35; 1959 M. P. C. 46; 1959 M. L. J. (Cr.) 109.

23. State v. Balchand, A. I. R. 1960 Raj. 101.

24. Nika Ram v. State of H. P., 1971 Sim. L. J. (H.P.) 190; 1972 Ori. L. J. 204 (Him. Pra.).

25. 1973 Cut. L. R. (Cri.) 402 (Orissa).

1. 1972 Cut. L. R. (Cri.) 554 (Orissa); In Re Balan Balusami Mudali, 1973 L. F. 91.

Cri. L. J. 1311 (Mad.); I. L. R.

1) 1960 Pat. 100; Nika Ram v. State of H. P., 1972 Cri. L. J. 204 (Him. Pra.); Jogindra Nath v. State of Assam, 1977 Cri. L. J. 1309; Md. Yunus v. State of Bihar, 1977 Cri. L. J. 1243 (Pat.).

2. In Re Chinnasami, A. I. R. 1960 M. 462.

3. Kandasamy v. State, 1968 M. L. J. (Cr.) 291; 1968 M. L. W. (Cr.) 36; (1968) 1 M. L. J. 372 at pp. 374, 375.

4. In re Bandi Murugulu, I. L. R. (1961) 1 A. P. 123; A. I. R. 1963 A. P. 87.

5. Ramavatar Harijan v. State, 1960 Assam L. R. 89, 91.

8. **Retraction of confession, effect of.** If a confession which has been previously made, whether judicially or extra-judicially, is not retracted at the trial, there appears to be little or no reason why it should not be accepted without any proof being given of its voluntary character. The law does not require that the confession of an accused person should be corroborated before it is acted upon. It is for the Court to say whether the confession is to be believed or not. This is, however, not so, where, as is frequently the case, the confession is retracted at the trial. In a very large percentage of Sessions cases the prisoners will be found to have made elaborate confessions shortly after coming into the hands of the Police; not infrequently these confessions are adhered to in the Committing Magistrates Court, they are almost invariably retracted when the proceedings have reached a final stage and the prisoner is at the Bar of the Sessions Court. These recurrent phenomena, peculiarly suggestive in themselves, can scarcely fail to attract the anxious notice of Judges who regard the efficient administration of justice as a matter in which they are directly and personally implicated not as a mere routine work mapped out for them in the higher tribunals.⁶ The retraction of confession is, as was said by Stoughton, J., in *R. v. Babu Lal*,⁷ "an endless source of anxiety and trouble to those who have to see that justice is properly administered."

In *R. v. Turner & Cave*, J. said: "I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given where the proof of the prisoner's guilt is once wise court is satisfactory, but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire, born of penitence and remorse, to supplement it with a confession, a desire which vanishes as soon as he appears in a Court of Justice." Were it not for the presumption raised by Sec. 80 of this Act, the rule which should be followed in cases of retracted confessions is to throw the onus on the prosecution of affirmatively proving the voluntary character of the confession. No doubt, abstractly considered, the mere fact that a confession is retracted raises no inference of improper inducement.⁸ Such retraction may be due to the fear of punishment for an offence which has been the subject of a true and voluntary confession. Having regard, however, to the notorious fact that confessions are frequently extorted in this country,⁹ retraction might not improperly be held to rest upon the prosecution the onus of showing that the confession was a voluntary one. When a prisoner has confessed and afterwards pleads not guilty, the truth and voluntariness of the confession is denied by implication. When a prisoner

6. *Queen-Empress v. Baswanta*, 2 Bom. L. R. 761.

7. *See* *R. v. A. Lal*, 133 reported in *R. v. Dada*, (1889) 15 B. 452, 461. I. E. 1889, 2 O. B. 1889, and was quoted in the Deputy Local Registrar v. Kargur, 1893, 22 C. 164 at 172.

8. *Pharho Shahwali v. Emperor*, A. I. R. 1923, 27 143 I. L. J. 292. *Emperor v. Bhagwandas*, 1941 Bom. 191 I. L. J. 1941 P. 27 122 I. C. 671; 42 Bom. L. R. 938; *Abdul*

Gafoor v. Emperor, 1941 Nag. 145; I. L. R. 1941 Nag. 169; 193 I. C. 320; 1 I. J. 325. 1941 N. L. J. 345. So in *Sheo Prasad v. R.*, 1941 P. 27 122 I. C. 50 20 Cr. I. J. 1941, we held that the fact of retraction would not necessarily deprive a confession of its (prima facie) voluntary character.

9. *See* *Regan v. State*, 1955 Pepsu 33, see cases cited post.

says he has been forced to confess, he is not bound upon judicial inquiry, and that inquiry, if it discloses the truth, may lead to the admission of the confession and a conviction. As however, the law now stands, provided the confession is made before a Magistrate or a prisoner before a Magistrate is admitted to the prison, even though the confession be retracted by the prisoner, a mere subsequent retraction of a confession which is admitted by a Magistrate is not enough in all cases to make it inadmissible. The burden of showing it to be inadmissible lies upon the accused.¹⁴ Where the confession is a mere retraction is not sufficient to render it inadmissible.¹⁵

9. Corroboration, necessity of. It is a general rule of practice that it is unsafe to rely upon a confession, much less a retracted confession, unless the Court is satisfied that (1) the retracted confession is true and voluntary and (2) has been corroborated in material particulars. A finding that there is such corroboration is one of fact. It is now well settled that there is a conviction based on a retracted confession, whether judicial or extrajudicial, is not strictly

11. *Queen Empress v. Baswanta*, 2 Bom. L. R. 761.
12. *Mst. Khuban v. Emperor*, 1930 All. 29; 120 I. C. 257; 37 Cr. L. J. 26; *Pharlo Shidwadi v. Emperor*, A.I.R. 1932 Sind 201; *Emperor v. Bhagwardas* 1941 Bom. 50; *Mridul Gafoor v. Emperor*, A. I. R. 1941 Nag. 14; 1 I. R. 1941 Nag. 16; *R. v. Mongol*, 1886, 6 W. R. Cr. 81; *R. v. Jama*, (1867) 8 W. R. Cr. 40; *R. v. Balvant*, (1874) 11 Bom. H. C. R. 137; *R. v. Petta*, (1865) 4 W. R. Cr. 19 (when) prisoners confess in the most circumstantial manner to having committed a murder, the finding of the body is not so absolutely essential to a conviction. *R. v. Balldandeen*, (1886) 11 W. R. Cr. 20; a Judge held that a proper passing of sentence of death in a case in which the dead body was not found; *R. v. Bhutun*, (1869) 1 W. R. Cr. 49 (the properly attested confession of a prisoner before a Magistrate is sufficient for his conviction without corroborative evidence and without standing a subsequent denial before the Sessions Court, where there was no conduct of the police, it is not that the prisoners could not be trusted in their own retracted statements without any corroboration. *R. v. Balldandeen v. R.*, (1886) 11 W. R. 132; see also *Sheopra v. R.*, 20 Cr. L. J. 16.
13. *R. v. Baswanta*, (1900) 25 B. 168; *Emperor v. Katchi Katchi*, 1908 Cal. 72; 47 I. C. 811; 22 C. W. N. 809; 19 Cr. L. J. 959.

14. *Pharlo Shidwadi v. Emperor*, A. I. R. 1932 Sind 201; 141 I. C. 392.
15. 1974 Punj. L. J. (Cri) 167.
16. *Pyare Lal Bhargava v. State of Rajasthan*, 1963 1 S. C. R. 689; 1963 S. C. D. 341; 1967 A. L. J. 479; 1963 A. W. R. (H.C.) 374; 1963 B. L. J. R. 407; (1963) 2 Cr. L. J. 158; A. I. R. 1963 S. C. 1094; 1927 *Puran Singh v. State of Punjab*, A. I. R. 1953 S.C. 459; *Hem Raj Devi Lal v. State of Ajmer*, A. I. R. 1954 S. C. 462; *Balbir Singh v. State of Punjab*, A. I. R. 1957 S. C. 216; *Ram Chand Prasad Sharma v. State of Bihar*, 1966 B. L. J. R. 920 (S.C.); *Gandey v. State of Punjab*, L. R. 963 365 strong and latest corroboration as to factum of crime and as to identity. *Mangru Nagabanshi Mehta v. State of Bihar*, 1960 P. L. J. R. 195, 201; *Himat Singh Budhar Singh v. State of Gujarat*, I. L. R. 1964 Guj. 804; (1964) 5 Guj. L. R. 897; (1965) 2 Cr. L. J. 753; A. I. R. 1965 Guj. 502; *Devi Prasad v. State*, 1967 Cr. L. J. 134; A. I. R. 1967 All. 64 (the authorities, *Pyare Lal Bhargava v. State of Rajasthan*, supra; *Subramania Gounder v. State of Madras*, A. I. R. 1958 S. C. 66 and *Balbir Singh v. State of Punjab*, A. I. R. 1957 S. C. 216 do not go to the extent of saying that a retracted confession cannot be used even for the purpose of corroborating other evidence against the accused. In the case be cause it comes from a tainted source. *Shri Singh v. State*, 1969 71 Punj. L. R. D) 198, 200.

illegal, still it is a rule of prudence to base a conviction on it only if the same has been corroborated by other independent evidence.

The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated, nor is it essential that the facts and circumstances discovered after the confession should corroborate it. The rule would be in vain if the independent evidence itself would afford sufficient basis for the conviction and it would be unnecessary to call in aid the confession. Apart from the general rule of prudence, if the circumstances of a case make the genuineness of a confession suspect, it is sufficient to require corroboration for conviction.¹⁷

Corroboration is of two kinds :

- (1) general corroboration and
- (2) corroboration in material particulars.

The latter requires independent evidence which in some way reasonably connects or tends to connect the accused with the crime. In the case of a retracted confession, however, general corroboration is sufficient. The Court has to be satisfied that the reasons given for the retraction are unimpeachable. The Supreme Court in a later decision has pointed out that a retracted confession must be looked upon with great concern unless the reasons for having made it in the first instance (not for retraction as erroneously stated in some cases) are on the face of them false.²⁰

If the confession is proved to be true by a reference to other facts and circumstances, then the confession can be accepted.

Usually and as a matter of caution courts insist that there should be some material corroboration to an extra-judicial confession made by the ac-

17. *Balbir Singh v. Punjab State*, A. I. R. 1957 S. C. 216; 1957 Cr. L. J. 328. See also *Srinivasulu. In re*, (1957) 2 Andh. W. R. 63; A. I. R. 1958 A. P. 37; *Noor Muhammad v. State*, A. I. R. 1959 Ker 46; 1959 Cr. L. J. 187; *State of Orissa v. Kevalananda Patnaik*, 1969 Cr. L. J. 1174, 1176, (case of extra-judicial confession); *Kali Ram v. State*, (1973) 3 Sim. L. J. 193 (H.P.).
18. *Mahesh Swami v. State of Mysore*, 1953 S. C. J. 619; 1954 Cr. L. J. 236; A. I. R. 1954 S.C. 4.
19. *Sreenivasan v. State*, (1957) 2 Andh. W. R. 63; A. I. R. 1958 Andhra Pradesh 37. See also *Krishna v. State*, A. I. R. 1958 Pat. 166, *Subramania Goundan v. State*, 1958 S. C. R. 428; A. I. R. 1958 S.C. 66; *Akhal Ali v. State*, 1970 Cr. L. J. 581; *Assam Uggappa Shetty v. State*, 1970 1 Mys. L. J. 145; *Sami Kissan v. State*, 32 Cut. L. T.

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20. *Hatoon Haji Abdulla v. State of Maharashtra*, (1968) 2 S. C. R. 641, 648; 1968 S. C. D. 391; (1968) 2 S. C. J. 534; (1968) 1 S. C. W. R. 243; 70 Bom. L. R. 540; 1970 M. P. L. J. (S.C.) 537; 1968 Cr. L. J. 1017; 1968 M. L. J. (Cr.) 591; 1968 M. L. W. (Cr.) 116; A. I. R. 1968 S. C. 832, see *Bharat v. State of U. P.*, (1971) 2 S. C. Cr. R. 158, 161 (the reasons for making the confession as well as retracting it must be weighed to determine whether the retraction affects the voluntariness of the confession or not); *Nika Ram v. State of H.P.*, 1972 Cr. L. J. 204.
21. *In re Ramaswamy Konar*, 1954 Mad. 1006, 1007; 1955 Cr. L. J. 1945; 1954 Mad. W. N. 463 (2) relying on *Puran v. State of Punjab*, 1953 S.C. 400; 1954 Cr. L. J. 165; *Sadhu Chandra v. State*, 1971 Cr. L. J. 86.

RETRACTED CONFESSION WHEN IRRELEVANT IN CRIMINAL PROCEEDINGS

and which connects the accused with the crime in question.²² As against a retracted confession, no conviction can be based on the basis of a confession without corroboration both as to the crime and the criminal.²³ A retracted confession should be corroborated in material particulars even to fasten guilt on its maker.²⁴

An extrajudicial confession may be corroborated not only by the other evidence but also by the statement made by the accused before the committing of the offence, and a section 80 Cr. P. C., 1898. When such a confession is retracted it may be well founded on the extrajudicial confession.²⁵

If a confession made by an accused is subsequently admitted in the Court, and if the confession is retracted in the trial in the Sessions Court the retraction will not carry any weight.¹

A confession which is retracted and is not corroborated by other evidence, cannot be made the foundation of a conviction.²

If a witness states in evidence that the witness has heard an extrajudicial confession has been made, should give the actual words used by the accused; the court may accept the evidence of the witness even if he gives the substance.³

Other corroborations are not reduced to writing must be carefully assessed before they can be acted upon. The voluntary nature of the confession must also be carefully considered. It is necessary to check by independent investigation the truth or otherwise of the confession where it is the sole evidence against the accused.⁴

A confession made by a wife to her husband is a corroborative piece of evidence against the accused-wife.⁵

22. *Ratan Gond v. State of Bihar*, 1959 S. C. R. 1336; 1959 S. C. J. 222; I. L. R. 37 Pat. 499; 1959 A. L. J. 35; 1959 A. W. R. (H.C.) 108; 1959 M. P. C. 46; 1959 M. L. J. (Cr.) 109; A. I. R. 1959 S. C. 18 at p. 22; *Guramma v. State of Mysore*, (1967) 1 Mys. L. J. 541, 544; *Latu Mukhi v. State*, 35 Cut. L. T. 94, 95; 1969 Cr. L. J. 1172; *Joseph v. State of Kerala*, 1966 Ker. L. T. 649; 1966 M. L. J. (Cr.) 698; *Meher Singh v. The State*, 72 Punj. L. R. 861, 863.

23. *Suboth Kumar Dhar v. State*, 1966 Cr. L. J. 1000 (Cal.).

24. *Himachal Pradesh Administration v. Shiv Devi*, A. I. R. 1959 Him. Pra. 3 at p. 8; *Harbans Lal v. State*, 1967 Cr. L. J. 62; A. I. R. 1967 Him. Pra. 10, 13; see also *Noor Muhammad Abdul Samad v. State*, A. I. R. 1959 Ker. 46 at p. 50.

25. *Mingura Malik v. The State*, 32

Cut. L. T. 1011. See also *Palau Munda v. State*, (1966) 32 Cut. L. T. 1170, 1177; *Abdul Khader, In re*, 1968 M. L. J. (Cr.) 682; (1968) 2 M. L. W. 515; 1969 Cr. L. J. 1082.

1. *State v. Tomeiran Maringni*, 1970 Cr. L. J. 549, 551 (Manipur).

2. *Bhulakiram Koiri v. State*, I. L. R. (1969) 1 Cal. 39; 73 C. W. N. 467; 1970 Cr. L. J. 403, 411.

3. *Mulk Raj v. State of U. P.*, 1960 A. W. R. (H.C.) 18; 1959 Cr. L. J. 1219; A. I. R. 1959 S. C. 902, 905; *Iqbal Miru v. State*, 1969 Cr. L. J. 1000 (Cal.).

4. *Veeral, In re*, 1969 M. L. W. (Cr.) 231; 1970 Cr. L. J. 1020; A. I. R. 1970 Mad. 298, 301.

5. *Padmeswar Phukan v. The State*, (1971) Assam L. R. 293; 1971 Cr. L. J. 1595.

6. *State v. Tomeiran Maringni*, 1970 Cr. L. J. 549, 552 (Manipur).

Section 25 *post* rests upon the principle that it is dangerous to depend upon a confession made to a Police Officer for such a confession is open to the suspicion that it was caused by coercion or enticement.⁷ The observation in the last cited case, that a confession made to other persons though in the presence of a police officer, may fall outside the orbit of section 25, is, it is apprehended, not correct. An extra-judicial confession made in the presence of a Police Officer cannot be considered voluntary and is therefore inadmissible.⁸ Simply because the record of an extra-judicial confession made to certain individuals was handed over to the police, that confession does not become inadmissible in evidence.⁹

In *Subramania Goundan v. Madras State*,¹⁰ the Supreme Court observed:

A confession of a crime by a person who has perpetrated it, is usually outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was laid down in certain cases, one such being *In re Kesava Pillai*,¹¹ that if the reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands without any corroboration. But the view taken by this court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated, one of the cases being *Bachan Singh v. State of Punjab*,¹² but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession. In this connection it would be profitable to contrast a retracted confession with the evidence of an approver or an accomplice. Though under Sec. 133 of the Evidence Act, a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, illustration (b) to Sec. 114 lays down that a court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person, on his own showing, he is depraved and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. In such circumstances it is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement

7. *In re Zafar*, 1966 M. L. J. (Cr.) 212; 1966 Mys. 199, 201.

8. *Bhaskirao Kumbhar v. State*, 73 C. W. N. 467; 1970 Cr. L. J. 403, 411.

9. *Bhagwan Das v. State*, 1968 Cr. L. J. 1; A. I. R. 1968 All. 8, 14.

10. A. I. R. 1958 S. C. 66; 1958 S. C. R. 428; 1958 Cr. I. J. 238; 1958 All. Cr. R. 261.

11. I. L. R. 53 Mad. 160; A. I. R. 1929 M. 837.

12. A. I. R. 1957 S. C. 216; 1957 Cr. L. J. 481.

of a person making a confession who stands on better footing, one need only find out when there is a retraction whether the earlier statement, which was the result of remorse, repentance and contrition, was voluntary and true, or not and it is with that object that corroboration is sought for. Not infrequently one is apt to fall in error in equating a retracted confession with the confession of an accomplice and therefore, it is advisable to clearly understand the distinction between the two. The standards of corroboration in the two are quite different. In the case of the person confessing, who has resiled from his statement, general corroboration is sufficient, while an accomplice's evidence should be corroborated in material particulars. In addition, the court must feel that the reasons given for the retraction in the case of a confession are untrue."¹²

Although in law the Court can convict an accused on his confession, though it be retracted, nevertheless, the Courts require some corroboration. What amount of corroboration would be necessary would depend on the circumstances of each case.¹³ In cases, where *corpus delicti* is not traceable and what remains is only a confession which, however, is retracted, it would be unsafe to base a conviction for murder, especially when the time, place and manner in which the offence was committed, indicated by the confession could not be relied upon.¹⁴ In *Hem Raj v. State*,¹⁵ the Supreme Court has finally settled the law in this regard. It has held that a confession need not be corroborated by evidence discovered by the Police after a confession had been made; that any material that is already in their possession can be put in evidence; that a confession can be made even during a trial and the evidence already recorded may well be used to corroborate it, that it may be made in the Court of the Committing Magistrate, and that the materials already in the possession of Police may be used for corroboration.

Where a prisoner adheres at the trial to a previous judicial or extra-judicial confession, it may, if the court believes it, be acted upon without there being any corroboration of it.¹⁶ In the same manner, a plea of guilty is sufficient by itself to support a conviction, though followed by a sentence of death. But a retracted judicial or extra-judicial confession stands on a different footing and is an endless source of anxiety and difficulty to those who have to see that justice is properly administered.¹⁷ Retraction is a common phenomenon in India.¹⁸ When a retracted confession is given in evidence against

12. This is erroneous; the reasons are not for the retraction but for having made the confession in the first instance; see *Haroon Haq Abdullah v. State of Madras* (1968) 2 S. C. R. 641, 648; 1968 S. C. D. 391; (1968) 2 S. C. J. 534; (1968) 1 S. C. W. R. 243; 70 Bom. L. R. 540; 1970 M. L. J. (S.C.) 537; 1968 Cr. L. J. 1017; 1968 M. L. J. (Cr.) 591; 1968 M. L. W. (Cr.) 116; A. I. R. 1968 S.C. 822, 847.

13. *Sarwan Singh v. State of Punjab*, A. I. R. 1957 S.C. 637; 1957 S. C. J. 699; 59 Bom. L. R. 945; (1957)

2 M. L. J. (S.C.) 87.

14. *Ramachandra v. State*, A. I. R. 1957 S. C. 381; 1957 Cr. L. J. 559.

15. A. I. R. 1954 S.C. 462; 1954 S. C. J. 449; 1954 S. C. R. 17; (1954) 1 Mad. L. J. 694; 1954 All. W. R. (Sup.) 49; 1954 Cr. L. J. 1313; (1954) 1 Mad. W. N. 468.

16. *Per Straight, C. J.* in *Queen-Empress v. Babu Lal*, (1884) 6 All. 509.

17. *Babbar v. The King*, 1949 M. W. N. 444; A. I. R. 1949 P.C. 257; 76 I. A. 147.

a presumption that a confession is false, it is necessary to determine whether or not a confession is a trustworthy statement. Where the confession has been held to be trustworthy the Court has then to consider whether or not it should be given to the jury as evidence. The admissibility of a confession depends upon its having been made without any such inducement, threat or promise as is mentioned in Sec. 24 of the Evidence Act, and it has been remarked more than once that the fact that a confession has been retracted does not show that it was not voluntary, but was made in consequence of some inducement, threat or promise. From the point of view of admissibility alone, therefore, the mere fact that a confession has been retracted does not disqualify it, and especially if the reasons given by an accused for withdrawing his confession are palpably true, and where the alleged offence or offences is not complained about at the earliest point of time. There may, however, be other circumstances in the case which may cast a doubt on the voluntariness of the confession, and where there are such other circumstances, the fact that the confession has been retracted will strengthen the inference that the confession was not voluntary, and the confession will then have to be excluded altogether from evidence. But if the court holds the confession to be voluntary, its admission is established, and there is no room for the law to prevent the court from basing a conviction on a retracted confession alone, if it believes it to be true.

When a confession of a crime has been established, the use to be made of it is not a matter of law but of prudence, and depends upon the circumstances of each case, upon the circumstances under which the confession was made, the circumstances under which it was retracted, the reasons given for the retraction, and the delay in retracting. However, as a matter of pure law there may be no room to prevent a court from convicting on a retracted confession alone, though a confession is a highly suspicious piece of evidence, and the courts have always been of the grave danger of resting such piece of evidence on a confession alone for conviction. They have therefore, as a matter of prudence, courts have ceased to record a conviction on a retracted confession alone and have required the prosecution to give some independent evidence in corroboration of the confession.¹⁸ It is a settled rule of evidence that unless a retracted confession is corroborated in material part it is not

18. *Pharho v. Emperor*, 141 I. C. 392; A. I. R. 1932 Sind. 201; *Mohar Singh v. Emperor*, (1926) 27 Cr. L. J. 983; *Emperor v. Dewan Kahar*, (1923) 24 Cr. L. J. 497; 72 I. C. 961; A. I. R. 1923 Pat. 13; *Sheo Prasad Koeri v. Emperor*, (1919) 20 Cr. L. J. 562; 52 I. C. 50; A. I. R. 1919 Pat. 322; *Queen-Empress v. Rasvanta*, (1900) 25 Bom. 168.
19. *Kesava Pillai v. Emperor*, (1929) M. W. N. 901; A. I. R. 1929 M. 837; *In re Rajagopal*, 1943 M. W. N. 798; A. I. R. 1944 M. 117; I. L. R. 1944 M. 308; 211 I. C. 367.
20. *In re Rajagopal*, 1943 M. W. N. 798; *Shyamo v. Emperor*, A. I. R. 1932 M. 391; 137 I. C. 9; (1932) M. W. N. 305; 55 Mad. 903

- (F. B.); *Kuttiappa Chetty v. Emperor*, (1929) M. W. N. 791; *Kesava Pillai v. Emperor*, (1929) M. W. N. 901; A. I. R. 1929 M. 837; *Lakshmayya v. Emperor*, (1930) M. W. N. 785; *Edigakanchappa v. Emperor*, 1936 Mad. Cr. C. 255; *Obigadu v. Emperor*, 1935 M. W. N. 824; *Sarwan Singh v. State of Punjab*, A. I. R. 1957 S. C. 637; 1957 S. C. J. 699; *Maddapeda Brahmayya, In re*, 1949 M. W. N. 281; A. I. R. 1949 M. 817.
21. *Harold White v. The King*, 1945 M. W. N. 560; A. I. R. 1945 P. C. 181; *Phuboni Sahu v. The King*, (1949) M. W. N. 444; A. I. R. 1949 P. C. 257; *Gopiseti Chinna Venkata Subbaiah, In re*, A. I. R. 1955 Andhra 161.

prudent to base a conviction in a criminal case on its strength alone²². Also see note 1 (b) *ante*. It is the duty of a court that is called to act upon a retracted confession to inquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true. The mere fact that a prisoner puts in a plea of not guilty and denies having made the confession, or explains having made it by improper inducement of police is enough in itself to put the Judge upon inquiry.

On the question as to what will constitute sufficient corroboration of a retracted confession in a particular case, no rule is laid down by the authorities, except that the corroboration must be on some material particular connecting the accused with the offence. The production of property, the object of the offence or some other article connected with the commission of the offence, will be sufficient corroboration. The truth of a confession may be sufficiently indicated also by the character of the confession itself and the circumstances in which it was made²⁴. Where a confession is wanting in those natural particulars which one could expect in a free and voluntary confession it would naturally excite court's suspicion²⁵. A confession should not be relied upon where it is inconsistent with the other evidence in the case. Evidence of motive alone is not sufficient corroboration. It is not essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient if the general trend of confession is substantiated by some evidence which would tally with what is contained in the confession. It is, however, not necessary that the corroborative evidence should itself be sufficient for conviction. It should be of the *Rex v Baskerville*¹ type.²

The law as it stands at present, may thus be summarized:

(a) In the case of a judicial confession recorded in the manner prescribed by the Criminal Procedure Code, the confession is to be held *prima facie* to be voluntary until the contrary is shown.

22. *Puran v. State of Punjab*, 55 P. L. R. 158; A. I. R. 1953 S. C. 459; 1953 Cr. L. J. 1925; see *Muthuswami v. State of Madras*, A.I.R., 1954 S.C. 4; 1954 Cr. L. J. 236; 1953 S. C. J. 619; *Ramaswamy Konar*, in re, (1954) M. W. N. 463 (2); 1954 M.W.N. (Cr.) 131 (2); 35 Cr. L. J. 154; A. I. R. 1954 Mad. 1006; *R. v. Lalit*, (1911) 38 Cal. 559 (F.B.).

23. *Emperor v. Thakur Das*, I. L. R. (1943) 1 C. 487; 209 I. C. 550; A. I. R. 1943 Cal. 625; *Puran v. The State of Punjab*, 55 Punj L. R. 158; A. I. R. 1953 S. C. 459; 1953 Cr. L. J. 1925; *Arjun Lal v. The State*, A. I. R. 1953 S. C. 411; *Pangamham v. The State of Manipur*, 17 Cut. L. T. J. 1953 Cr. L. J. 163; 1951 All. W. R. (Sup.) 38; 1956 Cr. L. J. 126; A. I. R. 1956 4 C. 9; *Balbir Singh*

v. State of Punjab, 1957 Cr. L. J. 481; A. I. R. 1957 S. C. 216; *Hemraj v. State of Ajmer*, A. I. R. 1954 S. C. 462; *Kalawati v. State of H. P.*, A. I. R. 1953 S. C. 131; 1953 S. C. A. 660; 1953 S. C. J. 144.

24. *Jehangiri Lal v. Emperor*, 150 I. C. 1056; A. I. R. 1935 Lah. 230; *Queen Empress v. Maiku Lal*, (1898) 20 All. 133.

25. *Mst. Parwati v. Emperor*, (1926) 37 Cr. L. J. 821 (Nagpur).

1. (1916) 2 K. B. 658.

2. *Muthuswami v. State of Madras*, A. I. R. 1954 S. C. 4; 1954 Cr. L. J. 236; 1953 S. C. J. 619; *Subramania Goundan v. State of Madras*, 1958 S. C. R. 428; A. I. R. 1958 S. C. 66; 1958 Cr. L. J. 238; (1958) 1 Mad. L. J. (S.C.) 130; 1958 All. W. R. Sup. 78; In re *Muthukarunga Konar*, A. I. R. 1959 Mad. 175; 1959 Cr. L. J. 609.

(b) But in the case of judicial and extrajudicial confessions the onus is upon the accused of showing that under this section a confession he has made is irrelevant.

(c) While the mere fact of retraction is not in itself sufficient to make it appear to have been unlawfully induced, in ordinary cases as a general rule corroborative evidence of the truth of the confession and by implication of its voluntariness is required.

Where a Sessions Judge came to the conclusion that the confession must be taken to be voluntary and true, because there was no evidence of ill-treatment by the police and the confessions had been repeated before the Committing Magistrate nearly a month after they had been made and recorded, the Court said: "There is undoubtedly a great deal of force in that reasoning, but where a confession is retracted, it is, we think, the duty of Court that is called upon to act upon it, especially in a case of murder, to enquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true".³ In other cases the Court is not at liberty to act upon mere conjecture, and its rejection of a confession must be based upon the nature of the confession, the facts disclosed by the evidence for the prosecution or adduced in proof of his plea of not guilty by the accused. If from the evidence given by the prosecution it appears doubtful whether the confession was voluntary, the onus will of course be upon the prosecution to affirmatively establish that the confession was voluntary and that it is admissible. If in such cases, this be not established, or if it appears upon the evidence adduced by the prosecution to the contrary, that the confession was not voluntary, it must be rejected upon the terms of this section. Section 27 does not qualify Secs. 25 and 26, but also Sec. 24.⁴

Reference may also be made to two cases, *State v. M. M. Sathul*,⁵ where it was said that where a confession is made before the Court it is necessary that there must be some independent evidence to the statement in order to satisfy the Court that the statement should be acted upon. And in *Narshetty v. State*⁶ it was said that a confession should not be acted upon unless it is corroborated by independent evidence, in material particulars. A confession and statement taken from a person cannot be acted upon without corroboration.⁷

10. "By an accused person". The words "by an accused person" in Sec. 25 include persons who subsequently become accused persons, and at the time of making the statement criminal proceedings were not commenced. For example, when a person is charged before a court it was held in *State v. M. M. Sathul*,⁵

3. *R. v. Durgaya* (1901) 3 Bom. L.R. 441.

4. *Amiruddin v. Emperor*, A.I.R. 1918 Cal. 88; I.L.R. 45 C. 557; 44 I.C. 321.

5. A.I.R. 1967 Mad. 91 (1964) 1 M.T.J. 239.

6. A.I.R. 1965 Assam 89.

7. *Parasuraman v. State of Madras*,

1969 M.I.W. (Cr.) 68, 70; *Kali. Ram v. State*, (1973) 3 Sim. L. J. 195 (H.P.).

8. *Smith v. R.*, 1918 Mad. 111; 43 I.C. 605; *Emperor v. Cunna*, 1920 Bom. 279; 23 I.C. 221; 22 B.L.R. 177 (F.B.) per Shah, J.; *Abdul Ghani v. Emperor*, 1931 Lah. 763; 113 I.C. 55.

the person confessing was accused of an offence by others, the confession must be regarded as one made by an accused.⁹

The expression "accused person" describes the person against whom evidence is sought to be adduced in a criminal proceeding.¹⁰ The Section refers to a person who is not only an accused at the time when he makes a confession, but also to one who becomes an accused subsequently. The Section refers to the status of the person not at the time when he makes the confession but at the time when the confession is being considered by the Court, and when he is undoubtedly an accused person.¹¹

A customs officer conducting an inquiry under section 107 or section 108 of the Customs Act is not a police officer and the person against whom the inquiry is made is not a 'person accused' and a statement made by such a person in that inquiry is not a statement by a person accused of any offence. The statement is therefore not hit by the present section nor by section 27 of Cr. P.

11. "Caused by any inducement, threat or promise.—A confession does not become inadmissible because it was made before a person in authority. It is inadmissible only when it is brought about under any inducement, threat or promise, and the court is of opinion that the accused had reason to believe that he would get some advantage or avoid some evil by making such a confession." The test of admissibility of a confession is its voluntary nature and not its truth or falsity. A confession which is voluntary is not necessarily true and ~~may be false~~. A confession by an accused is 'voluntary' if it is not obtained from him either by fear of prejudice or hope of advantage, exercised or held out by a person in authority.¹⁹ It is not voluntary, if it appears to have been caused by any inducement, threat or promise. It is difficult to lay down any hard and fast rule as to what constitutes an inducement, a term which of course includes torture. The question is one for the decision of the Judge, and his decision will vary in each particular case. A statement is inadmissible if it is obtained from an accused if the Court considers it to have been made

9. In re Ahmed. 1950 Mys 82.

S.C.: 1125: 1960 A.L.J. 733: 1960
Cr.L.J. 1504: 1960 All.W.R. (H.C.)

11. *Viran Wali v. State*. A I.R. 1961 J. & K. 11.

787: 1970 Cr. L.J. 863: A.I.R. 1970
S.C. 940; Illias v. Collector of
Maharashtra, A.I.R. 1970 S.C. 613;
(1970) 2 S.C.A. 165: (1970)
1 S.C.J. 701: (1970) 1 Andh.W.R.
(S.C.) 135: 1970 Cr.L.J. 998: (1970)
1 S.C.J. 701; (1970) 1 S.C.J. 701;
325; Percy Rustomji Basta v. State of
Maharashtra, A.I.R. 1971 S.C. 1037.

(1971) 1 S.C.C. 847.

25
 (H. C.) 459: 1963 A. W. R.
 (H. C.) 374: 1963 B. L. J.
 R. 1963 S. C. 1094, 1096; Sudra
 Hansa v. State, 1968 Cr. L.J. 697
 Raj. 1968 Wyan v.
 S. C. 1111 A. I. R.
 Punj. 364; 1975 Punj. L. J. (Cr.)
 261.

14. *Emperor v. Kasimuddin*, 1954 Cal. 587; 1 L.R. 52 Cal. 67; 86 I.C. 414.

15. *Kasimuddin v. Emperor*, 1954 Cal. 855; 39 C.W.N. 27.

23 I.C. 678; 18 C.W.N. 705.

in consequence of "any inducement, threat or promise."¹⁷ The question has however to be examined from the angle of the confessing accused to see how the inducement threat or promise would affect the working of his mind. If a commandant of BSF after having failed to obtain confessional statement through another agency, himself succeeded in obtaining confessional statements, it could be inferred that there was some hope generated in the mind of the accused of receiving support of a person in authority.¹⁸⁻¹⁹ If any coercion or inducement was used, the accused was the person to make the complaint. From mere denial of the confession by the accused when questioned about it, it cannot be said that any coercion or inducement was used.²⁰ The burden is on the accused to place sufficient material upon which the court may consider the confession to have been obtained by inducement, etc., sufficient to invoke a hope in his mind. Confession obtained on promised immunity from further action is not admissible.²²

12. Relevancy, question of law. The relevancy of the confession is to be determined by the Court, that is the Judge or the Magistrate and not by the jury.²³ The Section, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement, threat or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing.²⁴ Thus the voluntary character of a confession is a mixed question of law and fact.²⁵

It is for the Judge to decide for himself, whether *prima facie* the confession of the accused appears to him to have been induced by threat or promise and for that reason to be inadmissible. If he comes to the conclusion that it is inadmissible, he must exclude it from the consideration of the jury. It is not the province of jury to decide the question of admissibility of evidence. On the other hand, if the Judge considers the confession admissible, it is his duty to point out to the jury that the fact that he considers the evidence as admissible does not necessarily mean that it is true, and it is for jury to make up their minds whether they should accept the confession, and, in doing so, they should naturally be guided to a large extent by their opinion on the question, whether the confession was voluntary or not.¹ It is possible that the

17 R. v. Balwant, 1841 11 Bom. H. C.R. 157, 158; **Saraswathi Dasaratnam v. State of Mysore** (1966) 8 Law Rep. 80 at page 88; 1967 M.L.J. 30; statement of Savings Bank Counter Clerk to the Senior Superintendent of Post Offices held made under inducement, threat or promise, **Ismail Ibrahim v. State** (1970) Cr.L.J. 1335 (Goa).

18-19 **Sathya Sagar v. State of Pondicherry**, 2 S.C.C. 265, 1967 Cr.L.J. 1985; (1977) S.C.C. (Cr.) 333; A.I.R. 1977 S.C. 1294.

20 **Abdul Razak Mustaza Datedar v. State of Maharashtra**, (1969) 1 S.C.R. 561; (1970) 1 S.C.A. 25; 1969 2 S.C.J. 870; 1970 S.C. Cr. R. 241; 1970 A.W.R. (H.C.) 43-72; Bom. L.R. 646; 1970 Cr. L.J. 373; 1970 M.P.L.J. 931; 1970 M.L.J.

(Cr.) 862; 1970 Mch. L.J. 747; A.I.R. 1970 S.C. 283, 286.

21 **Raghunath Nark v. State**, 41 Cut. L.T. 1085.

22 **Devappa v. State**, (1972) 1 Mys. L.J. 199; 1972 Mad.L.J. (Cr.) 374.

23 R. v. Hamneth Moore, 21 L.L.Mg. Cr. 192; R. v. Sleeman, (1853) Dears. & Bell 279; R. v. Navroji, (1872) 9 Bom. H.C.R. 358, 367.

24 R. v. Navroji, 1872 9 Bom. H.C.R. 358 at p. 367; per Sargent, C.J.; see also S. 28 post.

25 **Government of Bombay v. Dashrath Ram Nivas**, 1945 Bom. 265; 1 I.L.R. 1945 Bom. 614; 220 I.C. 182 (A.B.)

1 **Baldeo v. Emperor**, 1933 Cal. 187; 142 I.C. 639; **Suker Dusadh v. Emperor**, 1941 Pat. 303; 1 I.R. 20; Pat. 547; 192 I.C. 888.

Judge may admit it in evidence after holding that it was voluntary, and the jury may think it was not voluntarily made, and therefore attach little or no weight to it. Whether the jury thought so, or not, cannot be known because no reasons are to be given for the verdict. The Judge cannot tell the jury that it was no part of their duty to consider whether the confession was made voluntarily or not. That would amount to a misdirection, as held in *Badan Ali v. Emperor*.² At the same time the Judge cannot ask the jury to decide whether the confession was voluntary, and then to decide whether it was true. The jury has not to consider only the voluntary character of the confession, as detached from its credibility as the Judge has to do, but it has primarily to determine its truth and, as a part of it, to consider whether it was voluntary. To ask the jury to detach the two aspects, and decide whether it was true, if and after they are satisfied that it was voluntary, amounts to a misdirection, because a confession may be involuntary and still true. It is not inconsistent that the Judge should take upon himself, as Sec. 25(1) of Cr. P. C., 1898 requires him to do, the decision, for the purpose of admitting a confession into evidence that it was voluntarily made, while at the same time leaving it to the jury for the purpose of determining what weight should be given to it to decide both whether it was true and whether it was voluntary.³

In scrutinizing a case from the point of view of this Section, the Court will have to perform a threefold function. It will have, as a Court, to determine the sufficiency of the inducement, threat or promise, as affording certain grounds, it will have again to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition that is mentioned in the section. Lastly, it will have to judge, as a Court, if the confession appears to have been caused in consequence of the inducement, threat or promise.⁴

If a confessional statement in a case of murder does not relate to the deceased but gives the name of another person and it is not shown that the deceased had another name, it is irrelevant and must be excluded from consideration.⁵

13. Confession to whom. It is immaterial to whom a confession, obtained by undue influence is made. Thus, a confession so tainted is relevant whether made to the Sessions Judge⁶ or Magistrate⁷ or any police officer⁸ or any other person, e.g. the Traffic Manager of a Railway⁹ or the Master of a vessel,¹⁰ or a Customs Officer.¹¹ It is also immaterial whether the confession

2. I.L.R. 63 Cal. 855; 165 I.C. 127; 37 Cr.L.J. 1084.

3. Government of Bombay v. Doodiah Ram Nivas, 1945 Bom. 265; I.L.R. 1945 Bom. 614; 20 I.C. 182; 1 B.L.J. 108.

4. Suker Dushadh v. Emperor, 1941 Pat. 303, 305. See also the cases cited therein.

5. Emperor v. Panchkari, 1927 Cal. 587.

6. Chenta v. State, I.L.R. 1966 Cr. 168, 1966 Cr. I J. 789; A.I.R. 1966 Orissa 156, 158.

7. R. v. Luchoo, 1873 5 N.W.P. 50.

8. Ibid., R. v. Rama Birappa (1878) 8

B. 12; R. v. Asghar, (1879) 2 A. 260; R. v. Uzeer, (1884) 10 C. 775.

9. R. v. Luchoo, supra; R. v. Rama Birappa, supra.

10. R. v. Luchoo, (1872) 9 Bom. H.C. R. 358.

11. R. v. Luchoo, 1872, 10 B.I.R. App. 1.

12. V. L. S. v. Assistant Commr., A.I.R. 1965 S.C. 181, 1965 S.C. J. 206; Bom. I.R. 182, 1964 M.A. L.J. 641; 1965 M.P.L.J. 25; 1965 M.A. I.J. 109, 1965 Cr. L.J. 247.

proper course for the Judge is to strike the confession out of the record and to tell the jury to pay no attention to it.²¹ A statement made out due discretion as to whether or not it is to be admitted as evidence as an admission or confession by a police officer is not binding on the Judge in ordering an admission or confession to be received or rejected or to be or not to be a confession.²²

In order to ensure complete freedom of the accused from police influence, the effective way is to send him to the Magistrate and give him adequate time to consider whether he should make a confession or not. No hard and fast rule as to the time can be laid down, but a period of speaking at least 24 hours should be given to the accused to decide whether or not to make a confession.²³ But there can be no time limit as to the time required for the accused to make a confession. It must be governed by the facts, where the accused was in police custody for a very short time and then produced before the Magistrate, was given three hours to make a confession, and the confession was made thereafter after due caution and was repeated twice, the confession recorded by the Magistrate as empowered by section 167 Cr. P. C. 1958 was considered voluntary.²⁴ If the accused was in police custody for about nine days and thereafter in judicial custody for four days before making the confession, he was considered to have freed himself from the influence of the police officers. In *Pradeep Rishi & Mustafa Durrani v. State of Punjab*,¹ the Court held that the accused had spent four days in police custody and he was not under the influence of the investigating officer at the time of confession. He was again taken to the Magistrate to think after he was told that he was free so that he was not bound to make any confession and if he said anything it would be only his own statement and not a confession. The confession made on the next day was held to be voluntary.²

The weight to be given to a confession made by a person who is not under the influence of the police officers is to be determined by the facts and circumstances of each case. The Magistrate is to be guided by the facts and circumstances of each case. The weight to be given to a confession made by a person who is not under the influence of the police officers is to be determined by the facts and circumstances of each case.

21. *R. v. Garner*, 1 Den. C. C. 329.
22. *R. v. Ramdhun*, (1864) 1 W. R. Cr. 24.
23. *R. v. Dhurum*, (1867) 8 W. R. Cr. 13. Cr. Pro. Code, S. 163.
24. *Sarwan Singh v. State of Punjab*, 1957 S. C. J. 699; 1 L. R. 1957 Punj. 1602; 1957 A. W. R. (Sup.) 99; 1957 M. P. C. 781; (1957) 1 M. L. J. (Cr.) 672; 1957 Cr. L. J. 1014; A. I. R. 1957 S. C. 637 at p. 643. (Held, enough time was not given to the accused. The Magistrate gave him only half an hour after accused was in police custody for more than five days).
25. *Babu Singh v. State of Punjab*, 1963 S. C. R. 749 (long police custody and the time given insufficient and unsatisfactory).

1. *Subodh Kumar Dhar v. State*, 1966 Cr. L. J. 393 (2) (Cal.).
2. *Jai Singh v. State*, 69 P. L. R. (D) 160-162; A. I. R. 1967 Delhi 14.
3. (1970) 1 S. C. R. 551; (1970) 1 S. C. A. 535; 1970 S. C. Cr. R. 241; (1969) 2 S. C. J. 870; 1970 A. W. R. (H. C.) 43; 72 Bom. L. R. 646; 1970 M. P. L. J. 932; 1970 M. L. J. (Cr.) 862; 1970 M. J. L. J. 747; 1970 Cr. L. J. 373; A. I. R. 1970 S. C. 953, 296.
4. *Sarwan Singh v. State of Punjab*, 1957 S. C. J. 699; 1957 A. W. R. (Sup.) 99; 1957 M. P. C. 781; (1957) 1 M. L. J. (Cr.) 672; 1 L. R. 1957 Punj. 1602; 1957 Cr. L. J. 1014; A. I. R. 1957 S. C. 637 distinguished as the material facts and the ratio were different.

terms of the section. The mere fact that there may be some restriction on the movements of the accused or that he may be under some sort of surveillance at the time when he makes a confession, will not *ipso facto* vitiate the confession as being involuntary.⁵

The fact that the accused was kept in the custody of the police for a period of time, and was produced before a Magistrate for recording his confession is not by itself a sufficient ground for holding that the confession is not voluntary. In another case a delay of seven days before the accused was produced before a Magistrate was held to be not satisfactorily explained and the confession was considered to be not voluntary.⁷ Where apart from prolonged custody and the failure of the prosecution to explain the delay, the Magistrate failed to disclose his identity before recording the confession, it lost its force.⁸

In a case in Madras the words 'if you tell the truth you will be released' were spoken by the police to the accused. Further, the accused had been kept in custody for ten days and tortured before the alleged confession. It was held that the confession was not voluntary but was brought about by inducement and threat. But if a Postal Inspector, a person in authority, conducting an inquiry against a subordinate, a branch Postmaster, tells the subordinate that he would be excused if he divulged the truth, it does not amount to an extorted confession on promise.¹⁰

When the atmosphere of the court is not free from police influence and the accused had reason to believe that he was produced in the presence of a police officer and not a Magistrate, the confession cannot be said to be voluntary.¹¹

A statement by an employer, the first accused in a case of adulteration, before a Food Inspector that the alleged adulterated milk belonged to him and that it was lawfully entrusted to his employee, the second accused, is hit by this section for in the circumstances it must be presumed that the statement was not voluntary and was made by inducement, threat or promise.¹²

15. Presumption about voluntariness. The term "voluntary" is wider in meaning than the term of section 24. If a confession is not voluntary, in the sense of section 24, then *ex facie* there the person who made it did not do so of his own free will to tell the truth. This fact in itself introduces an element of suspicion. In such circumstances, if facts are proved which sug-

5. **Harbans Singh Sardar v. State**, 71 F. 2d 101 (1944) Cr. I J. 101; AIR 1944 F. 101; **Jyoti Ram Ojha v. The State**, 34 Cut. L. T. 127 (1963) Cr. I J. 70; AIR 1968 Orissa 97, 98 (such a confession is not involuntary).

6. **Devi Singh v. State of Punjab**, 1 F.R. 101 (1944) Cr. I J. 101; AIR 1944 F. 101.

7. **A. N. L. O. Dey v. State**, 1967 Cr. I J. 342; AIR 1967 Manipur 11.

8. **Bhaskara Nair v. State of Kerala**,

1970 Ker. L.T. 11; **In re Antappa**, AIR 1969 Mys. 250.

9. **Devi Singh v. State of Rajasthan**, 1968 Raj. L.W. 604, 606.

10. **Mithusudan Swain v. State**, 33 Cut. L.T. 660, 668.

11. **Adinath Chakraborty v. The State**, 1967 Cr. I J. 125; AIR 1967 Myspur 1 at pp. 5-6.

12. **C. B. Navar v. Food Inspector**, 1967 Ker. I J. 887, 1967 M.L.J. (Cr.) 901; 1968 Cr. L.J. 347; AIR 1968 Ker. 66, 68.

gest that an inducement of some kind, although outside the terms of this section, was in fact given the Court may well refuse to accept the confession as true.¹² The frequent assumption, that a person would not make a confession of his guilt, which would be prejudicial to his interest, unless some pressure is exerted on him, is not wholly correct.¹³ The mere fact of a person being in custody is not a good basis for a presumption that any confession he has made was caused by an inducement, threat or promise, having reference to the charge against him, proceeding from some police officer, and sufficient to make him believe that he would be benefited in the trial by making it.¹⁴ The fact that a confession is more elaborate than necessary or that it contains more particulars than are required at the particular stage, does not necessarily show that the confession was not voluntary.¹⁵ Conversely also the absence in the confession of the details *in extenso* is not enough to discredit it, if the statement therein is supported by the oral evidence in the case.¹⁷

The circumstances that the confession was not retracted in the Court of the committing Magistrate but was retracted in the Sessions Court at a late stage goes strongly in favour of the confession being held to be voluntary.¹⁸ A plea, that as no question under Sec. 12, Cr. P. C. 1898 (Section 313 of the Code of 1973) has been put in before the committing Court with regard to the confession, would not entitle the accused to point out in the Sessions Court that it was not voluntary.¹⁹ Nevertheless, long detention in police custody coupled with the fact that, on the very first occasion when he was called by the Magistrate, he denied having committed any offence raises some doubt about the voluntary character of the confession.²⁰

In determining whether a confession is admissible or not under this section, it is necessary to consider (i) the character of the person alleged to have exercised undue influence (such person must be a 'person in authority'), and (ii) the nature of the inducement, threat or promise (such inducement must have reference to the charge and can be sufficient, etc.). It must, however, be established first that a confession is voluntary and that it is true. For the purpose of ascertaining both, it is necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities of the case.²¹

12. *Kanungo Bhattacharyya v. Emperor*, 1936 Cal. 316, 321; 1 L.R. 63 Cal. 1053; 163 I.C. 41; 37 Cr. L.J. 775; 63 C.L.J. 232.

14. *Nathu Ram v. State*, 1951 H.P. 1, 10; 52 Cr. L.J. 50.

15. *Dahi Lodhi v. Emperor*, 1926 Nag. 368, 369; 95 I.C. 59.

16. *In re Madda Pedda Brahmayya*, 1949 Mad. 817; 51 Cr. L.J. 8; (1949) 1 M.L.J. 386; 1949 M.W.N. 281. But see *Sivarajan v. State* 1 L.R. 1959 Ker. 319; *Kuttappan v. State*, (1960) 2 Ker. L.R. 222; 1960 Ker. L.R. 829.

17. *Subramaniva Goundan v. State*, 1958 S.C.R. 428; A.I.R. 1958 S.C.

66; 1958) 1 M.L.J. (S.C.) 130; 1958 M.L.J. (Cr.) 292; 1958 All. W.R. (Sup.) 78.

18. *Findal v. State*, 1954 H.P. 11, 1954 Cr. L.J. 1900.

19. *Subramaniva Goundan v. State*, 1958 S.C.R. 428; 1958 S.C.J. 321; 1958 A.W.R. (Sup.) 78; (1958) 1 Andh W.R. (S.C.) 130; (1958) 1 M.L.J. (S.C.) 130; 1958 M.L.J. (Cr.) 292; A.I.R. 1958 S.C. 66.

20. *State v. Girasia Bachulha*, 1954 Sau. 39, 41; 1955 Cr. L.J. 561.

21. *Sarwan Singh v. State*, A.I.R. 1953 S.C. 637; see also *Krishna v. St.*, A.I.R. 1953 Pat. 166.

Where a confession is made by an accused after due warning and time for reflection, and the accused is kept in judicial lock up both before and after the making of the confession, and no circumstance is pointed out to draw the inference of police pressure and the confession is found also to be true on comparison with the prosecution evidence and the probabilities of the case, it can be acted upon even though subsequently retracted.²²

16. "Person in authority". The expression 'person in authority' is not defined in the Act. He is 'someone engaged in the detention, examination or prosecution of the accused or someone acting in the presence and without the dissent of such person, or perhaps by someone erroneously believed by the accused to be in authority'.²³ Such a person must be in fact a person in authority. The mere belief of a confessing accused is not enough. But who is such a person?²⁴ No definition or illustration is given of this expression. "It is an expression well known to English Lawyers on questions of this nature, and although, as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions on the subject can scarcely be regarded as authorities, they may still serve as valuable guides."²⁵ Generally speaking, a "person in authority" within the meaning of this Section is one who is engaged in the apprehension, detention or prosecution of the accused, or one who is empowered to examine him. But, a Tahsildar who has no interest in the prosecution of an accused person, other than the interest which every citizen has in the maintenance of law and order, is not a person in authority, and a confession made to him is admissible in evidence.¹ If the inducement to confess comes from a person who has no power to interfere in the matter under inquiry, the accused cannot reasonably suppose that he will be able to modify a confession.² A too restrictive view might not be placed on these cases.³ The test would seem to be that the person authority to interfere in the matter, and any concern or interest in it. If he had would then be held sufficient to give him that authority, as in *R. v. Warrington*⁴ where P. K. B. held that the wife of one of the prosecutors and concerned in the management of their business was a person in authority and the rule is so held in *Arbuthnot's Criminal Practice*.⁵ A ordinarily a travel

22. *Roshan Lal v. Union of India*, A I R. 1965 H P. 1.

23. *Phipson*, 11th Edn. (1970) para 798, pp. 354, 355.

24. See *R. v. Ganesh*, 1923 Cal. 458; I. L. R. 50 Cal. 127; 74 I. C. 264; 24 Cr. L. J. 760; *Emperor v. Kutub Bux*, 1930 Cal. 699; I. L. R. 57 Cal. 488; 126 I. C. 547; but see *Emperor v. Panchkari*, 1925 Cal. 587; I I R. 52 Cal. 67; 86 I. C. 414; 26 Cr. L. J. 782; 29 C. W. N. 300.

25. *R. v. Navroji*, (1872) 9 Bom. H. C. R. 358, 369, per Sargent, C. J. *Santokhi Beldar v. Emperor*, A I. R. 1935 Pat. 149; I. L. R. 12 Pat. 241; 142 I. C. 474; 34 Cr. L. J. 319; 14 P. L. T. 82 (S. B.).

2. *Santokhi Beldar v. Emperor*, 1933 Pat. 149; I. L. R. 12 Pat. 241; 142 I. C. 474; 34 Cr. L. J. 319; 14 P. L. T. 82 (S. B.).

3. *Nazir v. R.*, (1905) 9 C. W. N. 474; 2 Cr. L. J. 255; see also *Viranwalli v. State*, A. I. R. 1961 J. & K. 11. See however *Nannhu v. State*, A. I. R. 1960 M. P. 132.

4. 2 Den. C. C. 447.

5. *R. v. Navroji* (1872) 9 Bom. H. C. R. 358, 369, per Sargent, C. J. "The inducement and authority must all be understood in relation to the prosecution; that is to say, a person is deemed to be in authority within the meaning of this rule, only if he stands in certain relations which are considered to imply some power of control or interference in regard to the prosecution." *Wills*, Ev. 210; *Smith v. Emperor*, 1918 Mad. 111; 43 I. C. 605; 19 Cr. L. J. 189 (the expression has a wider meaning than the actual prosecutor).

being auditor in the service of a Railway Company has been held to be a "person in authority", within the meaning of this section. The members of a panchayat which sit to consider whether two persons should be excommunicated from caste for having committed a murder, were held not to be "in authority" within the meaning of this section.⁷ In a later case, the Court, though not deciding the question, was disposed to think that where a panchayat was sitting in authority and leading the accused to believe that he had committed a crime within the section's scope, a police head constable,⁸ a collecting and assistant postmaster,⁹ a police constable,¹⁰ Superintendent of Excise,¹² Customs officer,¹³ Military officer,¹⁴ a Magistrate,¹⁵ Mukhia and Chowkidar¹⁶ and a Sessions Judge¹⁶⁻¹ are "persons in authority" as are also the master of a vessel,¹⁷ the prosecutor¹⁸ or his wife¹⁹ or his attorney,²⁰ the master or mistress of the person at the offence has been committed against the person or property of either but otherwise not the Chief Secretary of a State Government.²¹ A member of a member of a Co-operative Society,²² District Co-operative Officer,²³ a member of a Co-operative Society,²⁴ Postal

6. *R. v. Navroji*, (1872) 9 Bom. H.C., R. 358.

7. *R. v. Mohan*, (1881) 4 A. 46.

8. *Nazir v. R.* (1905) 9 C.W.N. 474; 2 Cr. L.J. 255, followed in *R. v. Jasha*, (1907) 11 C.W.N. 904.

9. *R. v. Rama Birapa*, (1878) 3 B. 12; *Fakira v. R.*, 1915 Bom. 249; (1915) 40 B. 220; 33 I.C. 309.

10. *R. v. Ganesh*, 1923 Cal. 458; I.L.R. 50 C. 127; 74 I.C. 264.

11. *R. v. Luchoo*, (1873) 5 N.W.P. 86; *R. v. Shepherd*, (1836) 7 C. & P. 579; *R. v. Pountney*, (1836) 7 C. & P. 302; *R. v. Laughen*, (1846) 2 C. & K. 225; *R. v. Millen*, (1849) 3 Cox. C.C. 507; as to private persons arresting, see 3 Russ. Cr. 464, and note; Roscoe, Cr. Ev., 16th Ed. 43; The wife of a constable is not a person in authority: *R. v. Hardwick*, (1911) 1 C. & P. 98 (n).

12. *Rokun Ali v. R.*, 1918 Cal. 138.

13. *Vallabhadas Liladhar v. Assistant Collector of Customs*, (1965) 1 S.C. 1, 208; (1964) 1 S.C.W.R. 411; 1965 M.P.L.J. 25; 1965 M.L.J. (Cr.) 98; 1964 Mah. L.J. 641; (1965) 2 Cr. L.J. 490; A.I.R. 1965 S.C. 481; *State of Rajasthan v. Budhram*, I.L.R. (1968) 18 Raj. 962; 1968 Cr. L.J. 311; A.I.R. 1969 Raj. 48, 49.

14. *Smith v. R.*, 1918 Mad. 111; 43 I.C. 605.

15. *R. v. Asghar*, (1879) 2 A. 260; *R. v. Uzeer*, (1884) 10 C. 775; *R. v. Clewes*, (1830) 4 C. & P. 221; *R. v. Cooper*, (1833) 5 C. & P. 533; *R. v. Parker*, (1861) L. & C. 42; *R. v. Ramdhun*, (1864) 1 W. R. Cr. 24 (Honorary Magistrate acting as prosecutor); also it has been held in England, the Magistrate's clerk: *R. v. Drew* (1837) 8 C. & P. 140, but

see *R. v. Fakira*, (1915) 40 B. 220, in which it was questioned whether a statement made before a committing Magistrate is governed by this section or by the Criminal Procedure Code, 1898, Sec. 287.

16. *Dhukaram Mian v. State of Bihar*, 1971 B.L.J.R. 641; 1971 P.L.J.R. 165, 169 and 170.

16-1. *R. v. Asghar Ali*, 2 A. 260; *R. v. Uzeer*, 10 C. 775.

17. *R. v. Hicks*, (1872) 10 B.L.R. App. 1; but see also *R. v. Moore*, (1852) 2 Den., C.C. 522 explaining *R. v. Parrott*, (1831) 4 C. & P. 570.

18. *Ashotosh v. R.*, 1921 Cal. 458; 68 I.C. 413; 26 C.W.N. 54; *Ganga Prasad v. Emperor*, 1945 Cal. 360; 221 I.C. 24; 79 C.L.J. 149; *R. v. Jenkins*, (1882) R. & R. 492; *R. v. Jones*, (1809) R. & R. 142.

19. *R. v. Warringham*, (1852) 2 Den. C.C. 447 (n); *R. v. Upchurch*, (1836) 1 M.C.C. 465; *R. v. Taylor*, 8 C. & P. 733; *R. v. Moore*, (1852) 2 Den. C.C. 522; *R. v. Sleeman*, (1853) 2 Dears. 249.

20. *R. v. Croydon*, (1846) 2 Cox. 67.

21. *R. v. Moore*, (1852) 2 Den. C. C. 522.

22. *Pyare Lal Bhargawa v. State of Rajasthan*, (1963) 1 S.C.R. 689; 1963 S.C.D. 341; 1963 A.L.J. 459; 1963 A.W.R. (H.C.) 374; 1963 B.L.J.R. 407; 1963 (2) Cr. L.J. 178; A.I.R. 1963 S.C. 1094, 1096.

23. *Lallen v. State*, 1969 A.W.R. (H.C.) 377.

24. *Purushottam v. State of Gujarat*, 1967 71 I.L.R. 1, 10; *R. v. Navroji Dadabhai*, (1872) 9 Bom. H.C.R. 358; *Emperor v. Appayya*, I.L.R. (1916) 40 Bom. 220.

Inspector in reference to Branch Postmaster² and generally any person engaged in the arrest, detention, examination, or prosecution of the accused.¹ Instances of a person not in authority are Gountia,³ Pradhan of a village,⁴ Sarpanch or Naib Sarpanch⁴ and Tahsildar having no interest in prosecution other than that of an ordinary citizen.⁵ But in the undernoted case,⁶ the Sarpanch of a Gram Panchayat was held to be a 'person in authority' and confession made as a result of harassment by such person was held involuntary.

The threat, inducement or promise must proceed from a person in authority. It is a question of fact in each case, whether the person concerned is a man of authority or not.⁷ Unless the threat emanates from a person in authority, the section can have no application. In a case before the Supreme Court, a person summoned under section 108, Customs Act, 1962, was under the statute placed under a compulsion to speak the truth. Though the compulsion may amount to a threat, it was held that the threat did not emanate from 'a person in authority' but from the provisions of the statute itself.⁸ Similar is the position of statement under Section 171 A, Sea Customs Act, which is not equivalent to confession.⁹ Mere warning of the possibility of prosecution for perjury if truth was not stated is not a threat which could have reasonably caused the person making the statement to suppose that he would thereby gain any advantage or avoid any evil of a temporal nature in reference to proceeding against him for smuggling.¹⁰

If a confession to Muktia who is a 'person in authority', is induced by a promise to release the maker, it is not a voluntary one.¹¹

The Section requires that the statement must be made by the accused person to the person in authority on account of any inducement, etc. If the statement is made to the person in authority without any inducement, etc., the confession does not fall within the mischief of the section. Thus, where

1. *Madhusudan Swain v. State*, 33 Cut. L.T. 650, 668.

2. See *Taylor v. State*, ss. 873, 874; *Roscoe v. State*, 11th Ed. 354; *Wills v. State*, 310; *R. v. Moore*, (1852) 2 Den. C.C. 522, 526.

3. *Loknath v. State*, 32 Cut. L.T. 402; 1966 Cr. L.J. 1180; A.I.R. 1966 Pat. 205; *Palau Munda v. State*, I. L. R. 1966 Cut. 635; 32 Cut. L.T. 1170, 1176.

4. *Madan Mohan v. State*, 32 Cut. L.T. 980.

5. *Ludra Hema v. The State*, 1968 Cr. L.J. 697 (Orissa); *Sadananda Bisoi v. State*, 33 Cut. L.T. 422, 447.

6. *Santokhi Beldar v. Emperor*, A.I.R. 1933 Pat. 149, 150.

7. 1972 Raj. L.W. 437.

8. *Pyare Lal Bhargava v. State of Rajasthan* (1963) 1 S.C.R. 623; 93 Cr. L.J. 341; 1963 A.L.J. 459; 1963 S.W.R. (2d) 374; 1963 B.L.J.R. 47; 1963 (2) Cr. L.J. 178; A.I.R. 1963 S.C. 1094, 1096; *Mir*

Kistoori v. State of Rajasthan, I. L. R. (1965) 15 Raj. 143; 1964 Cr. L.J. 518; A.I.R. 1967 Raj. 98.

9. *P. V. Rao v. State of Maharashtra*, A.I.R. 1971 S.C. 1087, 1092; (1971) 1 S.C.C. 847; *Hazari Singh v. Union of India*, A. I. R. 1973 S.C. 62.

10. *Hira H. Advani v. State of Maharashtra*, (1970) 2 S.C.A. 10; (1970) 1 S.C.R. 821; (1970) 2 S.C.J. 19; 1971 Cr. L.J. 5; 73 Bom. L.R. 112; 1971 Mad.L.J. (Cr.) 47; A.I.R. 1971 S.C. 44.

11. *Veera Ibrahim v. The State of Maharashtra*, 1976 Cri. L.R. (S.C.) 165; (1976) 2 S.C.C. 302; 1976 S.C.C. (Cri.) 278; 1976 Cr. A.R. (S.C.) 140; 1976 S.C. Cr. R. 235; (1976) 3 S.C.R. 672; 1976 Cri. L.J. 860; 1976 Chand. L.R. Cri. (S.C.) 134; A.I.R. 1976 S.C. 1167.

12. *Dukharan Mian v. State of Bihar*, 1971 B.L.J.R. 641; 1971 P.L.J.R. 169, 169 and 170.

the statement is made by the accused person before the customs officers, who can be taken to be persons in authority, it is not vitiated if it is not made on account of any inducement, etc. and is not rendered inadmissible under this section.¹²

A person in authority, within the meaning of this section, should be one who, by virtue of his position, wields some kind of influence over the accused, but not necessarily have authority to interfere in the matter of the charge against the accused.¹³ Thus, the superior officer of the accused is a person in authority, in relation to the accused.¹⁴

Even when a confession is made before a report was made to the police and before the person confessing was accused of an offence by others, the confession must be regarded as one made by an accused.

For a confession to be inadmissible under this section it is enough if it was extorted by threat from the person by a person who, in the opinion of the accused, had sufficient authority to put him in the imminent peril of his life or at any rate to seriously injure him, unless he confessed his crime.¹⁵

It has been held in England not to be necessary that the promise or threat should be actually uttered by the person in authority, it being regarded sufficient if it was uttered by someone else in his presence and tacitly acquiesced in by him so as to appear to have his confirmation and authority.¹⁶ A confession made to, but not induced by, a person in authority is admissible,¹⁷ while conversely a confession induced by, though not made to, such a person will be rejected.¹⁸ A confession not procured by inducement is not inadmissible merely because it was made by the accused under a mistaken belief that he would gain some advantage by making it.¹⁹ Confessions procured by inducements proceeding from persons having no authority are inadmissible.²⁰

17. Inducement, etc., must have reference to the charge. The inducement, threat or promise must have reference to the charge against the accused person, that is, the charge of an offence in a Criminal Court.²¹ It must have been made for the purpose of extorting a confession of the offence, the subject of that charge.²² It must reasonably imply that the prisoner's position with reference to the charge will be rendered better or worse accord-

12. *Vallabhdas v. Assistant Collector*, (1965) 1 S.C.J. 208; A.I.R. 1965 S.C. 481; 66 Bom. L.R. 482; 1964 Mah. L.J. 641; 1965 M.P.L.J. 25; 1965 M.L.J. (Cr.) 98; 1965 (1) Cr. L.J. 490.

13. *Nannhu v. State of M.P.*, A.I.R. 1960 M.P. 182; 1959 M.P.L.J. 1211.

14. *Viran Wali v. State*, A.I.R. 1961 J. & K. 11.

15. *Singh v. State*, 1963 O.C. 149; 11 L.R. 1952 Cut. 620.

16. *R. v. Laughier*, (1846) 2 C. & K. 227; *R. v. Taylor*, (1850) 8 C. & P. 720. Quære whether the section by the use of the words "proceeding from" enacts a different rule. It is

submitted not.

17. *R. v. Gibbons*, (1823) 1 C. & P. 97; *R. v. Tayler*, (1823) 1 C. & P. 129.

18. *R. v. Boswell*, (1842) Car. & M. 584; *R. v. Blackburn*, (1853) 6 Cox. 333.

19. *P. v. P.*, *Pratt v. Chandra*, 1929 Mad. 92.

20. See *Roxoe*, Cr. Ev., 44.

21. See *R. v. Mohan*, [1955] 4 A. 46.

22. *R. v. Hicks*, 10 B. L. R. App. 1 a confession under threat, made for purpose other than to extort confession was held to be inadmissible, but the correctness of this ruling is doubtful.

ing as he does or does not confess.²³ If the inducement be made to one charge, it will not affect a confession as to a totally different charge.²⁴ But the House of Lords has laid down that where a statement has been induced by a threat or promise it is inadmissible even though the threat or promise did not relate to the charge but to some other matter.²⁵ An inducement relating to some collateral matter unconnected with the charge, will not exclude a confession.²⁶ Thus, a promise to give the prisoner a glass of spirit or to strike off his handcuffs or let him see his wife will not be a bar to the admissibility of the confession. The inducement need not be express, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case.²⁷ Nor need it be made directly to the prisoner, it is sufficient if it may reasonably be presumed to have come to his knowledge provided, of course it might have induced the confession. Administering an oath to a witness cannot be said to be tantamount to a threat to the person under oath that if he does not speak the truth, he will be punished for it.²⁸ In deciding whether an admission is voluntary, the Court has been at pains to hold that even the most gentle threat or slight inducement will taint a confession.²⁹ As some accused are not reasonable men or women but are very ignorant and terrified by the proceedings in which they may find themselves it may have been right to err on the safe side.³⁰

18. The advantage to be gained or the evil to be avoided. The inducement must, in the opinion of the Court, be sufficient. See next paragraph, and the advantage to be gained, or the evil to be avoided must be of a temporary nature. Any inducement, having reference to a future state of reward or punishment, does not affect the admissibility of a confession. Thus, a confession will not be excluded, if it has been obtained from the accused

23. *R. v. Gurney*, 1848, 2 C. & K. 920; *Phipson*, 11th Edn., 356; *Taylor, Ev.*, ss. 879–881; 3 *Russ. Cr.* 42, 43; *Smith*, 12th Edn., 219. But if the threat or promise is connected with the charge, it will be inadmissible. *R. v. Hearn*, (1811) 1 Car. & M. 109.

24. *R. v. Williams*, 1871, 3 Russ. Cr. 442. A confession where two crimes being charged, both form parts of the same transaction; *R. v. Hearn*, (1811) 1 Car. & M. 109.

25. *Phipson*, 11th Ed. 356, citing *Commissioners of Customs and Excise v. Harz*, (1967) 1 A.C. 760 (H.L.); 51 Cr. App. R. 123 (H.L.).

1. *Taylor, Ev.*, s. 880.

2. *Phipson*, 11th Edn., 356; *Taylor, Ev.*, s. 880; 3 *Russ. Cr.* 445; *Smith*, 12th Edn., 219.

3. *R. v. Gurney*, 1848, 2 C. & K. 920.

4. *R. v. Hyod*, (1834) 6 C. & P. 393.

5. *Phipson*, 11th Ed. 356; *R. v.*

Gurney, 1848, 2 C. & K. 920; *Taylor, Ev.*, s. 880, but a promise or threat to one prisoner will not exclude a confession made by another who was present and heard the statement. *R. v. Jacobs*, (1849) 4 C. & K. 120; see *R. v. Bay*, 1851, 11 Cox 486, where a confession by a prisoner was received although an accomplice had been held out to an accomplice which might have been communicated to the prisoner, but see *R. v. Harding*, (1842) 1 Arm. M. & O. 320.

7. *In re Pariti Narayana Murti*, 1942 Mad. 654; 203 I.C. 479; (1942) 2 M. L.J. 112.

8. Per Lord Parker C. J. in *R. v. Smith*, (1959) 43 Cr. App. R. 121, 126 cited in *Phipson*, 11th Edn., 357.

9. See the observations of Lord Reid in *Commissioners of Customs and Excise v. Harz*, (1967) 1 A.C. 760 (H.L.); 51 Cr. App. R. 123 (H.L.) 128, regarding the last cited quotation from *R. v. Smith*, *supra*.

by moral or religious exhortation, however urgent, whether by a Chaplain¹⁰ or others,¹¹ e.g. "Be sure to tell the truth"—"I have said it, I tell because Mrs. G can ill afford to lose the money,"¹² "You had better, ye good boys, tell the truth,"¹⁴ "Kneel down and tell me the truth in the presence of the Almighty,"¹⁵ "If you have committed a fault, do not add to it by saying what is untrue,"¹⁶ "Don't run your soul into more sin, but tell the truth,"¹⁷ further, the advantage of evil must have reference to the promises against the accused,¹⁸ as for instance, that by confessing he will not be sent to jail¹⁹ or that nothing will happen to him,²⁰ or that steps will be taken to get him off,²¹ or "that if he confessed to the Magistrate he would get off,"²² or that he will be pardoned,²³ or that he would be set off if he confessed everything,²⁴ or the like. A promise or threat as to some purely collateral matter does not exclude the confession.²⁵

19. "Sufficient to give the accused grounds". As the admission or rejection of a confession rests wholly on the discretion of the Judge, it is difficult to lay down precise rules, e.g. for the Government or for the discretion, and the more so, because much must necessarily depend on the age, experience, intelligence, and character of the prisoner, and on the circumstances under which the confession was made. Inducement seldom overcomes the mind of one who has no effect upon that of another, a consideration which may serve to reconcile some courts to a decision, where the principal facts appear similar in the reports, but the lesser circumstances, though often very material in such preliminary enquiries, are omitted.²⁶

10. *R. v. Gilham*. (1828) 1 Moo. C.C. 186 (in this case the gaol Chaplain told a prisoner that, as the minister of God, he ought to warn him not to add sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God, and to repair, as far as he could, any injury he had done; the prisoner after this made two confessions to the gaoler and Mayor which were held to be admissible).
11. *R. v. Jarvis*. (1867) L.R. 1 C.C. R. 96; *R. v. Reeve*. (1887) 1 R. 1 C. C.R. 362; *Emperor v. Akhileshwar Prasad*. 1925 Pat. 772; 1 I.L.R. 4 Pat. 646; 89 I.C. 961.
12. *R. v. Court*. (1836) 7 C. & P. 486; *R. v. Holmes*. 1 Cox. 9; "as a universal rule, an exhortation to speak the truth ought not to exclude confession" per Erie, J., in *R. v. Moore*. (1852) 2 Den. C.C. 522, 523; see also *In re Karumuri China Mallava*. 1948 Mad. 324; (1947) 2 M.L.J. 359; 60 L.W. 693.
13. *R. v. Lloyd*. (1884) 6 C. & P. 393.
14. *R. v. Reeve*. (1867) 1 R. 1 C.C.R. 362.
15. *R. v. Wild*. 1 Moo.C.C. 452.
16. *R. v. Jarvis*. (1867) L.R. 1 C.C.R. 96.
17. *R. v. Sleeman*. 1833 2 Dears. 249.
18. Thus in *R. v. Mohan Lal*, 4 A. 46

the evil threatened. (ex communication) reference to the Government prisoners. The case of *R. v. Hicks*. 10 B.L.R. App. 1, is also open to the objection that it is not in accord with this portion of the section.

19. *R. v. N...* (1877) 9 B.L.R. 11 C.R. 258.
20. *R. v. Luchoo*. (1873) 5 N.W.P. 86.
21. *R. v. Rama Birapa*. (1878) 3 B. 12.
22. *R. v. Ramdhan*. (1864) 1 W.R. Cr. 24.
23. *R. v. Asghar*. (1879) 2 A. 260; *R. v. Radhanath*. (1867) 8 W.R. Cr. 53; *Bishoo v. R.* (1868) 9 W.R. Cr. 16 (promises of immunity by the police); *R. v. Jagat*. (1894) 22 C. 50. 73; see *Roscoe*, Cr. Ev., 45; *Abdul v. R.* (1904) 1 All. 1 J. 110; *Tara v. R.* (1924) 45 A. 633, 74 I.C. 529; A.I.R. 1924 A. 72 (A confession, however, made under promise of pardon, may be admissible under S. 308 Cr.P.C., 1973). *R. v. Asghar*, supra; *R. v. Hanumanta*. (1877) 1 B. 610.
24. *R. v. Ganesh*. 1923 Cal. 458; 1 I.L.R. 50 C. 127.
25. *v. ante*.
26. *R. v. ...* (1877) 9 B.L.R. 11 C.R. 258.

[illegible]

- R. v. Fennell, (1881) 7 Q.B.D. 147;
- R. v. Hatts, 49 L.T. 780; R. v. Walkley, (1833) 6 C. & P. 175; but this construction will not prevail if such a statement is accompanied by other words which show that it was not intended in this sense: as if "you had better as good boys, tell the truth;" R. v. Reeve, (1872) L.R. 1 C.C.R. 362: "I dare say you had a hand in it, you may as well tell me all about it," is an inducement; R. v. Croydon, (1846) 2 Cox. 67.
- R. v. [Name], (1872) 1 B. & H.C. R. 358.
- R. v. Hearn, (1841) 1 Car. & M. 109; Wills, Ev., 212. *ibid* 2nd Ed., 305; R. v. Richards, (1832) 5 C. & P. 318.
- R. v. Cass, (1784) 1 Lea. 293 note.
- R. v. [Name], (1872) 1 B. & H.C. P. 8.
- R. v. Luckhurst, (1853) Dears. C.C. 215.
- R. v. Upchurch, (1836) 1 Moo. C. C. 465.
- R. v. Jones, (1809) R. & R. 142.
- R. v. Thompson, (1783) 1 Lea. 291.
- R. v. Parrott, (1831) 4 C. & P. 570.
- R. v. Winsor, (1865) 4 F. & F. 366.
- R. v. Rama Birapa, (1878) 3 B. 12.
- R. v. [Name], (1872) 1 B. & H.C. R. Cr. 24.
- R. v. Mills, (1833) 6 C. & P. 146.
- R. v. Partridge, (1836) 7 C. & P. 551.
- R. v. Dhurum, (1867) 8 W.R. Cr. 13; Dinanath v. R., 60 I.C. 1006; A.I.R. 1921 B. 70; (1921) 45 B. 1086; see Zeta v. R., 37 I.C. 314, where the statement was held admissible.
- R. v. Thomas, (1834) 6 C. & P. 353.
- R. v. Asghar, (1879) 3 A. 260; R. v. Radhanath, (1867) 8 W.R. Cr. 53, and as to confession induced by knowledge that reward and pardon had been offered, see R. v. Blackburn, (1853) 6 Cox. 333; R. v. Boswell, (1842) 1 Car. & M. 584; R. v. Dingley, (1845) 1 C. & K. 537; R. v. Anant, 32 C.L.J. 204; 60 I.C. 417.
- R. v. Mansfield, (1881) 14 Cox. 639; Wills Ev., 2nd Ed. 12 and 303.

you are not to trouble and it will be the worse for you'⁴. But the effect of threat must be imported. Thus the following statements have been held not to exclude the confession: "I must know more about it;"⁵ "Now is the time for you to take it (the stolen property) back to the prosecutor."⁶

A confession induced by a promise of pardon or of being made an approver is inadmissible. Where there are more than one accused, and there are reasonable grounds for supposing that the confession of an accused might have been made with the inducement that the person confessing would be taken as an approver and escape punishment, omission to warn him that it was not intended to take him as an approver, is fatal to the admissibility of the confession,⁷ as it causes a great doubt as to the voluntary nature of the confession.⁸ But if the effect of the promise had worn off by the time the confession was made then under Sec. 28 the confession is admissible.⁹ The effect of a promise is not worn off by the Magistrate merely going through the form of telling the accused that he was not to allow any inducement to operate upon his mind in making the confession.¹¹

Under the expectation that the confession is the only way for safety, under which the accused makes a confession, is shown not to have been the effect of an inducement, threat or promise as specified in Sec. 24, a confession otherwise voluntarily does not cease to be so simply because the accused person of his own belief, that to confess his guilt would be the only way of escape, confesses.¹² An accused may wish to earn pardon by turning an approver, but that alone is not sufficient to show that any inducement was held out to him to make a confession.¹³ When an approver has been rendered a witness by Sec. 107 (1) (Section 306 (3) Cr. P. C., 1973), and he has accepted the tender of his statement can be recorded under Sec. 164 (S. 164 Cr. P. C., 1973) in confirmation, and it will be admissible in evidence against him at a subsequent trial after forfeiture of the pardon, even for the offence in respect of which the pardon was tendered. It is not a confession but a statement made by a person who was not an accused but was to be examined as a witness.¹⁴

4. *R. v. Cole*, 1858, 10 Cox 539.
 5. *R. v. Reason*, (1872) 12 Cox. 228; 12 Q.B. 119; 11 F.T. 370.
 6. *R. v. Jones*, (1872) 12 Cox. 241; 12 Q.B. 120; 11 F.T. 370; 11 F.T. 370; 52 Cr. L.J. 917; *Nanak Chand v. Emperor*, 1932 Lah. 73, 133 I.C. 545.
 7. *S. v. Baidul* 11 R. (1950) 6 Raj. 359; 1956 Raj. 67; *Khetal v. Emperor*, 1923 All. 352; 1 I.L.R. 45 All. 300; 73 I.C. 62; *Tara v. Emperor*, 1924 All. 72; 1 I.L.R. 45 All. 633; 74 I.C. 529.
 8. *In re Madhithati Venkata Reddi*, 1981 Mad. 331 333 11 R. 1951 Mad. 544 (1950) 2 M.L.J. 258 1950 M.W.N. 896.

9. *S. v. Sow v. Emperor*, 1936 Rang. 455; 165 I.C. 319.
 10. *Lee Ahnood v. Emperor*, 1936 Lah. 855; 165 I.C. 880.
 11. *Kesavan Gopalan v. State*, 1954 T.C. 456; 1954 Cr. L.J. 1468; see also *Srinivasulu v. Emperor*, 1928 Cal. 500; 109 I.C. 225; 32 C.W.N. 616.
 12. *Ram Singh v. Emperor*, 1943 Oudh. 269; 205 I.C. 514; *Emperor v. Sher Singh*, 1943 Lah. 388; 143 I.C. 499; *Nilmadhav v. Emperor*, 1926 Pat. 279; 1 I.L.R. 5 Pat. 171; 96 I.C. 509; *Emperor v. Hari Piari*, 1926 All. 737; 1 I.L.R. 49 All. 51; 97 I.C. 44.
 13. *Ram Bhatia v. Emperor*, 1944 Nag. 105 11 R. 1944 Nag. 274; 212 I.C. 449 (F.B.).

20. (a) Partial rejection of a confession; (b) Confession contradicted by confession; and (c) Confession contradicted by medical evidence. These three allied topics may be dealt as follows.

(a) *Partial rejection of a confession.* The Allahabad High Court in *Balmakunda v. Emperor*¹⁵ came to the conclusion that where there is no other evidence than a confession to show affirmatively that any portion of the exculpated element in the confession is false, the court may accept or reject the confession as a whole and cannot accept only the inculpated element while rejecting the exculpated element as inherently incredible. Flowing from this decision, the same court held, in *Emperor v. Nanna*,¹⁶ that if any part of a confession is relied upon by a court and there is no evidence to disprove an other part of it, the whole confession must be accepted by the court. But this is not so, when a part of it is proved false by other evidence. In such a case, the court can rely on one part discarding the other part. Similarly the Madras High Court has held in *In re Santhanakrishna Chetty*¹⁷ that the confession of the accused being the only evidence against him, it must be taken as a whole and nothing can be read into it which is not contained therein. But, in some other cases it has been held, that the contention, that where a confessional statement is put in it must go in as a whole and all parts of it must be accepted as true unless they are impossible of belief or are shown to be untrue, is putting a proposition too strongly and is not a correct statement of the law. To say that if the court believes the confession it must also accept the circumstances alleged by the accused in extenuation, however impossible, is to go much too far. A confession is like any other piece of evidence. The court can believe that part of it which tells against the accused and reject that which tells in his favour. The whole confession is left to the court to say whether the facts asserted by the accused in his favour are true¹⁸. In *Emperor v. Etwia*,¹⁹ the court said that it is true that if an accused person makes a confession the whole of the confession must be placed before the court and received in evidence. But there is no rule of law which compels belief in the statement of the accused. The Court, if it comes to the conclusion that the statement in its essential particulars is true, is entitled to disregard statements which it may hold in the circumstances are not true. Relying on *Harnamant Gurmud v. State of M. P.*,²⁰ it was held in *Para Kinkar v. Tripura State*,²¹ that there is no doubt that, in cases where there is no other evidence except the confession, the rule that a confession must be used either as a whole or not at all, applies with full force. But in cases where there is other evidence also, the entire confession can be examined in order to find out which part of it is correct. But, the absence in the confession of elaborate detail put forward by the prosecution, cannot brand it as false if there is nothing in the confession contrary to the oral evidence.²² If a confession is found to be

15. A.I.R. 1931 All. 1: 52 All. 1011: 129 I.C. 258, F.B.

16. A.I.R. 1941 All. 145: 42 Cr. L.J. 485.

17. A.I.R. 1938 Mad. 888 (2): 65 M.L.J. 897: 147 I.C. 46.

18. *Murugesan v. Emperor*, 1934 M.W.N. 13 (Cr.); *S. Lakshminya v. Emperor*, 1930 M.W.N. 785.

19. A.I.R. 1938 Pat. 258: 39 Cr. L.J. 554: 175 I.C. 300.

20. A.I.R. 1952 S.C. 343: 1952 S.C.J. 509: 1954 Cr. L.J. 129: (1952) 2 Mad. L. J. 631: 1952 All. W.R. Sup. 109.

21. A.I.R. 1957 Tripura 19: 1957 Cr. L.J. 1292.

22. *Sahayana Gopal v. State of Madras*, A.I.R. 1958 S.C. 66: 1958 Cr. L.J. 238: (1958) 1 Mad. L.J. 3.C. 130: 1958 M.L.J. Cr. 202: 1958 A.W.R. Sup. 78.

als, in part, namely, as to the justifying motive for an offence, it does not follow that the rest of it relating to the commission of the offence must be rejected. Where the entire statement of a person has gone in evidence any part of it may be contradicted by the prosecution and, if sufficient grounds exist, the court may accept the inculpatory and reject the exculpatory portion. Their Lordships of the Supreme Court have approved the observations of the Full Bench in *Bal Meharaj v. Emperor*²³ and *Palvinder v. State of Punjab*.²⁴

The rule deducible from all these decisions is that the inculpatory and exculpatory contents in a confession must be equally weighed, and that, if part of the confession is relied upon by the court and there is no evidence to disprove another part of it, the whole confession must be accepted by the court and that the rest of the confession when part of it is seen to be false by the other facts in the case. In such a case the court can act upon the acceptable inculpatory part and reject the unacceptable self-exculpatory part. The acceptability of inculpatories will naturally depend upon the circumstances of each case.²⁵

In a decision of the Supreme Court²⁶ it was observed that the proposition that a statement, which contains any admission or confession, must be accepted as a whole and the court is not free to accept in part while rejecting the rest, is not widely stated. The authorities establish that—

- (a) where there is other evidence, a portion of the confession may in the light of that evidence be rejected while acting upon the remainder with the other evidence; and
- (b) where there is no other evidence and the exculpatory element is not inherently incredible, the court cannot accept the inculpatory element and reject the exculpatory element.

Applying the aforesaid principle, the Supreme Court distinguished its previous decision²⁷ and held that in a case where the exculpatory part of a confessed statement is not only inherently improbable but is contradicted by other evidence, including the statement of the accused himself under section 313, Cr. P. C., 1908, there is enough evidence to reject the exculpatory part and the court acts rightly in accepting the inculpatory part and putting the same with the other evidence, and concluding that the accused was responsible for the crime. (See also Section 11, Note 5 and Section 24, Note 1, *supra*.)

23. A.I.R. 1931 All. 1.

24. A.I.R. 1962 S.C. 834; 1963 Cr. L.J. 154; 1953 All. L.J. 18; 1953 All. W.R. (Sup.) 19; 1953 M.W.N. 418; I.L.R. 1953 Punj. 107; 1 B.L.J. 30.

25. See *Bhima v. State*, A.I.R. 1956 Orissa 177.

1. *Naga Kumar Jha v. State of Bihar*, 1961, 2 S.C.R. 193; I.L.R. 48 Pat. 9; 1961 S.C.A. 587; 1969 1 S.C.C. 347; (1969) 1 S.C.J. 844; (1969) 1 S.C.W.R. 1149; 1969 A.L.

J. 638; 1969 A.W.R. (H.C.) 549; 1969 B.L.J.R. 281; 1969 M.P.W.R. 590; 1969 M.L.J. (Cr.) 458; A.I.R. 1969 S.C. 422.

2. *Hanumant Govind v. State of Madhya Pradesh*, A.I.R. 1952 S.C. 343 and *Palvinder Kaur v. State of Punjab*, A.I.R. 1952 S.C. 354 also referring to *Narain Singh v. State of Punjab*, A.I.R. 1959 S.C. 484.

(b) *Confession not withdrawn by confessioner* In *Balla Singh v. State of Punjab*³ the approach in such cases has been set out.

It has been held that if a confession is retracted subsequently, each confession should be considered on its merits and used against the maker if the Court is in a position to come to an unhesitating conclusion, that the confession was voluntary and true.

(c) *Confession contradicted by medical evidence* In *Harold White v. King*⁴ it has been pointed out that confessions are not always true and they must be checked, more particularly in murder cases, in the light of the whole evidence on the record in order to see if they carry conviction. The Court should attach great importance, for instance, to the existence of contradictions between confessions and medical testimony.

Where the contradictions between the confessional statement and the medical testimony are glaring and irreconcilable, the medical evidence will be fatal to the acceptance of the confession. Such a case was *Jagmal v. Emperor*,⁵ wherein one of the accused confessed that he had strangled the deceased with a cloth but the medical examination found no marks of strangulation. Where the accused's story was of having hit two *kachet* bows, but the doctor found five injuries which were not the kind and additions on the body of the deceased, this discrepancy was held to be a discrepancy in time of murder as given by the accused which, after representation case, was found vital enough to affect the voluntary nature of the confession.⁶

Where the accused denies the injuries inflicted by him in his confession but the medical examination evidence gives a fair picture of all the injuries inflicted, the probability of a confession statement will be affected, but it will not be a case of the medical testimony being fatal to the acceptance of a confession. Such a case was *Sunder v. Emperor*.⁷ But the medical testimony has to be carefully scrutinised, because the probative value of expert evidence is largely dependent upon the competency of the medical man, and on the care and attention with which he has given in the examination under consideration. In *Mohan Lal v. State*, it has been pointed out that the court should not adopt the easy course of throwing away the prosecution case on account of the alleged discrepancies between the confession and the evidence of the eye witnesses. Sometimes, medical officers also give the best of their attention while performing examinations, and their opinions may not be properly formed on account of inadvertence or mistake or exaggeration or lack of complete knowledge. Medical-legal work cannot be overdone. The proper approach is that the court should not necessarily give opinion as that of the medical men, who are called before it, but with their help as the medical men can afford, the court should form its own opinion on the facts in hand.⁸ The acceptability of the doctor's

3. A.I.R. 1957 S.C. 216; 1957 Cr. L.J. 481.

4. A.I.R. 1945 P.C. 181; 47 Cr. L.J. 575.

5. A.I.R. 1948 All. 211; 49 Cr. L.J.

243.

6. *Sunder Singh v. State of Rajasthan*, 1976 Raj. Cr. C. 214.

7. A.I.R. 1945 Lah. 91.

8. A.I.R. 1961 Rajasthan 24.

evidence depends upon the grounds and cogency of his reasons. The evidence of the medical man should be scrutinised, sifted and tested, like that of any other witness. It is the duty of the court to do so, for medical men like other witnesses are liable to make mistakes.

The difficulty in preferring medical evidence to confessional statements will be solved, if medical men would bear in mind certain principles laid down by Mr. Glaister. These are: Study the case and be conversant with the facts and the literature on the subject; always have adequate reasons for your opinions, be fair and unbiased, concede points which should be conceded, answer "I do not know" when you do not know; never express an opinion on the merits of the case that is the function of the Judge or the jury as the case may be; do not sit on the fence. A doctor who will not commit himself to an opinion is not worth calling as a witness.

Medico-legal work may not be well done. The court should carefully evaluate both the confessional statements as well as the medical evidence before rejecting the one or the other, in case there are discrepancies between them.

21. Magistrate not following precautions under Sec. 164, Cr. P. C. Where a Magistrate records a confession, without following the precautions mentioned in Sec. 164 of the Criminal Procedure Code, the confession is not a proper one. No evidence can be given regarding such a confession and it cannot be taken into consideration even though it was made by the accused independently of the police investigation.⁹

The act of recording a confession under Section 164, Cr. P. C., is a very solemn act and, in discharging his duties under the said section, the Magistrate must take care to see that the requirements of sub-section (3) of section 164 are fully satisfied.¹⁰

22. Judicial confession, admission of. The confessional statement of an accused recorded by a Magistrate can be admitted in evidence and made an exhibit without the recording Magistrate being examined in court.¹¹

25. Confession to police officer not to be proved. No confession made to a police officer,¹² shall be proved as against a person accused of any offence.

9. *Neeraj Kumar v. State*, A I R, 1965 A. 10. *Sripa Singh v. State*, 1975 Cr. I. J. 690. A I. J. *State v. Lobsang* Shorip, 1978 Cr. I. J. 85. H. P. J.

10. *Suresh Singh v. State of Punjab*, 1967 S. C. J. 693. 1957 A. W. R. Sup. 99. 1977 M. P. C. 781. (1957) 1 M. I. J. 101. 62 I I R. 1957 P. J. 152. 1957 Cr. I. J. 1014. A I R, 1957 S. C. 637, 643. *Prigal P. v. State*, 1 I L R. (1969) Cr. 809. 1969 Cr. I. J. 1255. A I R, 1969 Orissa 245. *State v. Banu dhar Panda*, 1974 Cut. L. R. (Cri.) 475.

11. *Bisipati Padhan v. State* 35 Cut. L. J. 362. 1969 Cr. I. J. 1517. A I R, 1969 Orissa 289, 292. *Kashmita Singh v. State of M. P.*, 1952 S. C. R. 726. 1952 S. C. J. 291. 1952 A. W. R. 64. 1952 Cr. I. J. 572. (1952) 1 M. I. J. 724. 1952 M. W. N. 402; A I R, 1952 S. C. 159, 163 [endorsing the remarks of the Privy Council in *Nazir Ahmad v. Emperor*, A I R, 1939 P. C. 253 (2), at p. 258].

12. As to statements made to a police officer investigating a case, see Cr. P. C., S. 162.

SYNOPSIS

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| 1. Principle. | c) Miscellaneous |
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1. Principle. The powers of the police are often abused for purposes of extortion and oppression,¹³ and confessions obtained by the police through undue influence have been the subject of frequent judicial comment.¹⁴ "The object of this section is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them."¹⁵ If a confession be 'made to a police officer, the law says that such a confession shall be absolutely excluded from evidence because the person to whom it was made is not to be relied on for proving such a confession, and he is moreover suspected of employing coercion to obtain the confession.' The reason for this rule (Sec. 25) is stated thus in *R. v. Bala Lal*:¹⁶

"These legislative provisions leave no doubt in my mind that the Legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture, nor do I doubt that the Legislature, in laying down such stringent rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the extortion of confessions by taking away from the police officers the advantage of proving such extorted confessions during the trial of accused persons It requires no vivid imagination to picture what too often takes place when two or three of these not very intellectual or highly paid police officials are called away to a village to investigate a grave crime, of which there are no very clear traces. Naturally it is much the easier way for them to begin by endeavouring to obtain a confession from the suspected person or persons, instead of by searching out the clues to the evidence from independent sources, and seeing what extraneous proof there is. But, as I have more than once been constrained to remark from this Bench, the effect of this sanction given by Sec. 161 of the Criminal Procedure Code to a Magistrate recording in the

13. See Extract from The First Report of the Indian Law Commission and remarks of Straight, J., in *R. v. Bala Lal*, (1884) 6 A. 509, 542 and Melrose, J., ib., 523, but see also remarks of Duthoit, J., ib., 550.

14. *v. ante*, notes to S. 24.

15. Per Chief J. in *R. v. Haribole*, (1876) 1 C. 207, 215; see also in the matter of Hiran, (1877) 1 C. L. R. 21; *R. v. Pancham*, (1882) 4 A. 198, 234. ss. 26, 26A and 27, "differ widely from the law of Eng-

land and were inserted in the Act of 1884 inasmuch as they have been taken in order to prevent the practice of the police for the purpose of extorting confessions." Steph. Introd., 165.

16-17. *R. v. Bala Lal*, (1884) 6 A. 509, 542, per Melrose, J., and *v. ib.*, 544, per Straight, J., ib., 513, per Oldfield, J.; see also S. 162, Cr.P. C. and *Keramat v. R.*, 1926 Cal. 147, 92 I.C. 43, 32 C.L.J. 52b.

course of an investigation, the confessions of accused persons are obtained not from the police, but from persons not connected with the commission of guilt as is supposed, for it continually happens that while the police have been occupying themselves in getting the confession, many of the traces of the crime, which, if properly followed up, would have afforded valuable proof, have disappeared. To regard a confession as a confession, instead of working up to the confession the work done prior to it, with the result that we frequently find ourselves compelled to reverse convictions simply because, beyond the confession, there is no other evidence of guilt. Moreover I have said, and I repeat now, it is necessary that the examination of a large number of confessions should come before us in the course of a trial, and of by this Court either in appeal or revision, should have been voluntarily and freely made in every instance represented. I may claim some knowledge and acquaintance with the ways and contacts of persons accused of crime, and I do not believe that the ordinary inclination of their minds, which in this respect I take to be pretty much the same all the way all the world over, is to make any confession of guilt. I can only say, that, during fourteen years as a judge in the Criminal Courts of England, I do not remember that a confession made by an accused person, even after having been made was reported. In this country, too, the confession is not even followed almost invariably as a matter of course, and I think I can say how this is sought to be explained by the fact that the police officer, upon whom the confession is made, is not a person of the same rank and position as the source of the confession, and that the confession is not properly admitted. I say, again, to sensible persons, however smart, that it is impossible not to feel that the average Indian policeman, with the desire to satisfy his superior before the eyes of the Police Act and Rule behind him, is not likely to be so honest as to make a confession which is not true to the elucidation of a crime, but a confession which is a mere confession.

The material words in section 162, Cr. P. C., and in section 163, Cr. P. C., and the intention of the Legislature is, so the section may be taken admission of confession made to a police officer.¹⁸ The words any person in section 162, Cr. P. C., in their ordinary meaning will include any person, though he may not make the statement under that section. Statements made by an accused to the police in the course of investigation are inadmissible under section 162, Cr. P. C. And if the statement is a confession it is also inadmissible under Evidence Act. An incriminating statement made to a police officer is not by section 162, Cr. P. C., and is not admissible in evidence.²²

2. Scope and applicability. In the case of *State v. B. S. B.*, the questions by the accused as to the admissibility of every confession made by him in law admissible provided that section 162, Cr. P. C., is not applicable to such

18. *Himat Singh Badhar Singh v. State of Gujarat*, 1 L.R. 1964 Guj. 804; (1964) 5 Guj. L.R. 897; 1965 (2) Cr. L.J. 753; A.I.R. 1965 Guj. 302, 309.

19. *Kakala Narayana Swami v. Emperor*, A.I.R. 1939 P.C. 47.

20. *Shiv Bahadur Singh v. State of V.P.*, 1954 S.C.R. 1098; 1954 S.C.

A. 1316; 1954 6 C.J. 362; 1954 Cr. L.J. 910; A.I.R. 1954 S.C. 322; *Mahabir Mandal v. State of Bihar*, 1972 Cr. L.J. 860; A.I.R. 1972 S.C. 1331.

21. *Ibrahim Husen v. State*, 1969 Cr. L.J. 739; A.I.R. 1968 Goa, 68, 72.

22. *Lalu Mukhi v. State*, 35 Cut. L.T. 94; 1969 Cr. L.J. 1172, 1173.

questions are to be condemned and Judges have a discretion to exclude such evidence. Such confessions are totally inadmissible under this section.

3 Construction of the section. The rule enacted by this section is without limitation or qualification and a confession made to a police officer is inadmissible in evidence, except so far as is provided by the twenty-seventh section, *post*.²³ It is better in construing a section, such as this, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification. The enactment in this section is one to which the Court should give the fullest effect.²⁴ The terms of the section are imperative; and a confession made to a police officer under any circumstances is inadmissible in evidence against the accused. The next section does not qualify the present one, but means that no confession made by a prisoner in custody to any person other than a police officer, shall be admissible, unless made in the presence of a Magistrate.¹ The twenty-fifth and twenty-sixth sections do not overlap each other. On the other hand the twenty-sixth section cannot be treated as an exception or proviso to this section. The two sections lay down two clear and definite rules. In this section, the criterion for excluding a confession is the answer to the question to whom was the confession made? If the answer is that it was made to a police officer, it is excluded. On the other hand, the criterion adopted in the twenty-sixth section for excluding a confession is the answer to the question under what circumstances was the confession made? If the answer is, that it was made whilst the accused was in the custody of a police officer, the confession is excluded, "unless it was made in the immediate presence of a Magistrate."² Therefore, a confession to a police officer, even though made in the presence of a Magistrate, is inadmissible.³ But the statement must amount to a confession, if it is not an admission of guilt it may be admissible.⁴

23. *Ibrahim v. R.*, 1914 P.C. 155; 23 I.C. 678; 15 Cr. L.J. 526; 18 C.W. N. 705; 1 L.W. 989; *R. v. Gardner*, (1915) 85 L.J.K.B. 206; *R. v. Babin*, (1918) 1 K.B. 581; *R. v. Cook*, (1918) 81 I.L.R. 515; *R. v. Booker*, (1834) 18 Cr. App. R. 47.
24. In the matter of *Hiran* (1877) 1 C.I.R. 21; *R. v. Babu Lal*, (1884) 6 A.L.J. 509; see *Hira v. R.*, 21 Bom. I.R. 724; 54 I.C. 601; A.I.R. 1919 B. 162 cited under S. 8 ante; see as to construction of this section, the *Madras Law Journal* (January and February, 1897) pp. 31-36 and also *Ahmad Noor Khan v. State of Assam*, 1972 Cr. I.J. 779; A.I.R. 1972 Gauhati 7.
25. Per Garth, C.J., in *R. v. Hurribole*, (1885) 1 C. 215; 25 W.R. Cr. 86, but see dissent of Smart, C.J. in *R. v. Pancham*, (1882) 4 A. 198, 203 in which however, Straight, J. seems not to have concurred and which was dissented from by the Calcutta Court in *Adu v. R.*, (1885)

11 C. 635, 641; "the prohibition in this section must strictly be applied." *R. v. Pancham*, (1882) 4 A. 198, per Straight, J.

1. *R. v. Hurribole*, supra, 215. In the matter of *Hiran*, supra. *R. v. Babu Lal*, (1884) 6 A. 509, 532.
2. *R. v. Babu Lal*, (1884) 6 A. 509, 532 per Mahmood, J., and *v. ib.*, 544-545, per Straight, J.
3. *Zwinglee Anel v. State*, 1964 S.C. 15; 1965 Cr. I.J. 299; *R. v. Domun*, (1896) 12 W.R. Cr. 82; *R. v. Mon Mohan*, (1875) 24 W.R. Cr. 33; in this case the confession was made to the Magistrate, but the report showed that had it been made to the police it would have been held to be inadmissible. *Mahinkumara-swami v. R.*, (1912) 35 M. 397; *Abdul Rahim and Muller, JJ.* dissenting.
4. *Jalal v. R.*, 1923 Lah. 282; 81 I.C. 347; 25 Cr. I.J. 811; *Ramhir v. R.*, 1922 All. 24; 65 I.C. 849; 20 A.L.J. 178; 23 Cr. L.J. 193.

Moss v. MacLennan⁵ says that the statement "it amounts to a confession that the accused is against the person making it. It does not say that it is inadmissible for any purpose." And so a confession has been used to show that a statement made by a defendant was not to be believed.⁶ Where the statement is made by a person to a Magistrate amounting to a repetition, practically without comment, of a previous incriminating conversation between himself and another, it is excluded by this section.

The provisions of the section are unqualified. It is therefore, immaterial whether the confession was made at the time of making the confession, accused or not, or whether he was in police custody or not, or whether the confession was made in the presence or in the absence of a Magistrate or not. When a police officer takes a confession from a person sufficient to justify the arrest of an accused, he is bound to make a note of the arrest, examine him, and record his statement. The confession made by a police officer should be taken down in writing, and he is required to sign the statement, to a particular effect, and to sign the statement under this section, and to sign the statement against the accused.

In order to determine the applicability of the section, it is the position of the person at the time when the confession is made that is significant to be proved, and not his position at the time he made the confession that is to be considered.⁸ Hence, so much of the First Information Report as amounts to a confession by the accused is inadmissible under the section. As to the admissibility of the remaining portion of the First Information Report, see Sec. 27, which states under that section, *post*.

The prohibition contained in Sec. 25 is of a general nature. It forbids the proof of a criminal offence of any description or offence made by the accused against another and it forbids the proof of any offence made by the accused against himself. It could have been limited to offences made by the accused against another, but it is not so limited.

5. *Gulab v. R.*, 1923 Lah. 315; 75 I. C. 693; 25 Cr. L.J. 5.

6. *Emperor v. Anand Rao*, 1925 Bom. 529; 1 I.L.R. 49 Bom. 642; 89 I.C. 1046; 26 Cr. L.J. 1478; 27 Bom. L.R. 1034.

R. v. Jadub Das, 27 C. 295; (1899) 4 C.W.N. 129; see also *Shewakram Issardas v. Emperor*, 1939 Sind 130; 182 I.C. 464; 40 Cr. L.J. 661; but see *Ram Lal v. Emperor*, 1942 Oudh 246; 198 I.C. 276; 43 Cr. L.J. 342; 1942 O.W.N. 3; where it was held that for a confession made to a police officer to be inadmissible it must be by a person accused of an offence. As to incriminating statements of one accused against another to a police officer, see *Zeta v. R.*, 10 Bur. L.T. 270; 37 I.C. 314; A.I.R. 1917 I.B. 87.

8. *Kartar Singh v. State*, 1952 Pepsu 98; 1 I.L.R. (1952) Pepsu 186; 1952 Cr. L.J. 1090.

9. *Kartar Singh v. State*, 1952 Pepsu 98; 1 I.L.R. (1952) Pepsu 186; 53 Cr. L.J. 1090; *Mohammad v. Emperor*, 1948 Lah. 10; 48 Cr. L.J. 961; *Bharosa Ram Dayal v. Emperor*, 1941 Nag. 86; 1 I.L.R. 1940 Nag. 679; 193 I.C. 6; 42 Cr. L.J. 390; 1940 N.L.J. 623; *Legal Remembrancer, Bengal v. Lalit Mohan Singh Roy*, 1922 Cal. 342; 1 I.L.R. 49 Cal. 167; see also *Emperor v. Mayadhar Pothal*, 1939 Pat. 577; 1 I.L.R. 18 Pat. 450; 181 I.C. 1001; 40 Cr. L.J. 625; *Baldeo v. Emperor*, 1940 All. 263; 1 I.L.R. 1940 All. 396; 188 I.C. 562; 41 Cr. L.J. 627 (F.B.); *Harnam Kisha v. Emperor*, 1935 Bom. 26; 1 I.L.R. 59 Bom. 120; 154 I.C. 621; 36 Cr. L.J. 539; 36 Bom. L.R. 1117; *Lal Khan v. Emperor*, A.I.R. 1948 Lah. 43; *In re Madegowda*, 1 I.L.R. 1956 Mys. 244; A.I.R. 1957 Mys. 50.

other words, the terms of this Section do not limit its application only to confessions of offences with which the accused was charged.¹⁰ This section applies equally to confessions with regard to offences not under this section as with regard to offences under investigation.¹¹

4. **Police officers.** Primarily, the term "police officer" in this section means the same as it has in the Police Act, 1861, where it is defined in Sec. 1, as including any person employed under that Act. In construing this section, the term "police officer" should be read, not in any strict technical sense, but according to its ordinary, comprehensive and popular meaning. A question therefore, whether a Deputy Commissioner of Police in Calcutta has been held to be inadmissible.¹⁴

The provisions of this section 25 and 26 apply to the attendance of the police in the investigation of a voluntarily incurred offence, and, therefore, its relation to offences in this country have been subjects of the voluntary nature of the offence. They have considered the law as not necessarily to be applied after arrest, but it has been held to extend to a state of affairs in which the accused can be said to have placed himself into the hands of a police officer, and has been under direct or indirect police surveillance or restrictions on his movements by the police.¹⁵

The provisions of this section apply to every police officer and are not restricted to officers of the regular police force. But the term "police officer" in the section must be extended beyond the definition in Sec. 1 of the Police Act, to cover all those persons who, like police officers, coming within that definition, are so interested in obtaining convictions that any member of the community is that they might possibly resort to improper means for doing so. In order to determine whether a person is a police officer or not, the question is whether a person would be expected to be given to him, not the conduct of the law, but he is required to wear, but his functions, powers and duties. A police officer does not cease to be such, merely because he is put in a different uniform instead of one in khaki dress.¹⁶

10. *Ali Gohar v. Emperor*, 1941 Sind 134; 1 L.R., 1941 Kat. 292; 195 I.C. 61.

11. *Kodangi v. R.*, 1932 Mad. 24; 135 I.C. 590; 61 M.L.J. 860; *In re Seshapani Chettu*, 1937 Mad. 209; 1 L.R., 1937 Mad. 358; 166 I.C. 917.

12. *Emperor v. Akia*, 1927 Nag. 222; 101 I.C. 599.

13. *R. v. Humibole*, (1876) 1 C. 207, 215, per Garth, C. J., *In the matter of Hiran*, (1877) 1 C.L.R. 21; *R. v. Bhima*, (1892) 17 B. 485, 486, per Cardine, J.; *R. v. Salemuddin*, (1899) 26 C. 569; *R. v. Nagla*, 22 B. 235; *Amin Sharif v. Emperor*, 1934 Cal. 580; 1 L.R. 61 Cal. 607; 150 I.C. 561 (F.B.); see also *Radha Kishun v. Emperor*, 1932 Pat. 293; 1 L.R.

12 Pat. 46; 140 I.C. 233 (F.B.) (Customs Officer); *Gopaldas v. State*, 1 L.R., 1958 Punj. 2420; A.I.R., 1959 Punj. 115; *State v. Kaikhushloo*, (1958) 3 S.T.C. 681 (Sales Tax Officer); *Raja Ram Jaiswal v. State of Bihar*, A.I.R., 1964 S.C. 828.

14. *R. v. Humibole*, supra.

15. *Ram Singh v. State*, 1970 Cr. L.J. 635 (D.) 637. See also Section 24, ante, Note 14.

16. *R. v. Salemuddin*, (1899) 26 C. 569.

17. *Emperor v. Akia*, 1927 Nag. 222.

18. *Public Prosecutor v. Patamasivani*, 1953 Mad. 917; 1 L.R., 1954 Mad. 57; (1953) 2 M.L.J. 189; 1953 M.W.N. 597; *Bhaja v. State of Orissa* (1976) 42 C.L.T. 80.

The expression 'police officer' is not to be construed in a narrow sense, but in a wide and its proper sense, though not in such a wide sense as to include persons on whom only some of the powers exercised by the police are conferred¹⁹. It is not the totality of the powers which an officer enjoys, but the kind of powers which the law enables him to exercise, which have to be considered for the purpose of determining as to who can be regarded a "police officer", for the purposes of this section. The test would be, whether the powers of a police officer which are conferred on him, or which are exercisable by him, because he is deemed to be an officer in charge of a police station, establish a direct or substantial relationship with the prohibition enacted by this section, that is, the recording of a confession. The test would be, whether the powers are such as to tend to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed, or the question what other powers he enjoys²⁰. It is the power of investigation which establishes a direct relationship with the prohibition enacted in this section; when such a power is conferred he is a police officer within the meaning of this section.²¹

The expression 'police officer' covers a person who is allowed to exercise the powers of a police officer. It does not necessarily mean a person who is in charge of a police station, who is empowered to make an investigation.²² The expression 'police officer' is not confined only to such officers who are appointed under the Police Act, 1861, but includes also other officers who exercise the same powers as that of a police officer of a police station, in respect of certain offences.²³

A confession is admissible, if not made to a police officer as, for instance, when made to a customs officer, who does not exercise police function of investigation and arrest, though he is a person in authority.²⁴

The Section is imperative. A confession to a police officer is, in no circumstances, admissible in evidence against the accused, which covers a confession made even when the accused was free and not in police custody, as also one made before any investigation was begun.

19. *Raja Ram Jaiswal v. State of Bihar*, 1964 2 S.C.R. 222, A.I.R. 1964 S.C. 858, 1964 1 Cr. 1 J. 76; 1964 B.L.J.R. 411; *State of Punjab v. Balkat Ram*, 1962 3 S.C.R. 338, A.I.R. 1962 S.C. 276, 1962 (1) Cr. L.J. 217.

20. *Raja Ram Jaiswal v. State of Bihar* *supra*.

21. *Ibid.*

22. *Punjab Mava v. State of Gujarat*, A.I.R. 1965 Cr. 1 J. 5.

23. *Prasanna v. State*, I.I.R. 1965 B. 648, A.I.R. 1965 B. 195.

24. *Vandandas J. Zoghar v. Assistant Collector, Customs, Jamnagar*, 1965 3 S.C.R. 824, 1965 1 S.C.J. 208, (1964) 1 S.C.W.R. 411, 66 Bom. L.R. 482; 1965 M.P.L.J. 25; 1965 M.L.J. (Cr.) 98; 1965 (1) Cr.

1 J. 490, A.I.R. 1965 S.C. 481, 187. *State of P.asthan v. Budhram*, I.I.R. 1968 18 Raj. 622, 1968 Cr. 1 J. 31, A.I.R. 1968 Raj. 48, 49; *Jaswant v. State*, I.I.R. 1967 Bom. 618, A.I.R. 1967 Bom. 195; *Harban Singh v. State of Maharashtra*, 1972 Cr. 1 J. 759, A.I.R. 1972 S.C. 1224; *Hazari Singh v. Union of India*, 1973 S.C.C. (Cri.) 312; (1973) 3 S.C.C. 461, 1973 1 J. S.C. 201, 1973 1 S.C.J. 18; 1974 Cr. 1 J. 4, A.I.R. 1973 S.C. 62, I.I.R. 1972 1 Delhi 775; *Deputy Collector of Central Excise and Customs v. P. Shyam Babu*, 1974 40 Cr. 1 J. 866, 1974 Cr. 1 J. S.C. 209, I.I.R. (1973) Cr. 1384.

The absolute ban imposed by this section is not qualified by section 26. The section, except as provided by section 27, absolutely prohibits a confession by an accused to a police officer.²⁵ Thus if the I. L. R. made by an accused contains facts relating to motive, preparation and opportunity to commit the crime with which he is charged, it is hit by this section.¹ Incriminating statements made to police officers are hit by this section and section 26 of the Evidence Act.²

A person making a confession is held to be an accused even though he was not an accused person at the time when he made it. It is not necessary that he should have been in police custody.³

Whether a confession was really made to a police officer or not is a question of fact depending on the circumstances in which the confession was made. Where it is clear that the confession was made to a police officer (police constable in the instant case) though others were present, the confession cannot be taken out of the prohibition which the section incorporates.⁴

The following persons are "police officers" within the meaning of this section: police patrol, Bombay⁵ or Mysore⁶ but not in Berar,⁷ daroga,⁸ sub-inspector of a taluqa,⁹ police sub-inspector,¹⁰ police constable,¹¹ police head constable,¹² chowkidar,¹³ Special Officer of the Commercial Tax Department,¹⁴ Ward Rationing Officer,¹⁵ Civic Guard on duty,¹⁶ members of C. R. Police,¹⁷ and the Jirga, but not village munsifs in the Presidency of Madras,¹⁸ or a

25. *Aghino Nages v. State*, 1965 2 S.C.A. 367; A.I.R. 1966 S.C. 119; 1965 M.W.N. 219; 1965 All W.R. H.C. 116; 1965 B.I.J.R. 865; 1966 Cr. I.J. 100; 1966 M.I.L.J. 49; 1966 M.L.J. Cr. 134.
1. *Ram Sajiwan v. State of U.P.*, A.I.R. 1961 A. 447; 1961 A.I.J. 285.
2. *Prabhu v. State of U.P.*, 1963 2 S.C.R. 881; 1963 S.C.J. 491; A.I.R. 1963 S.C. 111; 1963 B.I.J.R. 923; 1962 A.I.L.J. 1097; 1962 All W.R. H.C. 386; 1965 Patn. I.R. 182; 1965 2 Cr. I.J. 182.
3. *Devi Raj v. The State*, 11 I.R. (1961) 1; Punj. 33; A.I.R. 1962 Punj. 70.
4. *In re Zahirul*, 1955 M.I.J. Cr. 313; 1955 Cr. I.J. 11; A.I.R. 1966 Mys. 199, 201.
5. *R. v. Bhima*, 1886 10 B. 485, 486; *R. v. Kamara*, 1886 10 B. 595.
6. *State of Mysore v. Kamaji Ramappa*, (1972) 2 Mys. I. J. 6; *Devappa v. State*, (1972) Mad.L.J. (Cr.) 374; (1972) 1 Mys. L.J. 499.
7. *Emperor v. Akia*, 1927 Nag. 222; 101 I.C. 399; but see *Mt Mechi v. Emperor*, 1925 Nag. 340; 88 I.C. 32.
8. *R. v. Pancham*, 1882 4 A. 198.
9. *In the matter of Hiran*, 1 C.L.R. 21.

10. *Ado Shikadar v. R.*, (1885) 11 C. 635.
11. *R. v. MacDonell*, 1872 10 B.I.R. App. 2; *Imperatrix v. Pitambar*, 1887 2 B. 6; *R. v. Pandharinath*, (1881) 6 B. 34; *R. v. Babu Lal*, (1884) 6 A. 509.
12. *R. v. Buzar*, 1883 5 N.W.P. 86.
13. *R. v. Salemuiddin*, (1899) 26 C. 569; see *Nizam Jangiraj v. R.*, (1905) 9 C.W.N. 144; 2 Cr. I.J. 255; *Deoki Jangiraj v. Emperor*, 1936 All. 753; 11 I.R. 196; All. 939; 165 I.C. 701; I.B. overruling *Ghulam v. Emperor*, 1914 All. 152; 147 I.C. 630; 1914 A.I.J. 11; *Emperor v. Mst. Jaga*, 1938 Pat. 308; 11 I.R. 17 Pat. 369; 174 I.C. 524; explaining *Radha Kushun v. Emperor*, 1932 Pat. 20; 11 I.R. 12 Pat. 46; 140 I.C. 283; I.B.J.; *Birya v. Emperor*, 1941 Oudh 563; 195 I.C. 403.
14. *In re Sureshwar H. Shelat*, 1946 Mad. 40; 226 I.C. 269; (1946) 1 M.I.J. 68; 59 I.W. 212.
15. *Oin P. Vash v. State*, 1951 Punj. 387; 53 P.L.R. 157.
16. *Ibrahim v. Emperor*, 1944 Lah. 57; 212 I.C. 156.
17. *Jagjit Singh v. State of Kutch*, 1956 Kutch 1.
18. *R. v. Sarda*, 1886 7 M. 287; see *R. v. Bhama*, (1882) 17 B. 485, 486.

Chapter XIV of the Criminal Procedure Code, 1898 (now Chapter XII of 1973 Code). Therefore the statements recorded by the inquiring officers of the Customs department do not become inadmissible by reason of section 25¹⁰. The law is now settled and it may be summed up thus: a customs officer conducting an inquiry under section 107 or section 108 of the Customs Act, 1962, is not a police officer and the person against whom the inquiry is made is not an 'accused person' and a statement made by such a person in that inquiry is not a statement made by a person accused of an offence¹¹. Also see cases under Note 4 ante.

(b) *Excise Officers.* There is a difference of opinion as to whether an Excise Inspector or Excise Officer is a police officer within the meaning of this section. The High Courts of Bombay¹², Calcutta¹³ and Madras¹⁴ have held that he is a police officer, but before the Central Opium Act was amended by the Madras Legislature in 1951 a contrary view was taken¹⁵ and the Judicial Commissioners' Court of Nagpur¹⁶ and Sind¹⁷ had held that he is and that a confession made to him is inadmissible. But a contrary view was taken by the High Courts of Patna¹⁸, Lahore¹⁹ and Rangoon²⁰. In *Balika Joti Swant v. State of Mysore*²¹ it was urged that under subsection (2) of Sec. 21 of the

10. Collector of Customs, Madras v. Kotumal, 1967 Cr. L.J. 1007; A.I.R. 1967 Mad. 263 (F.B.). 275; Assistant Collector of Customs v. Tilak Raj Shiv Dayal, 71 Punj. L.R. (D) 302; A.I.R. 1969 Delhi 201 (not a 'police officer' within the meaning of that expression in section 523, Cr. P.C. 1898 (now Sec. 457 of Cr. P.C. 1973); I.L.R. (1974) 2 Delhi 706 (customs officer is not a police officer).
11. Percy Rustomji Basta v. State of Maharashtra, (1971) 1 S.C.C. 847; (1971) 2 S.C.D. 424.
12. Nanoo Sheikh Ahmad v. Emperor, 1927 Bom. 4; I.L.R. 51 Bom. 78; 99 I.C. 330 (F.B.). (Abkari Officer); Emperor v. Dinshaw Cursetji Driver, 1929 Bom. 70; 117 I.C. 331; 51 Bom. L.R. 49 (Excise peon).
13. Amin Shariff v. Emperor, 1934 Cal. 580; I.L.R. 61 Cal. 607; 150 I.C. 561 (F.B.). (Excise Officer); Kerala v. Emperor, 1934 Cal. 616; I.L.R. 61 Cal. 967; 150 I.C. 980 (Excise Officer).
14. Public Prosecutor v. C. Paramasivam, 1953 Mad. 917; I.L.R. 1954 Mad. 57; 1953 Cr. L.J. 189; (1953) 2 M.L.J. 189, (Excise Officer).
15. Mahalakshmi v. Emperor, 1932 M.W.N. 453; Doraiswami Nadar v. Emperor, 1934 M.W.N. (Cr.) 67; Public Prosecutor v. Marimuthu Goundan, 1938 Mad. 460; 39 Cr. L.J. 388; 1938 M.W.N. 95; In re Mayilvahanam, 1947 Mad. 308; 48 Cr. L.J. 326; 1946 M.W.N. 766 (Assistant Inspector of Customs); In re K. Venkata Reddi, 1918 Mad. 116; I.L.R. 1948 Mad. 574; 49 Cr.

- L.J. 100; (1947) 2 M.L.J. 218; 1947 M.W.N. 524; (Prohibition Sub-Inspector); In re P.T. Vadivel Goundar, 1952 Mad. 299; 1953 Cr. L.J. 640; (1952) 1 M.L.J. 69; 1952 M.W.N. 57 (Prohibition Officer).
16. Ram Karan Singh v. Emperor, 1935 Nag. 13; 154 I.C. 341; 36 Cr. L.J. 511 (Excise Officer).
17. Bachoo Kadero v. Emperor, A.I.R. 1938 Sind 1; 172 I.C. 968; 39 Cr. L.J. 239 (F.B.) (Abkari Officer).
18. Radha Kishan Marwari v. Emperor, 1932 Pat. 293; I.L.R. 12 Pat. 46; 140 I.C. 283; 34 Cr. L.J. 1; 13 P.L.T. 627 (S.B.) (Excise Inspector).
19. Ramchand v. Emperor, 1945 Lah. 10; 217 I.C. 172; 46 Cr. L.J. 213; 46 P.R. 329 (Excise Officer).
20. Maung San Myin v. Emperor, 1930 Rang. 49; I.L.R. 7 Rang. 771; 121 I.C. 715; 31 Cr. L.J. 303 (Excise Officer).
21. (1966) 3 S.C.R. 698; 1967 S.C.D. 152; (1967) 1 S.C.J. 701; 1966 Cr. L.J. 1353; (1967) 1 M.L.J. (Cr.) 38; A.I.R. 1966 S.C. 1746 (the decision to the contrary in Rajendra Kumar v. State, 1966 A.W.R. (H.C.) 149; 1966 Cr. L.J. 4; A.I.R. 1966 All. 42 cannot be considered good law), the fuller Bench of the Supreme Court re-affirming the test in State of Punjab v. Barkat Ram, A.I.R. 1962 S.C. 276; Public Prosecutor v. Avvaru Annappa, 1969 Cr. L.J. 1022; A.I.R. 1969 Andh. Pra. 278, 280; Superintendent, Central Excise v. V. N. Malaviva, (1968) 1 Mys. L.J. 17, 19.

Central Excises and Salt Act, 1944 a Central Excise Officer under the Act has all the powers of an officer in charge of a police station and, therefore, he must be deemed to be a police officer within the meaning of those words in this Section, but it was observed that this power is conferred for the purpose of Sec. 21 (1), which gives power to a Central Excise Officer to whom an arrested person is forwarded to inquire into the charge against him, but a Central Excise Officer does not appear to have power to submit a charge sheet under Sec. 173 of the Cr. P. C., 1908. He will have to make a complaint, if he wants the Magistrate to take cognizance of an offence. The Central Excise Officer has powers of an Officer in charge of a police station when investigating a cognizable case, that is for the purpose of his inquiry under Sec. 21 (1) of the Central Excises and Salt Act, 1944, which is in terms different from Sec. 78 (3) of the Bihar and Orissa Excise Act, 1915, which came to be considered in *Ravi Ram Lal v. State*,²² which provided that such officer shall be deemed to be the Officer in charge of a police station. As the Sec. 21 of the Central Excises and Salt Act, 1944 provides as that for the purpose of his inquiry a Central Excise Officer shall have the powers of an Officer in charge of a police station when investigating a cognizable case. It does not say that the Central Excise Officer shall be deemed to be an Officer in charge of a police station and, therefore, he cannot be deemed to be a police officer. In any case he does not become a police officer within the meaning of this Section. Therefore, the voluntary statement made by an accused to the Deputy Superintendent of Customs and Excise is not hit by the section and is admissible in evidence, unless the accused can take advantage of section 24 ante.

(c) *Miscellaneous*.—It is immaterial whether such police officer be the officer investigating the case, the fact that such person is a police officer invalidates a confession.²³ A confession made to a police officer, even if the officer is a constable or a private police officer, is not admissible in evidence, and is therefore excluded by this section.²⁴ But a person who overhears a conversation made to a police officer in a public place, and is competent to depose to what he heard, it was held in *R. v. Pancham*,²⁵ that the evidence of a policeman who overheard a private conversation made in an inn room, and in ignorance of the police officer's identity and uninduced by it was admissible, the statement not being made to a police officer, not to what was said in his custody.²⁶ A confession made to another person in the presence of a police officer, who has asked or induced that other person to make the confession in such case, is not a confession, and the confession takes place under such circumstances that the mere presence of such policeman is to make his presence likely to affect the mind of the confessing person, is in substance a confession to a police officer. But it is otherwise if the presence of the police officer does not affect the mind of the confessing person.²⁷ If a policeman happens

22. (1964) 2 S.C.R. 752; A.I.R. 1964 S.C. 828; (1964) 1 Cr. L. J. 705; 1964 B.L.J.R. 414.

23. In the matter of Hiran, 1 C.L.R. 21; *Budhi Singh v. State*, (1972) 2 Sim. L.J. (H.P.) 152; N. C. Nath v. State, 1971 Cri. L.J. 407; A.I.R. 1971 Tripura 16.

24. *R. v. Pancham*, (1882) 4 A. 198.

201.

25. *R. v. Sageena*, (1867) 7 W.R. Cr. 56; *Jagjit Singh v. State of Kutch*, 1956 Kutch 1.

1. *Emperor v. Harpiani*, 1926 All. 737, 740; 97 I.C. 44; 27 Cr. L.J. 1068; 24 A.I. J. 958; *Emperor v. Shankar*, 1934 Oudh 222; 149 I.C. 69; 35 Cr. L.J. 894; 11 O.W.N. 636.

An extrajudicial confession made in the presence of a police officer can not be considered voluntary and is therefore inadmissible.¹⁵

It is improper for a Magistrate to record a confession in jail in disregard of the instructions contained in Government orders.¹⁶ But such a confession may be acted upon if in the circumstances of the case its voluntary character was not affected. The court, after appreciating the circumstances which made the voluntariness open to doubt, can still hold that the confession is voluntary if it finds that there are other facts and circumstances attesting the voluntariness.¹⁸

6. "Against a person accused of any offence." This section only provides that a confession made to a police officer shall be proved as against a person accused of any offence. It may, however, be proved for other purposes. It does not prevent the accused person from proving a confession made to a police officer as evidence against a person not charged with him. But, under such circumstances, it is the duty of the Judge to instruct the jury that such confession cannot be received in the trial as evidence against the person making it, but serves as evidence on behalf of the other.¹⁹ A confessional statement that the accused killed his wife on receiving provocation from her is not inadmissible where it is to be used not against the accused but in his favour to rebut his defence.²⁰ Statements made by accused persons, as to the ownership of property, the subject-matter of the proceedings against them, have been held to be admissible as evidence with regard to the ownership of the property in a dispute held by the Magistrate under Sec. 523, Act X of 1882, (now Section 142 of the Cr. P. C. of 1973-74). In this case, West J., observed: "Confession in section 25 of the Indian Evidence Act (I of 1872) means, as in the twentieth fourth section, a 'confession made by an accused person', which it is proposed to prove against him to establish an offence. For such a purpose, a confession must be inadmissible, which yet for other purposes would be admissible as an admission under the eighteenth section against the person who made it (the twenty first section) in his character of one settling a dispute as to the property, the object of litigation or judicial enquiry and disposal."²¹ Similarly, in *Pondu v. Imperial*,²² Black J., referring to a statement made by the accused to a Police Sub-Inspector observed:

"No doubt this is a confession to a police officer and it is also a statement made during the course of investigation. But it would not be acted upon under Sec. 25, Evidence Act (I of 1872) were it not proved as against an accused person. For the purposes of Sec. 517, Cr. P. C. 1898 (Sec. 152 of the Code of 1973) where

15. *Bhulakiram Koiri v. State*, 73 C. W.N. 467; 1970 Cr. L.J. 403, 411.

16. *Raj Chandra v. State of U.P.*, 1957 Cr. L.J. 559; A.I.R. 1957 S.C. 381, 386.

17. *Hem Raj Devlal v. State of Ajmer*, 1954 S.C.R. 1133; 1955 S.C.A. 50; 1954 S.C.J. 449; 1954 A.W.R. 5; 1954 Cr. L.J. 1375 (1954) 1 M.L.J. 694; A.I.R. 1954 S.C. 462, 464.

18. *Shri Irfan Ali v. State*, 1970 Cr. L.J. 603, at pp. 607, 608; 1970 Cr.

R. 498; 1970 A.W.R. (H.C.) 679.

19. *R. v. Pitamber*, (1877) 2 B. 61; *Id. v. Chandra*, 1887 Cr. L.J. 1041.

20. *R. v. Tribhovan*, (1884) 9 B. 131.

21. *Ib.* 134.

22. 1948 Lah. 312; 209 I.C. 546; *Dhanraj Baldeo Kishan v. State*, (1965) 2 Cr. L.J. 58; A.I.R. 1965 Cr. L.J. 238; see also *Prakash Chandra Jain v. Jagdish*, A.I.R. 1958 Madh. Pra. 270.

the accused does not claim the property it cannot be said that this statement is being used against him and as it is otherwise a perfectly good piece of evidence. I see no reason for not admitting it and relying on it. Similarly, Sec. 162 Cr. P. C., only bars the use of such a statement 'at any inquiry or trial in respect of any offence under investigation at the time when such statement is made'. Section 161 Cr. P. C. 1898 (Section 162 of the Cr. P. C., 1973), does not relate to any such inquiry or trial. In fact the opening words which are 'when an inquiry or trial in any Criminal Court is conducted', show clearly that it is a separate proceeding from the substantial trial of the accused person for the offence. I can see no bar, therefore, either in Sec. 25 Evidence Act, or in Sec. 162 Cr. P. C., to this statement being used for the purpose of Sec. 71 Cr. P. C. 1898 (Sec. 162 of Cr. P. C. 1973) to determine firstly whether the property is the property regarding which an offence appears to have been committed and secondly for determining the person to whose custody it should be delivered."²⁴

The expression 'accused of any offence' covers a person accused of an offence at the time whether or not he was accused of an offence when he made the confession.²⁵

The prohibition in the section cannot operate against the statement of a person recorded under section 162 Cr. P. C. in the course of an inquiry into a case of theft in proceeding under section 188, Cr. P. C. 1898 (Sec. 125 of the Cr. P. C., 1973) because in such a proceeding the maker, petitioner is not 'accused of any offence'.¹

Statement made by an accused to police is inadmissible against co-accused.²

1. Admission made to Police officers. An admission made by an accused person to a police officer may be proved, if it does not amount to a confession. A statement made by the accused to the police, containing an admission of a gravely incriminating fact, or even a conclusively incriminating fact, is not of itself a confession³ and not being a confession, it cannot be excluded by this Section. And if the statement happens to be made to the police, prior to the arrest of the accused in the case, then it is also not hit by Sec. 162, Cr. P. C. Thus it becomes admissible in evidence. Before the decision of the Privy Council in *Pabla Narayan Swami v. Emperor*,⁴ the word 'confession' was construed as meaning a statement made by an accused suggesting

24. See also *Mahanta Singh v. Her Ram*, 1944 P.W.D. 27 and the cases cited therein. *Amarendra Singh v. Govindamma*, 1 L.R., 1973 Mys. 641.

25. *Acharya Nagesia v. State of Bihar*, 1966 1 S.C.R. 131, 1965 2 S.C.A. 36, 1965 S.C.D. 248, 1966 1 S.C.J. 1, 1965 2 S.C.W.R. 77, 1965 A.W.R. (H.C.) 648, 1965 B.L.J.R. 86, 1966 Cr.L.J. 106, 1965 M.P.L.J. 49, 1965 Mad.L.J. 118, 1966 M.L.J. (Cr.) 133, 1965 M.W.N. 20, 1965 1 Ann.L.J. 430, A.I.R., 1966 S.C. 119, at p. 123.

1. *Talpaamal v. M. Muniswami* (1965) 1 M.L.J. 34, 1965 M.L.J. (Cr.) 474; 1966 M.L.W. (Cr.) 60; 1966

A.W.R. (Sup.) 34, 1966 Cr.L.J. 106, A.I.R., 1966 Mad. 392, *Prabha Devi v. State of Bihar*, 1971 Cr.L.J. 747 (Pat.).

2. *State of Gujarat v. State*, 1956 Cr.L.J. 82.

3. *Prabha Narayan Swami v. Emperor*, 1966 P.C. 4, 1966 1 A. 66, 1 L.R. 28 P.C. 234, 150 I.C. 140, Cr.L.J. 61, 1969 A.I.J. 298, 41 Bom.L.R. 428, 29 Cr.L.J. 28, 33 C.W.N. 478, 1966 1 M.L.J. 756, 49 L.W. 340, 1966 M.W.N. 185, 5 B.R. 449; 20 P.L.T. 265.

4. *State of Chhattisgarh v. State*, 1956 Cr.L.J. 82.

6. *Supra*.

the intention that he had committed the crime, and it was held in several cases that such statements made to a police officer were inadmissible under this section.⁷ Such statements would now be admissible, unless they are hit by Sec. 162 of the Cr. P. C. as they do not amount to confessions. The prohibition in Sec. 162 is based on a rule of public policy; it is absolute. The proposition that no confession to a police officer of any offence made at any time shall be proved, refers only to the confession made to a police officer and not to one made to any person. A confession made by an accused to the villagers, in the course of enquiry about the deceased, even if made in the presence of the police, which is proper, then would not be inadmissible under this Section. It is, however, true that the police officers in no case influenced the accused to make a confession or to make a confession in order to be taken no part in bringing home the confession to the accused. The prohibition in the Section applies to a confession only when made to be proved against the accused person in any civil or criminal proceedings. In *Deo Math Thakar*⁸ the head of Section 2 of Evidence Act says that no confession made to a police officer shall be proved against a person accused of any offence. The section does not prohibit the use of a confession in any other case. It is not also applicable to the case where a person proceeded to commit the offence for an offence, e.g. Sec. 141 Cr. P. C. This section forbids only the use of a confession made to a police officer to be proved against the accused person for having committed an offence. The confession could be admitted in any case brought against an accused for any offence, such as the offence of trespass, etc.; and also in proceedings under Sec. 417 of the Code of Criminal Procedure, 1898 (Sec. 152 of the Cr. P. C. 1973) which are proceedings which take place after the main proceedings are over.¹²

What if the confession is made to a sub-inspector in a police station? If the confession is made to a police officer, but it is not made to a police officer, it is not rendered inadmissible by virtue of this section. The confession was written and signed by the accused and contained a confession that he poisoned his wife and used a blue ink to make the confession. The confession was signed by the wife is not rendered inadmissible by the police officer who was not a police officer created by the police officer. The confession was made in the presence of the police officer and not was it made from the police officer. The confession was made to a police officer, even though the letter used the words 'Sub-Inspector'.¹³

7. See *R. v. Haji Sher Mahomed*, 1923 Bom. 67; 1 L.R. 46 Bom. 961; 75 I.C. 70; 24 Cr. L.J. 870; 25 Bom. L.R. 214; *Legal Remembrancer v. Lalit Mohan*, 1922 Cal. 342; 1 L.R. 49 Cal. 167; *Arimaddy v. R.*, 1927 Cal. 17; 1 L.R. 54 Cal. 237; 99 I.C. 227; 44 C.L.J. 253.

8. *Emperor v. Shankar*, A.I.R. 1934 Cal. 87; 1 I.L.J. 801; 149 I.C. 69; *Maharani v. Emperor*, A.I.R. 1948 All. 7; 48 Cr. L.J. 939; see also *Jagjit Singh v. The State*, A.I.R. 1956 Kutch 1; 1956 Cr. L.J. 217; *Stridevi v. State of U.P.*, 1973 All. Cr. R. 458; 1973 All. W. R. (H.C.) 668; 1974 Cr. L.J. 126.

9. A.I.R. 1956 Mad. 86; 19 Cr. L.J. 1240; 1951 (2) M.L.J. 605.

10. See also *Rajam v. State of Andhra Pradesh*, A.I.R. 1959 A.P. 335; 1959 Cr. L.J. 813; *In re Thandavan*, 1973 Cr. L.J. 1041 (Mad.); 1972 M.L.W. (Cr.) 214; *In re Rayappa Asari*, 1972 Mad. L. W. (Cr.) 48; 1972 Cal. L.J. 1226.

11. *Rex v. Ramdaval*, A.I.R. 1950 All. 134; 51 Cr. L.J. 436.

12. *Vijaya v. State of Andhra Pradesh*, A.I.R. 1954 Punj. 27; 1955 Cr. L.J. 155; 1 L.R. 1954 Punj. 404.

13. *Sita Ram v. State of U.P.*, (1966) S.C.R. (Supp.) 265; 1966 S.C.D. 926; (1967) 1 S.C.J. 809; (1967) 1 S.C.W.R. 955; 1966 A.L.J. 856; 1966 A.W.R. (H.C.) 407; 1966 Cr. L.J. 1000; 1966 M.L.J. 664; A.I.R. 1966 S.C. 1906.

13. Act does not in terms apply to proceedings before the Director of Enforcement and a section 23 of the Foreign Exchange Regulation Act, 1947. Section 23 of the Evidence Act does not apply when the confession is not made to such an officer having no police powers at the time of confession¹⁴.

8. Confession in first information report. If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by the section. The confession includes not only the admissions of the offence but all other admissions of incriminating facts contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of section 25 is lifted by section 27 *post*. The separability test that if a part of the first information report is properly severable from the strict confessional part, then the severable part could be used in evidence, is misleading. The entire confession statement is hit by section 25 and save and except as provided by section 27 *post* and save and except the formal part as identifying the accused as the maker of the report, no part of it can be tendered in evidence¹⁵. The decision of the Supreme Court has set at rest the conflict in judicial decisions containing all shades of opinion ranging from total exclusion of the confession to total inclusion of all admissions of incriminating facts except the actual commission of the crime. It has also discarded the separability test. See the cases discussed on page 120 of A.I.R. 1966 S.C. 119. The first information report made to the police by a person, who is subsequently made an accused in respect of the offence reported by him, is admissible in evidence against him if the trial it it does not amount to a confession¹⁶. A first information report is not substantive evidence and can be used only to corroborate the statement of the maker under section 157 *post* or to contradict it under section 145 *post*. It cannot be used as evidence against the maker if he himself becomes an accused nor to corroborate or contradict other witnesses.¹⁷

In *Dal Singh v. Emperor*¹⁸ their Lordships of the Privy Council expressed the opinion that a first information report which the accused had made at the

14. *N. Gopaladas v. Union of India*, 1969 Ker. L.R. 450.

15. *Ajit Singh Nagaria v. State of Bihar*, 1965 1 S.C.R. 134; 1965 2 S.C. 193; 1966 S.C.D. 243; (1966) 1 S.C.J. 193; (1965) 2 S.C.W.R. 750; 1966 A.W.R. (H.C.) 648; 1965 B.I.J.R. 85; 1965 Cr. I.J. 100; 1966 M.P.L.J. 40; 1966 Mah. L.J. 117; 1966 M.L.J. (Cr.) 134; 1965 M.W.N. 216; 1966 1 Andh. L.T. 390; A.I.R. 1966 S.C. 119, 120; *Kishan Harnam Agrawal v. State of Gujarat*, 1972 Cr. I.J. 626; 1972 Cr. App. R. 184; S.C. 1972, 2 S.C. 1972; 1972 M.L.J. (Cr.) 713; 1972 L.J. (S.C.) 72; (1972) 3 S.C.C. 7; 1972 S.C. (Cr.) R. 785; 1972 S.C.C. (Cri.) 715; A.I.R. 1972 273; 1972 Bahi v. State of U.P. 1973 A.W.R. (H.C.) 142; 1973 A.W.R. (H.C.) 143; Cr. I.J. 1478; *Mahabharan v. State of Madhya Pradesh*, 1970 M.L.W. 287; 1970 Cr. L.J. 730; *Mahabharan v. Mavadhhar Rana*, 1972 58 Cut. L.T. 727; (1971) Cut.

L.R. (Cr.) 23; *Bhuria v. State of Rajasthan*, 1975 W.L.N. 682; 1975 R.J.L.W. 479; *Jalan Singh v. State of Rajasthan*, 1976 W.L.N. 678; *Gopal v. State*, 1977 A.W.C. 88; 1977 Cr. L.J. 358 (All.); 1977 A. Cr. R. 29.

16. *Jaggi v. State of Madhya Pradesh*, 1964 S.C.D. 772; (1964) 2 S.C.W.R. 130; 1964 Jab. I.J. 252; 1964 M.P.L.J. 610; 1964 Mah. L.J. 51; 1964 2 Cr. I.J. 744; A.I.R. 1964 S.C. 1870; *Jattiva v. State of M.P.*, 1967 Jab. I.J. 504; *Natesan*, In re, 1969 Cr. I.J. 83 (Madras), 84.

17. *Nagar Ali v. State of Uttar Pradesh*, 1957 S.C.R. 627; 1957 S.C.A. 81; 1957 S.C. 188; 1957 S.C.J. 222; I.L.R. (1957) 1 All. 561; 1957 A.L.J. 447; 1957 A.W.R. (H.C.) 431; 1957 B.I.J.R. 552; 1957 M.P.C. 346; 1957 1 M.L.J. (Cr.) 314; 1957 Cr. I.J. 550; A.I.R. 1957 S.C. 346; *Chhotu Lal v. State*, 1968 Cr. I.J. 17; A.I.R. 1968 All. 37, 39; A.I.R. 1917 P.C. 25, 39; I.C. 311; 1917 Cr. L.J. 471; 33 M.L.J. 555.

station to the police under the provisions of Sec. 154, Cr. P. C., 1898, (Sec. 154 (1), Cr. P. C., 1973) prior to his arrest, was clearly admissible and that certain statements in it constituted cogent evidence against him. It was said—

“It is important to compare the story told by Dal Singh when making his statement at the trial with what he said in the report he made to the police in the document which he signed, a document which is sufficiently authenticated. The report is clearly admissible. It was in no sense a confession. As appears from its terms, it was rather in the nature of an intimation of a charge. As such the statement is proper evidence against him”.

Thus a self-deserving statement of an accused person, in a document, or an oral statement serving that an inference as to any fact in issue or relevant fact, whether it amounts to a confession or not, is always provable as an admission under Sec. 20, if not hit by any provision of law. It is substantive evidence of a valuable kind against him if it is satisfactorily traced to an accused person and proved to be in his handwriting or to have been signed by him. In *In re Barendra Kumar Ghose*,¹⁹ it was said that a document to be admissible at all against an accused person should be proved to be either a document in the handwriting of an accused person by comparison with his admitted or proved specimen of his handwriting in the light of the testimony of an expert witness, or to be in the possession of an accused person or to be admissible as falling within the scope of Sec. 10 of this Act. Similarly, just as there can be proof against accused persons from admissions in documents traceable to them, there can also be proof for accused persons. An accused person usually files such a document at the close of the prosecution case, adopting them in his oral or written statement in answer to the examination by the court under Sec. 342, Cr. P. C., 1898, (Sec. 313, Cr. P. C., 1973). Where they contain provable admissions in writing by the accused, they constitute valuable substantive evidence under the law for the accused. *Empress v. Tattambee*²⁰ is authority for the proposition that there may be cases in which a court would be justified in accepting documents in evidence for the defence without separate evidence to prove them.

Confession in F. I. R. in favour of accused is not inadmissible²¹

9. Counter-complaints by accused: Admissibility. The position has been summarised in *Ramabai Kanaya v. The State*,²² where it is stated: “Counter-complaints made by accused persons when sought to be used for or against them, whether as complainants in their cases attract only the provisions of the law as to evidence as to corroboration or contradiction and are no more than former statements of witnesses, yet when used against them as accused they attract the provisions as to admissions and confessions”.

In *Hilly v. Crown*,²³ it was held that where two versions of the same incident are put forward it is of greatest importance for an accused to be able to show that his own explanation was put forward at the earliest possible op-

19. 37 Cal. 467.

20. A.I.R. 1946 Pat. 373; 47 Cr. L.J. 937; I.L.R. 25 Pat. 33; 226 I.C. 404.

21. *Dharmay v. State*, 1975 W.L.N. 508; 1975 Raj. L.W. 370.

22. (1954) M.W.N. 41; 1954 MWN (Cr.) 9; 55 Cr. L. J. 610; A.I.R. 1954 M. 442.

23. I.L.R. 1943 Lah. 77; A.I.R. 1942 Lah. 37; 198 I.C. 441.

portunity and it is the duty of the prosecution to bring that on record. In *Mohammad v. Emperor*²⁴ the position was summed up thus: "A report which amounts to a confession is admissible as being a confession made to a police officer, but a report not amounting to confession can be admitted in evidence. At the same time a report of the latter kind cannot since the maker is an accused person and not a witness, be treated as evidence against any co-accused."

The view of the Madras High Court is also similar. In *Gowdram Leelan v. Emperor*²⁵ it was observed that the complaint made by the accused was not inadmissible either under Sec. 162 Cr. P. C. or as being a confession made to a Police Officer. In *In re Pedla Venkatam*²⁶ it was stated that it was the duty of the prosecution to exhibit the counter-complaint arising out of the same transaction.

In *Patterson v. Palmer*²⁷ it was held, that where, after the fact information report of a murder had been received, the accused voluntarily goes to the police station and makes a report to the police by way of defence or reply and no question is put to him by the police, the report of the accused is not a statement made in the course of investigation within Sec. 162 Cr. P. C. and is not therefore inadmissible. It was also stated that a report of self-exculpatory nature made by an accused to the police is not a confession and is not excluded under this section, but is admissible under Sec. 24. This was followed in *Quarrell Henry v. Emperor*²⁸. See also the note noted case²⁹.

In *Indu Sanyal v. Emperor*³⁰ an information was given by the accused long before the police had information of the occurrence. It was held, that the statement was admissible as an admission, provided it was not of the nature of a confession and did not come within the excluding provisions, Secs. 24, 25 and 26 of the Evidence Act, and was not hit by Sec. 162, Cr. P. C. It was pointed out that such a statement may also be admissible under other sections of the Evidence Act, e.g. Sec. 8, Explanation I and Sec. 32.

In *Sat Chander v. King*³¹ the son of the deceased gave information and immediately afterwards the accused gave a counter-complaint and the counter-complaint was held to be admissible as investigation had not started.

In *Gowdram Leelan v. Emperor*³² the fact as to a report given by the accused having been proved, which was not a confession was held admissible in evidence.

In *Sahabuddin v. State*³³ it was observed that there is the high authority of the Privy Council not bringing counter-information which ac-

24. A.I.R. 1948 Lah. 19.

25. 1939 M.W.N. 513; 184 I.C. 336; A.I.R. 1939 M. 780.

1. 1952 M.W.N. 69; (1952) 1 M.L.J. 244; 65 M.L.W. 146; 1 L.R. 1952 Mad. 562; 1954 M. 15.

2. A.I.R. 1941 Oudh 359; 194 I.C. 236.

3. A.I.R. 1942 Oudh 60; 197 I.C. 121; See also Mathai v. State of Kerala, 1959 Ker. L.R. 839.

3-1.^o 1. L. R. (2) 1970 Delhi 854.

4. I. L. R. 26 Pat. 49; A. I. R. 1948 Pat. 62; 48 Cr. L. J. 565; 230 I.C. 167.

5. I. L. R. 28 Pat. 762; A. I. R. 1950 Pat. 44.

6. A. I. R. 1945 Sind 132; I. L. R. 1944 Kar. 456; 221 I. C. 358.

7. A.I.R. 1950 T.C. 9.

8. Dal Singh v. Emperor, 1917 M.W.N. 522; A. I. R. 1917 P.C. 25; 39 I. C. 311.

cused has given on the record of the case in which the informant himself stands his trial.

26. Confession by accused while in custody of police not to be proved against him. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate,⁹ shall be proved as against such person.

¹⁰[*Explanation.*—In this section, 'Magistrate' does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George¹¹ * * *] or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.]¹²

* 25. (Confession to a Police Officer)

* 27. (Facts discovered in consequence of information.)

SYNOPSIS

1. Object and principle.
2. Scope and applicability.
3. Police custody.

4. In the immediate presence of a Magistrate.

1. Object and principle. The object of this section (as of the last) is to prevent the abuse of their powers by the police¹³. The last section excludes confessions to a police officer under any circumstances. The present section excludes confessions to anyone else, while the person making it is in a position to be influenced by a police officer, that is, when he is in the custody of a police officer, unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of the Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any part of the police¹⁴. A confessional statement must be proved to be voluntary by the evidence of the Magistrate who recorded it and the intrinsic evidence contained in the document itself.¹⁵

2. Scope and applicability. Incriminating statements to police are hit by Sec. 25¹⁶. The section intends that confessional statements made by per-

9. A Coroner has been declared to be a Magistrate for the purposes of this section, see the Coroners Act, 1874 (4 of 1871), Sec. 20.

10. Ins. by the Indian Evidence (Amendment) Act, 1891, 3 of 1891), S. 3.

11. The words 'or in Burma' rep. by the A.O. 1937.

12. See now the Code of Criminal Procedure, 1973 (Act 2 of 1974).

13. R. v. Monmohun, (1875) 24 W. R. Cr. 33, 36, per Birch, J.

14. In the matter of Hiran, (1875) 1 C. L.R. 21, per Ainslie, J.; R. v. Hurribole, (1876) 1 C. 207, 215. For

later application of Sec. 26, see Ma. v. R. 1925 O.C. 75 I.C. 753; 25 Cr. L. J. 49; In re Naina Malai, (1921) 23 Cr. L.J. 697.

15. Bhatnagar Pant v. State of Assam, 1977 Cr. L.J. 296.

16. Pabla v. State of U.P., 1962 2 S.C.R. 881; 1963 S.C.D. 115; (1963) 2 S.C.J. 165; I.L.R. (1962) 1 All. 161; 1962 A.L.J. 1097; 1962 A.W.R. (HC) 876; 1962 B.L.J.R. 924; 1963 M.L.J. (Cr.) 365; 65 Panj. I.R. 224; 1963, 2 Cr. L.J. 182; A.I.R. 1963 S.C. 1118.

nots in police custody.¹⁷ The law is imperative in excluding, when it comes from an accused person in custody of the police, if it incriminates him.¹⁸ The prohibition in this section must be strictly applied.¹⁹ This section does not apply when confession is made by a person not in police custody though in the presence of the police.²⁰ This section does not qualify the preceding one,²¹ so that a confession made to a police officer is not admissible, even if it was made in the immediate presence of a Magistrate but not recorded in the manner laid down by Sec. 164, Cr. P. C.²² But this section, as well as the last, is qualified by the following one.²³ The twenty-fifth section applies to all confessions to police officers; the present section to all confessions to any person, other than a police officer, made by persons whilst in police custody.²⁴ This section includes all statements made by a person whilst in custody of the police and applies to such statements to whomsoever made e.g. to a fellow prisoner, a doctor or a visitor. Such statements are not covered by Sec. 162, Cr. P. C.²⁵ The words "no confession" and "any person" used in this Section are not limited to accused persons. All that is necessary to attract the provisions of this section is the custody of a police officer and a confession, any confession it would seem, and not merely a confession of the offence then under inquiry, and any confession made by any person in custody whether he is an accused person, or not; that is to say, he may be in merely preventive custody for his own safety or alternatively in jail serving a sentence for another offence.²⁶ Such confessions are inadmissible unless made in the immediate presence of a Magistrate.²

The section applies only to statements and not to acts, such as the commission of a crime. A person proceeded against under Sec. 109 Cr. P. C. is not proceeded for any offence so that a statement made by him is not a confession, and is not therefore affected by this section.³ A confession inadmissible under this section against the confessing party is, however, admissible in favour of a co-accused.⁴ As to the meaning of the expression "police officer", see section 25 *ante* Note 5.

3. Police custody. As this section relates to confessions made to persons other than a police officer whilst the accused is in the custody⁵ "of the police" a confession made to such third persons by an accused whilst the

17. *Udai Bhan v. State of U P*, A.I.R. 1962 S.C. 1111; 1962 2 Cr. L.J. 251; 1962 All. W.R. (HC) 111; 1962 All. I.J. 302; I.L.R. (1962) 2 All. 522.

18. *R. v. Matthews*, 1881 10 C. 1022, 1023, per Field, J.; see as to the construction of this section the *Madras Law Journal*, Jan. and Feb., 1895, pp. 36-44.

19. *R. v. Parbhoo*, 1882 1 A. 198, 204, per Straight, J.

20. I.L.R. 1901 2 D.M. 506.

21. *R. v. Dabhu*, 1871 12 W.R. 68; 82; *R. v. Babu Lal*, 6 A. 509, 532, *v. ante*.

22. *Zwingle v. Field v. State of U.P.*, C.P. 1964 C. 1 J. 230.

23. *R. v. Ladd Lal*, 1884 6 A. 509; *Alfred Noel Khan v. State of Assam*, 1972 Cri. L.J. 779, see note to S.

27. *post*.

24. *See H. K. K. v. Y. v. Emperor*, 1940 Lah. 129; 1 I.L.R. 1940 Lah. 129; 1884 4 Cr. L.J. 54 (F.B.).

25. *Prasad Narayan Swami v. Emperor*, 1939 P.C. 47, 52; 66 I.A. 66; 1 I.L.R. 18 Pat. 234; 180 I.C. 1.

1. *Ram Bharose v. Emperor*, A.I.R. 1944 Nag. 111; 1 I.L.R. 1944 Nag. 274; 212 I.C. 449 (F.B.).

2. *v. ante*.

3. *Bij. Nandan v. Emperor*, A.I.R. 1931 All. 9; 133 I.C. 154.

4. *R. v. Ram Dayal*, A.I.R. 1950 All. 194; 194 A.I.J. 113.

5. *R. v. Pitha*, 1876 2 B. 61.

6. *See Mang Laya v. Emperor*, A.I.R. 1924 Rang. 173; 1 I.L.R. 1 Rang. 62; 77 I.C. 429.

latter is not in such custody is not excluded by the section. Where a woman who was not in the custody of the police at the time, made a confession to a Village Munsif, whom the Court held not to be a police officer within the meaning of the preceding section, it was held that the confession could not be excluded under this section.⁷

The word "custody" in this and the following section does not mean formal custody, but includes such state of affairs in which the accused can be said to have come into the hands of a police officer, or can be said to have been under some sort of surveillance or restriction.⁸

"Police custody" for the purposes of this section does not commence only when the accused is formally arrested, but it also commences from the moment when his movements are restricted and he is kept in some sort of direct or indirect police surveillance. In *Mung Tay v. Emperor*⁹ it was said that as soon as an accused or suspected person comes into the hands of a police officer, he is, in the absence of any clear and unmistakable evidence to the contrary, no longer at liberty but is therefore, in the custody within the meaning of this section and Sec. 2. Every indirect control over the movements of suspects by the police amounts, in law to, "police custody" within the scope of this section. Indeed, there may be police custody without formal arrest. In *State of U. P. v. Dhanraj Prasad*¹⁰ the majority of the Judges observed:

"Section 40 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken into custody. Submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the custody of the police officer."

In *Paranjhansa v. State*¹¹ it was held that the accused was in police custody for the purpose of this Section from the date of his interrogation by the inspector and that he continued to be in police custody when he was brought and kept in the custody of the doctor, when some persons who came

7. *R. v. Sama*, (1886) 7 M. 287.

8. *M. v. Mahabadi v. Emperor*, A.I.R. 1948 A.C. 7; 194 A.L.J. 285; *Chhotey Lal v. State of U.P.*, 1954 All Cr. 1964 A.L.J. 99; *Mung Tay v. Emperor*, A.I.R. 1933 Rang. 13; I.L.R. 1 Rang. 609; 77 I. C. 429; *Hakam Khuda Yar v. Emperor*, 1940 Lah. 129; I. L. R. 1940 Lah. 242; 188 I. C. 498 (F.B.); *Rodal Mal v. Ramji Das*, 1935 Lah. 609; 146 I.C. 40; *Allah-das v. Emperor*, 1937 Lah. 106; I.L.R. 1937 Lah. 106; 171 I.C. 377; *Emperor v. Pancham*, 1933 Oudh 192; I.L.R. 8 Luck. 410; 143 I.C. 846; *Emperor v. Mst. Jagia*, 1938 Pat. 308; I.L.R. 17 Pat. 369; 174 I.C. 524; I.L.R. (1971)

2 Ker. 30

9. *Paranjhansa v. State*, A.I.R. 1964 O.R.S. 144; 1963 O.J.D. 52.

10. A.I.R. 1924 R. 173.

11. *Hoson v. Emperor*, A.I.R. 1932 S. 149; *Pharho v. Emperor*, A.I.R. 1932 S. 201.

12. *Gurdial Singh v. Emperor*, A.I.R. 1932 L. 609; *In re Mannem Edukondalu*, A. I. R. 1957 A. P. 729.

13. (1961) 1 S.C.R. 14; (1960) 2 S.C. A. 371; (1961) 2 S.C.J. 334; I.L.R. (1960) 2 All. 481; 1960 A.L.J. 733; 1960 A.W.R. (HC) 568; (1961) 2 Andh. W.R. (SC) 90; (1961) 2 M.L.J. (S.C.) 90; 1961 M.L.J. (Cr.) 554; 1960 Cr.L.J. 1504; A. I.R. 1960 S.C. 1125, at p. 1131.

14. *Supra*.

with the police van were left there, for there was indirect control and surveillance over the movements of the appellant by the police, which continued till the next day and the Circle Inspector came there and formally arrested him. It is settled that once police custody has commenced the mere fact that for a temporary period the police discreetly withdraws from the scene and leaves the accused in charge of some other person does not render the confession of the accused before the person in whose charge the accused was left admissible. Thus in *Degeer v. State of Rajasthan*¹⁵ the confession before a Postmaster was held inadmissible, and in *Myr Hassan Puri v. Emperor*¹⁶ the confession before a Medical Officer in hospital was held inadmissible, as police custody had commenced. In *Emperor v. (Myr) Jagia*,¹⁷ the fact that the accused was in charge of a private individual after he was first taken into police custody was held insufficient to render his confession before that individual admissible.¹⁸ The scheme of the Act appears to divide the cases into two classes:

- (1) Confessional statements made by persons not in custody are admissible in evidence against such persons in a criminal proceeding unless they are procured in the manner described in Section 24 or made for a police object and fall under Section 25.
- (2) Confessional statements made by persons in custody, except those made in the presence of a Magistrate fall under this Section and are not provable except to the limited extent permitted by Section 27 of the Act.

This distinction has been upheld in *State of U. P. v. Deoman Upadhyaya*,¹⁹ where it was said:

Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence prohibited them from being received in evidence. It is manifest that the class of persons who needed protection must were those in the custody of police and persons not in the custody of the police did not need the same degree of protection.

Where a person goes to a police officer and makes a statement which shows that an offence has been committed by him, he accuses himself and though he is formally not arrested, since he is not free to move wherever he likes after disclosure of the information to the police, he must be deemed to be in custody of the police.²⁰ In *Bakshi Mukand v. State of Bombay*²¹ the view was taken that the fact that the accused was interrogated and that he made a statement and

15. A.I.R. 1928 L. 282.

16. A.I.R. 1941 Peshawar 22.

17. A.I.R. 1938 Pat. 308.

18. See also *Emperor v. Tester*, I.L.R. (1895) 20 B. 165; *Emperor v. Myr Hassan Puri*, I.L.R. 42 B. 1; A.I.R. 1917 B. 130.

19. (1961) 1 S.C.R. 14; (1960) 2 S.C. A. 371; (1961) 2 S.C.J. 334; I.L.R. 1960 2 A.L.J. 471; 1960 A.I.J. 12; 1961 A.W.R. (HC) 568; (1961) 2 Andh. W.R. (S.C.) 90; (1961) 2

M.L.J. (SC) 90; 1961 M.L.J. (Cr.) 554; 1960 Cr. L.J. 1504; A.I.R. 1960 S.C. 1125 at p. 1130.

20. See *v. Mohammad Hussain*, A.I.R. 1959 B. 534, 536; 61 Bom. L.R. 783; see also *Legat Remoubrancer v. Lalit Mohan*, I.L.R. 49 C. 167; A.I.R. 1922 C. 342; *Santokhi v. Emperor*, I.L.R. 12 Pat. 241; A.I.R. 1933 Pat. 149.

21. A.I.R. 1960 B. 263; 62 Bom. L.R. 80.

led the pauchas and the police officer to a field and thereafter produced certain articles which were the subject matter of dacoity, was sufficient to establish that there was submission on his part to police custody.

The word "custody" in this Section or Section 27, does not mean formal custody but includes cases in which the accused can be said to have come into the hands of a police officer or can be said to have been under some sort of surveillance or restriction.²²

The "police custody" is deemed to extend even when the accused is deemed to have submitted to such custody of a police officer by submitting to the interrogation and by making statement about discovery, and cannot thereafter be said to be a free man.²³

Even if a police officer, in order to avoid the effect of the provisions of this Section, studiously refrains from taking the accused into his custody, that is not a good ground for not ruling out a confession, if it was actually made before the accused's movements were controlled by the police. The crucial test is, whether, at the time, when a person made an extra-judicial confession, he was a free man, or his movements were controlled by the police, either by themselves or through some other agency, employed by them for the purpose of securing such a confession.²⁴

The arrest by the police officer need not be legal. Whether the arrest is legal or illegal, the mischief which this Section is intended to avert remains all the same.²⁵ The terms of the section do not limit its applicability only to confessions of offences with which the accused was charged, nor to confessions made by a person while in the actual custody of police.¹ Any sort of custody appears to be sufficient. So, where the prisoners were among certain persons who had been "collected" by a police patel on suspicion and the police patel had himself accused them of complicity in the offence, the prisoners were deemed to be in the custody of the police.² The immediate presence of the custodian is not necessary. Language would probably have to be strained to suggest that a person in the immediate presence of a Magistrate with the police outside to see that he does not escape is not in the custody of the police simply because they cannot be seen by the prisoner.³ When once an accused is arrested by a police officer and is in his custody, the mere fact, that, for some purpose or other, he happens to be temporarily absent and during his temporary absence leaves the accused in charge of a private individual, does

22. *Maharaj v. Emperor*, A.I.R. 1948 A. 7, 9.

23. *Punji Maya v. State of Gujarat*, I.L.R. 1964 Guj. 954; A.I.R. 1965 Guj. 7.

24. *Chand v. Emperor*, 1982 Sind 201; 200 I.L.R. 802; *Heron v. Emperor*, 1982 Sind 140; 141 I.C. 215.

25. *Emperor v. Mst. Jagia*, 1938 Pat. 868; I.L.R. 17 Pat. 869; 174 I.C. 524.

1. *Ali Gohar v. Emperor*, 1941 Sind

134; I.L.R. 1941 Kar. 292; 196 I.C. 61; *Ram Bharose v. Emperor*, I.L.R. 1944 Nag. 274; 212 I.C. 449; A.I.R. 1944 Nag. 105.

2. *R. v. Kamah*, (1856) 10 B. 595, 596; see also *Mauag Lay v. Emperor*, 1924 Rang. 173; I.L.R. 1 Rang. 609; 77 I.C. 429 (Mst.) *Asla Bibi v. Emperor*, 1934 Lah. 160; 2 I.L.R. 15 Lah. 310; 152 I.C. 206.

3. *Ram Bharose v. Emperor*, *supra*.

not terminate his custody, the accused is deemed to be still in police custody.⁴ In the undermentioned case⁵ a person under arrest on a charge of murder was taken in a *tonga* from the place where the alleged offence was committed to Godhra. A friend drove with her in the *tonga* and a mounted policeman rode in front. In the course of the journey, the policeman left the *tonga* and went to a neighbouring village to procure a fresh horse, the *tonga* meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to her friend, with reference to the alleged offence. At the trial it was proposed to ask what the prisoner had said on the ground that she was not then in custody, and that this section did not apply, but, it was held that, notwithstanding the temporary absence of the policeman, the accused was still in custody, and the question was disallowed. In a subsequent case⁶ it was added, that the custody of the keeper of a jail, who is not a police officer, does not become that of a police officer merely because his subordinates, the warders of the jail, are members of the police force. In the absence of any suggestion of a close custody inside the jail such as may possibly occur when an accused person is watched and guarded by a police officer investigating an offence, this section does not exclude such a jailor from giving evidence as to what the accused told him while in jail. But the words, "being a prisoner, a doctor, or a visitor", used by their Lordships of the Privy Council in *Pooja Narayan Swami v. Emperor*,⁷ indicate that jail custody is still police custody.⁸ In the under-noted case⁹ a question having arisen whether the confession was properly let in, it was held that the confession was excluded by this section because the accused who was in police custody up to his arrival at the hospital remained in that custody while the policemen were standing outside on the verandah of the doctor's room where the accused was. But custody in a judicial lock-up is magisterial custody as opposed to police custody. The presence of the policeman whose duty it is to guard the lock-up is quite immaterial, for even the Police Sub-Inspector cannot approach the accused confined in the lock-up without the permission of the Magistrate in charge of the lock-up.¹⁰

As to the effect of prolonged custody before the making of a confession, see section 24 *ante*, Note 14.

4. In the immediate presence of a magistrate. If the confession be made to a third person, the presence of a Magistrate is necessary in order to render the confession admissible under this section. But a confession made to the Magistrate himself conforms to the requirement of the section and is admissible even though the confessing party be at the time in the custody of the police.¹⁰

4. *Emperor v. (Mst.) Jagia*, 1938 Pat. 308, 311; I.L.R. 17 Pat. 369; 174 I.C. 524; *Emperor v. Sheo Ram*, 1928 Lah. 282; 108 I.C. 398; 29 Cr. L.J. 386; *Birja v. Emperor*, 1941 Oudh 563; 193 I.C. 493; *Mst. Hassan Pat. v. Emperor*, 1941 Pesh 22; 193 I.C. 284; *Empress v. Lester*, (1895) 20 Bom. 165.
5. *Empress v. Lester*, (1895) 20 B. 165.
6. *R. v. Taiya*, (1895) 20 B. 795.

- 6-1. A. I. R. 1939 P.C. 47.
7. *Ram Bharose v. Emperor*, I.L.R. 1944 Nag. 274; 212 I.C. 449; A.I. R. 1944 Nag. 105.
8. *R. v. Mallangowda*, 1917 Bom. 130; 42 B. 1; 42 I.C. 597.
9. *Indoo Dary v. Emperor*, 1934 Lah. 75; 151 I.C. 894.
10. *R. v. Monmohun* (1875) 24 W.R. Cr. 33; *R. v. Nilbadhar*, (1888) 15 G. 595.

In a case, however, to which provisions of Sec. 164, Cr. P. C. apply, a confession to a Magistrate is not admissible, unless those provisions are strictly complied with¹¹. In the undernoted case¹² it was pointed out that the ruling of their Lordships of the Privy Council¹³ relates to confessions made to a Magistrate in the course of investigation, and a confession made by an accused person before a Magistrate before the investigation is begun, does not come within the ruling of the Privy Council. In another case, it was held by the same High Court, that Sec. 164, Cr. P. C., comes into play when during an investigation an accused is formally brought before a Magistrate for the purpose of recording his confession and that a confession recorded by a Magistrate holding an inquest under Sec. 176, Cr. P. C., and not empowered under Sec. 164 to record confessions, is admissible in evidence and can be sued against the accused even though the provisions of Sec. 164, Cr. P. C., have not been complied with¹⁴. In *Miral v. Emperor*,¹⁵ the Chief Court of Sind observed:

"It is to be observed that if this ruling of the Privy Council is to be kept as clearly it should be kept in effect to cases of confessions recorded by Magistrates empowered to record confessions during the course of an investigation, the special provisions of Sec. 164 Cr. P. C., do not apply to confessions otherwise made, they would not apply, for instance, to a confession made by an accused person to a third class Magistrate such as in 31 S. L. R. 460,¹⁶ nor to a second class Magistrate not especially empowered to record confessions, nor also to a confession alleged to have been made, as in this case, to someone who is not a Magistrate, Sher Muhammad. The ruling of their Lordships and the provisions of Sec. 164 would also not apply to a statement of a confession for which a special provision is made in Sec. 339 (3), Criminal Procedure Code."

Where a (Second Class) Magistrate not specially empowered by the State Government to record a confession under section 164, Cr. P. C., does so, his oral evidence to prove the confession will be inadmissible.¹⁷ A confession so recorded cannot be treated as an extrajudicial confession because there was no evidence as to who recorded the same. In the instant case it was held that it mattered little whether the confession was recorded by the Magistrate in his own hand or was got recorded by some other person.¹⁸

11. *Nazi Ahmad v. King Emperor*, 1936 P.C. 253 (2); 63 I.A. 372; 1 I.R. 153; 63 I.C. 881; *Bala Majhi v. State of Orissa*, 1951 Orissa 168; 1 I.L.R. 1951 Cut. 65; 1 I.R. 125; *Zwagore Avel v. State of Madhya Pradesh*, 1954 S.C. 15; 1954 Cr. L.J. 255; *Miral v. Emperor*, 43 S.L.R. 460; 1 I.R. 1943 Kar. 285; 209 I.C. 242; see also *Emperor v. Kommoju*, 1940 Pat. 163; 1 I.L.R. 19 Pat. 301; 188 I.C. 57; *In re Dhanoo Gaurat Rai*, 1940 Nag. 186; 1 I.L.R. 1940 Nag. 232; 189 I.C. 591; *State of Orissa v. Jayadhar*, 1975 Cut. L. R. (Cr.) 433; 1 I.L.R. 1975 Cut. 1557.

12. *In re Nainamuthu*, 1940 Mad. 138;

1 I.R. 1940 Mad. 428; 186 I.C. 479.

13. *Nazi Ahmad v. King Emperor*, *supra*.

14. *In re Ramaswami Reddiar*, 1953 Mad. 138; 1952 2 M.L.J. 814; 1952 M.W.N. 897.

15. 1943 Sind 196; 109 I.C. 169.

16. *Nouker Meledino v. Emperor*, 1937 Sind 212; 170 I.C. 827; 31 S.L.R. 460.

17. *State of U.P. v. Singhara Singh*, 1963 A.W.R. (H.C.) 97; *Basdeo v. State*, 1965 A.L.J. 77; 1965 All. Cr. R. 122; 1965 A.W.R. (H.C.) 117; 1967 Cr. L.J. 1104.

18. *Basdeo v. State*, *supra*.

A confession made to a Magistrate does not become inadmissible because of the presence of an armed constable. As far as possible the accused should be kept in charge of Magistrate's own staff.¹⁹

A Full Bench of the Bombay High Court has also held that although under Sec. 19 of the Coroners Act, a Coroner is, for the purposes of this section, to be deemed to be a Magistrate, a confession recorded by him is admissible even if the provisions of Sec. 164, Cr P C, have not been complied with.²⁰ But in a case a Bench of the Madras High Court has held that a correct interpretation of the Privy Council decision in the case of *Nazir Ahmad v. King Emperor*,²¹ is that no confession recorded by a Magistrate of any rank is admissible unless it conforms to the provisions prescribed in Sec. 164, Cr P C.²²

It is true that in the Privy Council case the confession was made to a Magistrate who was empowered to record the confession under Sec. 164, Cr P C. But the observations of their Lordships make it clear that no confession which does not conform to the provisions of Sec. 164, Cr P C, can be admitted in evidence. The observations of their Lordships that "any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what was supposed to have said, or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of Sec. 164, Cr. P. C., would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case", make it quite clear that they do not approve of any confession recorded by a Magistrate which does not conform to the provisions of Sec. 164, Cr P C.²³

It was held that, in order to give weight to confessions of prisoners recorded, there should be a judicial record of the special circumstances under which such confessions were received by the Magistrate, showing in whose custody the prisoners were and how far they were quite free agents.²⁴ In another case decided under the same section, it was held that the words "a Magistrate" mean "any Magistrate" and not merely "the Magistrate having jurisdiction."²⁵

The word "Magistrate" in this section included Magistrates of Native States as well as those of British India. And so a confession made by a prisoner while in police custody, to a first class Magistrate of the Native State of Muli

19. *Padan Munda v. State*, I L.R. 1966 Cut. 65: 32 Cut. L.T. 1170, at pp. 1180-1182; see also the observations of Meredith J. in *Dikson Mah v. Emperor*, A I.R. 1942 Pat 90, at p. 94.

20. *Government of Bombay v. Dashrath Ramdas*, 1947 B. 265: 1 I.R. 43 B. 614: 220 I.C. 182 (F.B.).

21. 1936 P.C. 253 (2).

22. In re *Thothan*, 1956 Mad. 425: (1956) 1 M.L.J. 206: 1955 M.W. N. 1012 (2).

23. *Ib.*, see also *The King v. Saw Min*, 189 Rang. 219: 18 I.C. 707.

24. *R. v. Krishna*, (1896) 5 W.R. Cr. 6: see *Sastry's Criminal Procedure Code*, ss. 164, 281, 468.

25. *R. v. Vahala*, (1870) 7 Bom. H.C. R. Crown cases; see also *The King v. H. and v. Emperor*, 193, Sind 251: 171 I.C. 737; *Emperor v. Hulasi*, 1933 All. 286: 144 I.C. 157; *Panchanatham v. Emperor*, 1929 Mad. 487: 1 I.L.R. 52 Mad. 529: 121 I.C. 151.

word 'confession' strictly as in decisions of the Supreme Court pertaining to that word in section 25.⁹

27. How much of information received from accused may be proved. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

* 24. Confession caused by inducement.)

a. 25 (Confession to a Police Officer.)

s. 26. Confession by accused while in police custody.).

Steph. Dig. Art. 22; Taylor, Ev., ss. 902, 903; Phipson, Ev., 11th Ed., 368, 369; Wills, Ev., 8th Ed., 307; Roscoe, Cr. Ev., 10th Ed., 61, 3; Russ. Cr. 482—485.

SYNOPSIS

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|---|--|
| 1. Principle. | 15. "As relates distinctly to the fact thereby discovered". |
| 2. Analogous provisions in English and American laws: | 14. "In consequence of information". |
| (a) England. | 15. "The extent of the information admissible under Section 27." |
| (b) America. | 16. From an accused person in custody. |
| 3. Validity of the section: | 16-A. Police officer. |
| (a) General. | 17. Custody. |
| (b) The Section and Article 20 (3) of the Constitution. | 18. Information given by more than one accused. |
| 4. Section not affected by Sections 161 and 162, Cr. P.C. | 19. "So much of such information may be proved." |
| 5. This Section and Section 8. | 19-A. Two statements by accused. Admissibility of. |
| 6. The Section. | 20. "Whether it amounts to a confession or not." |
| 7. Section is not <i>ultra vires</i> . | 21. Admissibility against co-accused: Secs. 27 and 30. |
| 8. Scope and applicability. | 22. Witnesses to recovery memo. |
| 9. "Any fact". | |
| 10. "Deposed to". | |
| 11. "Discovered". | |
| 12. Information. | |
| 12 A. "Accused of any offence". | |

1. Principle.—The broad ground for not admitting confessions made under inducement (Section 24) or to a police officer (Section 25) or by persons without in custody (Section 26) is the danger of admitting false confessions.¹⁰ But the necessity for the exclusion disappears in case proved for by this section when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. It is this guarantee, afforded

9. *Pakala Narayana Swami v. Emperor*, A.I.R. 1939 P.C. 47 (the limited definition of "confession" in section 27 which has been followed by the Supreme Court); *Palanider Kaur v. State of Punjab*, A.I.R. 1952 S.C. 354; *Om Prakash v. State of U.P.*, A.I.R. 1960 S.C. 400; see *Jaddy v. State of M.P.*, A.I.R. 1964

S.C. 1850 where the first information report of an accused was used against him in obtaining an admission which was held to amount to a confession; *Del Singh v. Emperor*, 1941 Cr. App. 151, 33 M.L.J. 555; A.I.R. 1917 P.C. 25. See cases cited in the notes to Ss. 24, 25 and 26 ante.

by the discovery of the property, for the correctness of the accused's statement which is the ground for the admission of the exception to the general rule. The fact discovered shows that so much of confession as immediately relates to it is true¹¹ and also perhaps voluntary¹². But, there is always this rider, that, if the facts disclosed point to the accused having been subjected to third degree methods prior to the discovery of the fact, the genuineness of the discovery is rendered doubtful, and the discovery may become worthless as a piece of evidence. The reason behind the view, that threat, promise and inducement are irrelevant for admissibility of evidence of discovery, within the purview of this section, seems to be that discovery by itself is a guarantee of the genuineness of the discovery.¹³ In *State of U.P. v. Doman Upadhyay*,¹⁴ their Lordships of the Supreme Court reversed the decision of the Full Bench of the Allahabad High Court, and held that this section and section 162-2 of the Criminal Procedure Code, in so far as that section relates to this section, are *intra vires* and do not offend Article 11 of the Constitution.

The Section seems to be based on the view that, if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly that information can be safely allowed to be given in evidence, but the extent of information admissible depends on the exact nature of the fact discovered to which such information is required to relate.¹⁵ The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to past user, or the past history of the object produced, is not related to its discovery in the setting in which it is discovered.¹⁶ The Section brings out what part of the statement is admissible under it. It is only that part which distinctly relates to the discovery which is admissible, but if any part of the statement distinctly relates to the discovery, it will be admissible as a whole, whether it be in the nature of a confession or not.¹⁷ The extrajudicial confessions and statements making disclosure constitute circumstances independent from the circum-

11. *R. v. Babu Lal*, (1884) 6 A. 509, 513, 517, 546; *R. v. Nana*, (1889) 14 B. 260, 264; see also *Palukuri Kotavva v. Emperor*, 1947 P.C. 67, 70; *11 R. 1948 Mad. 1*; 230 I.C. 135; *Ram Kishan v. State of Bombay*, 1955 S.C. 104; 1955 S.C.J. 129; 1955 Cr. L.J. 196; (1955) 1 M.L.J. (S.C.) 66; 57 Bom. L.R. 600; 1955 All. W. R. (Sup.) 41; *Taylor, Ev.*, ss. 902, 903. "But not only are confessions excluded when they are obtained by improper means, but also the acts of the prisoner are, under the influence of such inducements unless confirmed by the finding of the property, or the same influence which might produce a groundless confession might produce a groundless conduct". 3 Russ. Cr. 485. As to the Indian Authorities, see *R. v. Nana* (1889) 14 B. 260, 265; *R.*

v. Rama Bappa, (1878) 3 B. 12; *R. v. Babu Lal*, (1884) 6 A. 509, 517, 547.

12. *Jethiya v. State*, 1955 Raj. 147.

13. *Doman Singh v. State*, A.I.R. 1957 All. 197; 1957 All.L.J. 330.

14. (1961) 1 S.C.R. 14; (1960) 2 S.C.A. 1125; (1961) 2 S.C.J. 334; 1 I.L.R. (1960) 2 All. 431; 1960 A.L.J. 733; 1960 A.W.R. (H.C.) 568; (1961) 2 Andh W.R. (S.C.) 90; (1961) 2 M.L.J. (S.C.) 90; 1961 M.L.J. (Cr.) 4; 1961 Cr. I.J. 114; A.I.R. 1961 SC 1125.

15. *Palukuri Kotavva v. Emperor*, A.I.R. 1947 P.C. 67, 70.

16. *Ibid.*

17. *Chandraswamy v. State of Andhra Pradesh*, (1963) 1 Andh.L.T. 111; 1963 A.W.R. (H.C.) 50; 1962 Cr.L.J. 8; (1962) 2 Ker L.R. 364; A.I.R. 1962 S.C. 1788, 1793.

stances constituted by a judicial confession as such proof or otherwise of one would not affect the other.¹⁸

2. Analogous provisions in English and American law. (a) *England*. It is a well established rule that confessions must be voluntary before they can be held admissible in evidence. Further, under certain circumstances, the Judge may exercise a discretion to exclude a confession, even though it has not been induced by threat or promise. But, it sometimes happens that by means of a confession that is not admitted in evidence, facts are brought to light which may be relevant to the case and which the prosecution wishes to put in evidence. In England, an inadmissible confession, thus verified by subsequently discovered evidence, is stated to be a confession confirmed by subsequent facts. Two questions arise, namely, first, the extent to which the confession can be admitted and secondly, the discovered facts. In the Law Quarterly Review, Volume 72 (1956), Mr. Gotheb has reviewed the entire case-law on the subject beginning from the earliest case of *R. v. Warwickhall*.¹⁹ The law on the subject has not been uniform and Mr. Gotheb has classified the authorities under the following groups establishing the following propositions:

(1) Subsequent facts are admissible but they cannot in any way be connected with the confession.²⁰

(2) Evidence can be given of subsequent facts and that they were discovered as a result of a statement made by the accused.²¹

(3) Evidence may be given of subsequent facts and so much of the confession as strictly relates to them. This has been stated to be the currently existing law by such authorities as Stephen (Art. 23), Phipson (Evidence, 11th Ed., 1970, at pp. 368-369) and Cockle (Cases and Statutes on Evidence, 8th Ed., 1952, at page 197) and more cautiously by Archbold (Pleading, Evidence and Practice in Criminal Cases, 32nd Ed., page 399).

(4) Subsequent facts and the whole confession that led to their discovery are admissible. Wigmore on Evidence, 5th Edition, § 858, and Baker following him argue that it is the most desirable view to take, on the principle, that the assumption is, that improperly induced confessions are excluded solely because they are not entitled to credit but when they are confirmed or verified in part the whole confession should be admitted in evidence, since it can hardly be supposed that at certain parts, the possible fiction stopped and the truth began and that if we are to cease distrusting any part we should cease distrusting all.

(5) Subsequent facts are not admissible.²² Mr. Gotheb considers the last-mentioned decision clearly an unsatisfactory decision on which to base a wide exclusionary rule.

The learned author has summarised his analysis by stating as follows:

The problem of how to treat evidence discovered through an inadmissible confession is a difficult one, chiefly because of a lack of consistent approach

¹⁸ *Kelly v. State* (1974 Cr. L. J. 839 (J. & K.).

¹⁹ (1783) 1 Leach C. C. 263.

²⁰ *R. v. Warwickshall*, (1783) 1 Leach C. C. 263.

²¹ *Hobbes Case* (1802) 2 P. C. (1803) at p. 638.

²² *R. v. Barker*, (1941) 2 K. B. 381; (1941) 3 All E. R. 33.

in English law on how to treat improperly obtained confessions and evidence got through illegal searches and seizures. It is submitted that, as a general rule, evidence discovered through confessions ought to be admissible, whether or not the confession is excluded. But, it is doubtful, if any part of the confession ought to be admissible, even though confirmed by the discovery of evidence made in consequence of the confession as the reasons for excluding improper confessions are complex, and not based solely on a presumed untrustworthiness."

(b) *America.* Similar discordant views are taken in the United States of America concerning the admissibility of involuntary confessions after verification of inculpatory facts. *Wharton's Criminal Evidence*, 12th Edition, sections 357 and 358, sum up the position as follows:

"357. When an inadmissible confession leads to the discovery of inculpatory facts, all courts admit evidence of such facts, but differ in the extent to which they will admit the confession itself under such circumstances. The authorities are divided into three classes:— (1) those courts that admit no part of the confession but only the inculpatory facts which have been discovered; (2) those courts which admit the entire confession to accompany the facts, on the theory that if any part of the confession can be believed, the entire confession must be deemed trustworthy; and (3) those courts that admit only that part of the confession which is relevant to the corroborating facts.

"It is true that the line is not always clearly drawn between these different views. The inculpatory facts are always admissible, and of necessity, the court must determine the connection of the accused with those facts. Did the accused have knowledge of the inculpatory facts because he was an unwilling witness to, or discovered, the crime, or did the accused have knowledge of the inculpatory facts because he committed the crime, and are such facts of corroboration of the involuntary confession? To determine satisfactorily either form of the question, more or less detail must be inquired into, and necessarily, the line cannot be very closely drawn, so that many of the authorities cited seem to support both the first and the third views above set forth.

"358. All facts discovered in consequence of information given by the accused, and which tend to prove the existence of the crime charged, are admissible as evidence, even though such information was contained in a confession which is itself inadmissible because coerced. Thus, when the accused, in confessing, points out or tells where the stolen property is, or, in case of homicide, states where the body can be found, or where the deceased was shot, which is verified by blood stained earth at the spot, or with what weapon, and in what part of the body the deceased was shot, which is verified by exhuming and examining the body, or when he gives a clue to other evidence which proves the case, all such facts are admissible. Only a few Courts have questioned this rule."

3. Validity of the section.

a. *General.* In the undernoted case²³ it has been held that this section is not void under Art. 13 (1) of the Const.

23. *Jethiya v. State*, 1955 Raj. 147.

inter alia, is repugnant to Art. 20(3) of the Constitution, under which "no person accused of any offence shall be compelled to be a witness against himself". Nor, it is pointed out by their Lordships of the Supreme Court in *M. D. S. v. State of N. H. Chandra*²⁴ "to be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished not only through the lips of a person but also by the production of a thing, and the protection afforded by Art. 20(3) is not confined to the oral evidence of a person standing his trial for an offence when called to the witness stand, but extends to his testimony previously obtained from him, but the guarantee in the Article is only against "testimony" or "evidence". The Article protects a person against being compelled to be a witness against himself, but the information admissible under this section cannot be presumed to be "compelled testimony" so as to make the section repugnant to the Article.

The scope of Article 20(3) of the Constitution has been laid down by the Supreme Court in *The State of Bombay v. Kathi Kalu*,²⁵ as follows:

By Majority. Approving its earlier decision in *Mohamed Dastagir v. The State of Madras*, the Court held: "In order to bring the evidence within the inhibition of clause (3) of Article 20, it must be shown not only that the person making the statement was an accused at the time he made it and that it had material bearing on the criminality of the maker of the statement, but also that he was 'compelled' to make that statement". 'Compulsion', in the context, must mean what in law is called 'duress.'

The expression in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so affected by some extraneous process as to render the making of the statement involuntary and therefore, extorted. Hence the mere asking by a police officer, having charge of a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time he was subjected to treatment which, in the circumstances of the case, warranted the inference that compulsion was in fact exercised.

Therefore, it is manifest that the discovery was made as a result of information extorted from the accused by duress, the evidence of the discovery at the instance of the accused would be hit by the provisions of Article 20(3) of the Constitution.

In *State of Madras v. V. G. Menon*, and *Article 20 (3) of the Constitution* In *In re Madugula Jeremiah*² it was held:

24. 1954 5 C.R. 1077; 1954 S.C.A. 449; 1954 S.C.J. 428; (1954) 1 M. L.J. 680; 1954 M.W.N. 566; 1954 Cr.L.J. 865; A.I.R. 1954 S.C. 300.
25. (1962) 3 S.C.R. 10; 1961 A.L.J. 136; 1961 A.W.R. (H.C.) 736; 1961 B.L.J.R. 840; 64 Bom. L.R. 240; (1961) 2 Cr.L.J. 856; (1961) 2 Ker.

L.R. 378; A.I.R. 1961 S.C. 1808.
1. (1960) S.C.J. 726; (1960) 2 M. L.J. (S.C.) 39; (1960) 3 S.C.R. 116; A.I.R. 1960 S.C. 756; 1960 All. W.R. (H.C.) 357; 1960 Cr. L.J. 1459.
2. I.L.R. (1956) Andh. Pra. 173; A.I.R. 1957 A. P. 611.

It is not a condition for the applicability of section 27 that the information should have been given voluntarily by the accused. Although it may be given voluntarily or otherwise the said information is not admissible as evidence as the Legislature presumably thought that the fact of voluntary or otherwise of the information is sufficient guarantee of the truth of the information. This is the reason why, though as a rule, statements made to the police are inadmissible as substantial evidence on the assumption, that the police are not in a position to compel an accused to give information, the protection afforded by the discovery is thought sufficient protection against any information or information extracted from the accused. Therefore the information received under section 27 may be either voluntary or extracted from the accused. In either case, before the Constitution it was admitted that the conditions laid down in the section are complied with. The section of the Constitution 'embodies the principle of protection against self-incrimination' and the protection afforded under the section is not to be compelled testimony previously obtained from him. The information given to the police by the accused is certainly testimony for that is intended to be used in a Court of law. It is not voluntary but is compelled testimony. Article 20 (3) of the Constitution says the said evidence in Court. Section 27 of the Evidence Act is in violation of Article 20 (3) of the Constitution may be reconciled. Information received from an accused relating distinctly to the fact thereby excluded from evidence by Article 20 (3) and, therefore, is relevant evidence under the Evidence Act. But such information obtained by compulsion is not admissible in evidence before the Constitution. After the enactment of the Constitution they must be excluded from evidence for otherwise in effect they would be compelled to be a witness against himself.³ There is no doubt that information received by the police from an accused person as the result of compulsion and such information is not violative of Article 20 (3) of the Constitution.⁴

The above authority has been followed in *Amrut Soma v. State of Bombay*.⁵

In *State of U. P. v. Deewan Upadhyay*,⁶ Hon'ble Justices have expressed the desirability of cautioning as in the United Kingdom, persons under Sec. 27 and has cited the recommendation of the Royal Commission on Police Powers and Procedure.⁷

4. Section not affected by Secs. 161 and 162, Cr. P. Code.—It is the Privy Council decision in *Pitaka N. v. The Magistrate, Pithoragarh*,⁸ that by some Courts that the provisions of Secs. 161 and 162, Cr. P. Code, do not affect

3. See also *Amrut Soma v. State of Bombay*, A. I. R. 1960 Bom. 488; I.L.R. 1960 Bom. 664.

4. *N. Vasudevan Pillai v. State of Kerala*, I.L.R. 1968 Ker. 1362, 1371; 1968 Cr.L.J. 1362, 1371; A.I.R. 1963 Guj. 159; 1963 Guj. L. R. 543.

6. A. I. R. 1960 S.C. 1125, 1146; (1960) 2 S.C.A. 371; 1960 A.L.J. 733; 1960 Cr.L.J. 1504; 1960 All.

W. R. (H.C.) 56L.
7. (1928-29) C.M.D. 3297. See also Rules framed by the Judges of the King's Bench Division for the production of evidence, reproduced in *Halsbury's Laws of England* (3rd Edition), Vol. 10, page 470, para 865.

8. 1939 P.C. 47; I.L.R. 18 Pat. 234; 180 I.C. 1; L.R. 66 I. A. 66.

this Act on the ground that statements by accused are not within those sections.⁹ A Full Bench of the Madras High Court¹⁰ had held that the statements made by the accused were not excluded from the operation of Sec. 162, Cr. P. C., but that section being general did not, in any way, affect the operation of this section when the conditions therein were fulfilled. Their Lordships of the Privy Council in *Pakala Narayana Swami v. Emperor*, supra, also held, that the expression "any such statement" in Sec. 162, Cr. P. C., includes a statement made by a person possibly not then even suspected but eventually accused, but left undecided the question whether Sec. 162, Cr. P. C., *pro tanto* repealed the provisions of this section or not. The question was subsequently considered by almost all the High Courts, but their opinions differed. The Bombay,¹¹ Nagpur,¹² Madras,¹³ Patna¹⁴ and Rangoon¹⁵ High Courts have held that this section has not been *pro tanto* repealed by Sec. 162, Cr. P. C. A contrary view was taken by the Allahabad¹⁶ Calcutta¹⁷ and Lahore¹⁸ High Courts. The question has been settled at last by the Legislature by amending¹⁹ Sec. 162 (2), Cr. P. C. which now runs as follows: "Nothing in this section shall be deemed to apply to any statement falling within the provisions of Sec. 32, clause (1) of the Evidence Act, 1872,²⁰ or to affect the provisions of Sec. 27 of that Act." The result now is that the provisions of this section are not affected by Sec. 162 of the Code of Criminal Procedure.

5. This Section and Section 8.—In the under noted case,²¹ it was said that the prohibition contained in section 162, Cr. P. C., extends to all statements made to a police officer in the course of an investigation under Chapter XIV, irrespective of whether those statements are admissible under any provision of the Evidence Act, except this section. If a statement does not come within this section, it cannot be admitted in evidence by circumventing the provisions of section 162, Cr. P. C., on the ground that it is relevant under some other section of this Act. In *In re Krishnachand Sonekar*,²² however, it was observed that although, evidence of conduct is admissible yet it is not admissible because of the prohibition in section 162, Cr. P. C.

In *In Re Bandi Marugudu*,²³ the accused after stabbing the deceased went to the police station and made a confession and stated *inter alia* that he would show the place where the deceased fell, and also the tree where the dagger

9. *Jagwa v. R.*, 1905 P. 232; 11 R. 5 Pat. 63; 93 I.C. 884; *Rannun v. R.*, 1926 Lah. 88; 7 Lah. 84; 94 I.C. 900; *R. v. Nga Tha Din*, 1926 Rang. 116; 1 I.L.R. 4 Rang. 72; 96 I.C. 145 (F.B.); *Azimaddy v. R.*, 1927 Cal. 17; 11 R. 54 Cal. 237; 99 I.C. 227.

10. *Swami Maragatha v. Emperor*, 1932 M. 391; 11 R. 5 M. 903; 132 I.C. 9, 33 (F.B.).

11. *Biram Sardar v. Emperor*, 1941 Bom. 146; 11 R. 1041; Bom. 302; 194 I.C. 122.

12. *Bharosa v. Emperor*, 1941 Nag. 86; 11 R. 1440; Nag. 670; 198 I.C. 6.

13. *In re Subbiah Tevar*, 1939 Mad. 856; 1 I.L.R. 1939 Mad. 947; 184 I.C. 593.

14. *Adhik Lal v. Emperor*, 1942 Pat. 156; 200 I.C. 208.

15. *Ram Dayal v. The King*, 1942 Rang.

16. read with *Emperor v. Nga Tha Din*, 1926 Rang. 116; 1 I.L.R. 4 Rang. 72; 96 I.C. 145 (F.B.).

17. *Prasad v. Emperor*, 1940 All. 263; 1 I.L.R. 1940 All. 396; 188 I.C. 562 (F.B.).

18. *Narain Chandra Das v. Emperor*, 1942 Cal. 593; 1 I.L.R. (1942) 1 Cal. 436; 204 I.C. 111.

19. *Hakam Khuda Yar v. Emperor*, 1940 Lah. 129; 1 I.L.R. 1940 Lah. 242; 188 I.C. 498 (F.B.).

20. By the Criminal Procedure Code Second Amendment Act, 15 of 1941, 20.. 1 of 1872.

21. *The State v. Kabi*, A.I.R. 1951 H.P. 28.

22. A. I. R. 1943 Mad. 527; 208 I.C. 265; (1943) 1 M. L. J. 377.

23. 11 R. 1601; 1 A.P. 123; A.I.R. 1963 A.P. 87.

fore, they must be accused persons. Under that section when a confessional statement is made by an accused person who is in police custody, that statement is inadmissible in evidence unless it is made in the immediate presence of a Magistrate. This Section provides an exception to sections 25 and 26 because this section contains the phrase 'in the custody of a police officer'. The confessional statement mentioned in this section is a statement made by a person in police custody, and accused of an offence. In other words, this section relates only to those confessional statements which are made by accused persons while they are in police custody. The section lays down that such confessional statements are admissible in evidence provided they lead to the discovery of a fact in consequence of information received from the person accused of any offence in the custody of a police officer. If the statement is made by a person who is a stranger or is a prosecution witness, then such statement is not admissible in evidence, despite the fact that it amounts to a confession and leads to the discovery of a new fact.³

Before the provisions of this section can be attracted, two essential requirements should be satisfied, namely,—

- (1) the person making the statement must be accused of any offence, and
- (2) he must be in the custody or deemed to be in the custody of a police officer.

It is only when both the above requirements are satisfied that the information relating to the discovery can be received in evidence. If either of the two conditions is not satisfied the statement would fall outside the purview of this section.⁴

The embargo on statements of the accused before the police will not apply if the following conditions are fulfilled:

- (1) the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information;
- (2) only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused; and
- (3) the discovery of the fact must relate to the commission of some offence.⁵

In *Pudukottai Kottaya v. Emperor*,⁶ the Judicial Committee pointed out the following necessary conditions to bring the section into operation:

- (1) discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposited to, and

3. *Devi Ram v. The State*, 1.L.R. (1961) 1 Punj. 33: A.I.R. 1962 Punj. 70.

4. (In re.) *Bandi Murugulu*, 1.L.R. (1961) 1 A.P. 128: A.I.R. 1963 A.P. 87.

5. *Jaffer Hussain Dastagir v. State of Madhya Pradesh*, 1970 2 S.C.R. 832. 1969 135 L.J. 5 N. 135 (S.C.).

1969 Ker. L. T. N. 25 (S.C.): 1970 M.L.W. (Or.) 138: 1970 Cr. L.J. 1659: A.I.R. 1970 S.C. 1934, 1937.

6. 11 I.R. 1948 M.L. 230 I.C. 135: A.I.R. 1947 P.C. 7. This decision has been cited with approval in many decisions of the Supreme Court; *Ram Kishen v.*

- (2) thereupon so much of the information as relates distinctly to the effect thereby discovered may be proved.

Their Lordships observed that the section seems to be based on the view that if a fact is absolutely discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence, but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally, the section is brought into operation when a person in police custody produces from some place of concealment some object, said to be connected with the crime of which the informant is the accused. Their Lordships said that it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced. The fact discovered embraces the place from where the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered.

This section partially removes the ban on the reception of confessional statements under section 26. But the removal of the ban is not of such an extent as to absolutely undo the object of section 26. All that it says is that so much of the statement made by a person accused of an offence and in custody of a police Officer, whether it is confessional or not, as relates distinctly to the fact discovered, is provable.⁷

This section is an exception to sections 25 and 26 which prohibit the proof of a confession made to a police officer or a confession made while a person is in police custody unless it is made in the immediate presence of a Magistrate. It allows that part of the statement given by the accused to the police, whether it amounts to a confession or not, which relates distinctly to the fact thereby discovered, to be proved.⁸ Thus, even a confessional statement before the police which distinctly relates to the discovery of a fact may be proved under this section.⁹ In other words, it is only that part which distinctly relates to the discovery which is admissible wholly, and the Court cannot say that it will excise one part of the statement because it is of a confessional nature.¹⁰

Although the statement may lead to certain discovery, it would not prove the offence, for after the discovery the prosecution has still to show that the articles recovered are connected with the crime.¹¹ The extent of the informa-

State of Bombay, A.I.R. 1957 S.C. 141, 116; *Prasadi v. State of U. P.*, A.I.R. 1957 S.C. 211, 214; *Udai Bhan v. State of U. P.*, A.I.R. 1962 S.C. 1788, 1792; *Chinnaswami Raddy v. State of A.P.*, A.I.R. 1963 S.C. 1788, 1792; *Prabhoo v. State of U. P.*, A.I.R. 1963 S.C. 1113. See also *Rajani Kant Keshav v. State*, 1967 Cr.L.J. 357; A.I.R. 1967 Goa 21, 29 (F.B.), (information by accused in police custody—currency notes in a case of robbery and murder—conditions of section satisfied).

7. *Udai Bhan v. State of U. P.*, I.L.R. 1962 2 A. 522; A.I.R. 1962 S.C. 1116; 1962 All.W.R. (H.C.) 512; (1962) 2 All.L.T. 502; (1962) 2 Cr. L.J. 251.

8. *Chinnaswami Raddy v. State of A. P.*, (1963) 1 Andh.L.T. 111; 1963 A.W.R. (H.C.) 56; (1963) 1 Cr. L.J. 8; (1962) 2 Ker.L.R. 364; A.I.R. 1962 S.C. 1788, 1793.

9. Ibid.

10. Ibid.

11. Ibid.

whatever the inducement that may have been applied, or made use of, towards the accused, there is nothing in the law which forbids policemen or others from, at any rate, going so far as to say: "In consequence of what the prisoner told me, I went to such and such a place, and found such and such a thing." Moreover, they may repeat the words in which the information was couched, whether they amount to a confession or not, provided they relate distinctly to the fact discovered.¹⁹ Therefore, although a confession may be generally inadmissible, in consequence of an inducement having been offered within the meaning of the twenty-fourth section, yet, if any fact is deposed to as discovered in consequence of such confession, so much thereof as relates distinctly to the fact thereby discovered may be proved under this section. But, though the present section qualifies the twenty-fourth section, it will not be applicable in every case that falls within the scope of that section, which enacts that confessions unduly obtained are irrelevant whether the confessing party was in custody or not. But the present section refers to confessions made by *accused persons in custody*. Therefore, confessions made by persons when accused but not in custody, or in custody but not accused, or neither accused nor in custody, will not be rendered admissible by the present section, even if there is discovery.²⁰

The Section lays down that where an accused is in the custody of a police officer and furnishes some information in consequence of which some fact is discovered then so much of such information as relates distinctly to the fact so discovered can be proved, and it would not matter whether such information amounts to a confession or not. This section is based on the doctrine of confirmation by subsequent facts. That doctrine is, that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material points, then such discovery is a guarantee that the confession made was true. But only that portion of the information can be proved which relates distinctly or strictly to the facts discovered.²¹ The section

Empress v. Ramesh Chandra, 1947 Pat. 111 (R. 25 Pat. 255) 230 I.C. 99; *Mathura Prasad v. Empress*, 1946 Pat. 230 (I.L.R. 24 Pat. 614) 9 I.C. 101; *Dayan Nandani v. Empress*, 1942 Cal. 27 (I.L.R. 1942 Cal. 149) 18 I.C. 111; *Ram Rajpal v. N. S.*, 11 I.R. 104 Pat. 80 (1914 Pat. 92) 1 Pat. 92; *Punj L.R. 23 (F.B.)*.

- 19 *R. v. Babulal*, 1884 All. 547 (F.B.); *see also* *J. v. Biddhurst*, J., citing *Taylor, Ev.*, Sec. 902 (1891) 11 M. & W. 104; *R. v. K. S. P. D. A. V. Week*, N. 108 (1882), 223; *see also* to the same effect, viz. that S. 27 does not qualify S. 24, *P. v. T. S. V.*, (1887) 5 N.W.P. 86; *R. v. Rama Birapa*, 1887 B. 27 (F.B. W. 104). It is pointed out that the discovery of facts through information derived from R. occurred after that section was passed. Its defect as now subject to the influence therefore was not and could not be counteracted in the only possible way. This qualification of the rule enacted in S. 24 by that enacted in

the present section is in accordance with the English law upon the subject: *see Taylor, Ev.*, s. 902. The provision does not appear to have been criticised by the Calcutta and Madras High Courts in any reported case. But under the corresponding section of Act XXV of 1861 (S. 150), it was held by the former Court that where a Police Officer had offered an inducement to make a confession and no part of his evidence, as to the discovery of facts in consequence of such confession, was obtained by the confession, *R. v. Dharani*, 1867) 8 W.R. Cr. 13; *see also Bishoo v. R.*, (1868) 9 W.R. Cr. 16, 17. *See R. v. Babulal* (1884) 6 All. 509 (F.B.).

Dharani v. The State, A.I.R. 1966 Raj. 54 (1965 Pat. 1 W. 418); *Brahmabhatt v. State*, (1971) 1 Cut. W.R. 351; I.L.R. 1971 Cut. 466; *State v. Kishor Chandra Saha* (1972) 1 C.W.R. 107; *State of Rajasthan v. Ramji* (1973) W.L.N. 934; *R. v. Pankaj v. State of Rajasthan*, 1970 W.L.N. (Part I) 518; I. L. R. (1971) 21 Raj. 52.

can have no application, if the fact is discovered otherwise than on account of the information given. Accused gave information about selling stolen property to A, but when the accused took the police to A, A said that he had sold the articles to others and the police recovered those articles at the instance of A. The information furnished by accused was held inadmissible²². The information given to the police by the accused cannot be used against him when it did not lead to any discovery.²³ When the knife was not discovered, as a result of the statement by the accused, the same cannot be relied upon.²⁴

This section, as a qualification of the imperative rules contained in Secs 24-26, should be strictly construed and applied.²⁵ Any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Secs 25 and 26, and the safeguard provided in Sec 27, are not rendered nugatory by a lax interpretation.¹ The protection given to the accused by these sections should not be dependent on the ingenuity of the police officer, or the folly of the prisoner, in composing the sentence which conveys the information.²

9. "Any fact". The expression "fact" as defined by Sec 3 of the statute includes, not only the physical fact which can be perceived by the senses, but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in this Section. The phrase "fact discovered" used by the Legislature refers to a *material*, and not to a *mental fact*.³ The fact discovered within the meaning of this section must be some *concrete* fact to which the information directly relates.⁴ In the Full Bench case of *Emperor v. Ramanuja Avangar*,⁵ Cornish and Burn, J.J., held that the word 'fact' in this section is not restricted to actual physical material object which can be exhibited as material object, but Lakshmana Rao, J., held, that the fact discovered should be a material or concrete and not a mental fact.⁶ But in *Pulukuri Kottaya v. Emperor*,⁷ their Lordships of the Privy Council

22. *Gurnam Singh v. State*, 1972 W. L. N. 303; 1972 Raj. L. W. 530; 1972 Cal. L. J. 1038.

23. *State v. Zilla Singh*, 1974 J. & K. L.R. 51; 1973 Cri. L.J. 1384; In re Krumikaran, 1974 M.L.W. (Cri.) 190; 1975 M.L.J. (Cri.) 106; (1975) 1 M.L.J. 209; 1975 Cri. L.J. 798 (Mad.); H.P. Administration v. Om Prakash, A.I.R. 1972 S.C. 975; 1972 Cri. L.J. 606.

24. Ibid.

25. *R. v. Pancham*, (1882) 4 A. 198; see *Adu v. R.*, (1885) 11 C. 635, 642. In *R. v. Ram Charan*, (1875) 24 W.R. Cr. 36. Jackson J., commented upon a prevailing tendency to disregard the provisions of Sec. 26 of the Evidence Act, which has occurred in this case as well as in others recourse being had, although not justified by facts, to the proviso contained in Sec. 27. *Tara v. Emperor*, 16 Cr. L.J. 545; 29 I.C. 817.

1. Supdt. and Remembrancer of Legal Affairs v. Bhajoo, 1930 Cal. 291; 125 I.C. 733; I.L.R. 57 Cal. 1062.

34 C.W.N. 106.

2. *Naresh Chandra Das v. Emperor*, 1942 Cal. 593; 204 I.C. 111; I.L.R. 1942-1 C. 436; Supdt. and Remembrancer of Legal Affairs v. Bhajoo, 1930 Cal. 291; I.L.R. 57 Cal. 1062; 125 I.C. 733; 34 C.W.N. 106; *Sonaram Mahton v. Emperor*, 1931 Pat. 145; I.L.R. 10 Pat. 153; 131 I.C. 797; 32 Cr. L.J. 792; 12 P.L.T. 481; *Phulua v. Emperor*, 1936 Nag. 23; 161 I.C. 8; 37 Cr. L.J. 460.

3. *Sukhan v. Emperor*, 1929 Lah. 344; I.L.R. 10 Lah. 285; 115 I.C. 6; 30 Cr. L.J. 414 (F.B.).

4. *Ganu Chandra Kashid v. Emperor*, 1932 Bom. 286; I.L.R. 56 Bom. 172; 137 I.C. 174; 38 Cr. L.J. 396; 34 Bom. L.R. 305.

5. 1935 M. 528; I.L.R. 58 Mad. 642; 158 I.C. 764 (F.B.).

6. The majority view was followed in the case of *R. Ramamurthy*, in re, 1941 Mad. 290; 193 I.C. 347; 42 Cr. L.J. 407; 1940 M.W.N. 163.

7. 1947 P.C. 67; 74 I.A. 65; I.L.R. 1948 Mad. 1; 230 I.C. 135.

observed. "It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced, the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact." This view has been approved by the Supreme Court in the undernoted cases.⁸ In the undernoted case,⁹ it was observed that 'facts discovered' mean the physical perception of a material fact and not merely learning of a mental fact or the contacting of a witness. The fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing, or it may be a material thing in relation to the place or the locality where it is found.¹⁰ Applying the decision in *Pulukuri Kottaya v. Emperor*,¹¹ the Supreme Court has held as admissible the statement of the accused promising to produce the clothes of the deceased which was followed up by his taking them out of the place where they were hidden and which were identified as the clothes of the deceased.¹² The Supreme Court has observed in the undernoted case that what makes the information leading to the discovery of a witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused. No witness with whom some material such as weapon of murder, stolen property or other incriminating article is not hidden, sold or kept (which is unknown to the police) can be said to be discovered as a consequence of information furnished by accused.¹³

The words "any fact" are qualified by the word 'discovered' in the section. Under the present section, it is not every statement made by an accused of any offence while in the custody of a police officer, which leads to the production or finding of property, which is admissible. It is the nature of the fact discovered, that fact must in all cases be relevant to the case and the connection between it and the statement made must have been such that that statement constituted the information which led to the discovery was made in order to render the statement admissible. Statements connected with the one thus made evidence of other facts, but not necessarily or directly connected with the fact discovered, are not admissible.¹⁴ As the Lords have observed in *Pulukuri Kottaya v. Emperor*,¹⁵ the information given must relate distinctly to this fact. Information as to past user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife, knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge and if the knife is proved to have been used in the

8. *Mohamed Ibrahim v. The State of Maharashtra*, A.I.R. 1976 S.C. 483; 1976 Cri. L.J. 48; (1976) 1 S.C.C. 848. *H.P. Administration v. Om Prakash*, A.I.R. 1972 S.C. 975; 1972 Cri. L.J. 606.

9. *Kartar Singh v. State*, 1952 V.P. 42; 1953 Cr. L.J. 986.

10. *Sekhon v. Emperor*, 1950 Lah. 344; I.L.R. 10 L. 283; 115 I.C. 6; *Pulakoti Prasad v. A. Haribabu* (1975) 1 An. W. R. 304.

11. A.I.R. 1947 P.C. 67.

12. *Pershad v. State of U.P.*, A.I.R. 1957 S.C. 211, 214; 1957 Cr. L.J. 328.

13. *H.P. Administration v. Om Prakash*, A.I.R. 1972 S.C. 975; 1972 Cri. L.J. 606; *In re Karunakaran*, 1975 Cri. L.J. 798 (Mad).

14. *R. v. Jora*, (1874) 11 Bom. H.C.R. 33; *State of Rajasthan v. Rama*, 1973 W.L.N. 934 (Raj.).

15. 1947 R.C. 67; I.I.R. 1947 M. 1: 230 I.C. 135.

commission of the offence the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant. In a case before the Supreme Court,¹⁶ it was held that the words in the statement of the accused, namely, "where he had hidden them" had nothing to do with the past history of the crime and that they were related distinctly to the discovery that took place by virtue of the statement. But in *Mohamed Ibrahim v. The State of Madras*,¹⁷ the Supreme Court held that only the words "I will tell the place of the deposit of the three chemical drums" out of the words "I will tell the place of the deposit of the three chemical drums which I took out from Haji Bunder on first August" are admissible, because the rest of the statement, namely, "which I took out from Haji Bunder on first August" constituted only the past history of the drums or their theft by accused and it was not distinct and proximate cause of discovery.

"No judicial officer (dealing with the provisions of this section) should allow one word more to be deposed to by a police officer, detailing a statement made to him by an accused in consequence of which he discovered a fact, than is absolutely necessary to show how the fact, that was discovered, is connected with the accused, so as in itself to be a relevant fact against him. The twenty seventh section was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion and led him to ascertain the fact or facts of which he gives evidence"¹⁸ "The question is whether under this section of information received from a person in the custody of police officer, whether an admission or not, the fact discovered by reason of the information is the immediate cause of the information was the immediate cause of the fact discovered and as such a relevant fact?"¹⁹

When the information was given there was no reason for the officer to fabricate, and the information leading to the discovery of property had been given, it must be held that the information was obtained by the investigating officer by his tact and skill.²⁰

10. "Deposed to." The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person in custody of any officer in the custody of a police officer, must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved.²¹ The fact may be deposed to by anyone. But the fact must be deposed to

16. *Chatterjee v. State of A. P.*, (1963) 1 Andh. L. T. 111; 1963 A. W. R. (H.C.) 56; (1963) 1 Cr. L. J. 8; (1962) 2 Ker. L. R. 364; A. I. R. 1962 S. C. 1788.

17. A. I. R. 1976 S. C. 483; (1976) 1 S. C. C. 828; 1976 S. C. C. (Cri.) 199; 1976 S. C. Cr. R. 375; 1976 Cri. L. J. 481; 1976 All. Cri. C. 11; 1976 Mad. L. J. (Cri.) 329.

18. *R. v. Bahr*, (1884) 6 A. 509, 546, per Stowell, C. J. cited and approved by Norris, J., in *Adu v. R.* (1885) 11 C. 635, 641.

19. *R. v. Chander Singh*, (1888) 12 M. 153 in which it was also said that "the reasonable construction of Sec. 27 is that in addition to the fact discovered, so much of the information as was the immediate cause of the discovery is legal evidence."

20. *Aziz Khan v. State*, 1958 Raj. L. W. 527.

21. *Pulukuri Kottaya v. Emperor*, A.I. R. 1947 P. C. 67.

22. *State of P. v. Mohan*, *Ex. v. Balu Mohan*, 1922 Cal. 342; 1. L. R. 49 Cal. 167.

11. "Discovered."— There is no discovery of facts when the facts were already known to the police from other sources. The discovery that the section contemplates must be of some fact which the police had not previously learnt from other sources and the knowledge of the fact should be first derived from information given by accused²³. If an accused states to the police, 'I will show you the articles at the place where I have kept them' and the articles are found there, there can be no doubt that the information given by him led to the discovery of a fact, i.e., keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not discovery of the articles but the discovery of the fact that the articles were kept by the accused at a particular place. Similar is the statement that 'I will show you the person to whom I have given the articles.' The only difference between the two statements was that a 'named person' was substituted for 'the place where the articles were kept.'²⁴ In neither case were the articles, the fact discovered. If the statement of the accused that *another* accused had the custody of the stolen articles was not something unknown to the police so as to constitute 'a fact deposed to as in consequence of the information received' from the accused, the discovery merely related to the whereabouts of the other accused. There was thus no discovery of any fact deposed to by the accused within the meaning of the section. Although the statement of the accused might otherwise have been admissible in evidence, there was no discovery of a fact connecting the accused with the receipt of the stolen articles within the meaning of this section because the police already knew that the other accused had the stolen articles²⁵. The discovery referred to in this section is that made to, or by a police officer, and the section applies, in such a case, though the facts are already known to persons other than police officers.¹

The word "discovery" may either mean the purely mental act of learning something which was not known before to a person, as the mere mental act of becoming aware of something after hearing it stated, or, the physical act of finding upon search or inquiry something, or some material fact, the existence or the exact locality of which was unknown till then. It is in the latter sense that the word is used in this section, that is, in the sense of a finding upon a search or inquiry, of articles connected with a crime or other material

23. *Thimma v. State of Mysore*, (1970) 2 S.C. 765; (1970) 2 S.C. W.R. 122; (1971) 1 S.C. J. 721; (1971) Mad. L.J. (Cr.) 336; 1971 Cr. L.J. 1314; (1971) 1 S.C.R. 215; A.I.R. 1971 S.C. 1871; *Mema v. State*, (1972) 1 Cut. L.R. (Cr.) 101; (1972) 2 Sim. L.J. (H.P.) 118; I.L.R. (1972) H.P. 105.

24. I.L.R. (1971) 2 Ker. 30.

25. *Jaffer Husain v. State of Maharashtra*, (1970) 2 S.C.R. 332; 1969 Jab. L.J. (S.N.) 135 (S.C.); 1969 Ker.L.T. (S.N.) 25 (S.C.); 1970 M.L.W. (Cr.) 138; 1970 Cr. L.J. 1659; A.I.R. 1970 S.C. 1934 at pp. 1936, 1937, 1939; *Aher Raja Khima v. State of Saurashtra*, (1935)

2 S.C.R. 1285; 1956 S.C.A. 440; 1956 S.C. J. 243; 1957 Andh. L.J. 92; 1956 A.W.R. (Sip.) 60; 1956) I.M.L.J. (S.C.) 195-9; 1956 I.R. 109; 1956 Cr.L.J. 421; A.I.R. 1956 S.C. 217, 223 (information not derived from accused but one of the other suspects); 1967 A.L.J. 473, 477; 30 Cr.L.J. 385; 115 I.C. 1; 1929 Lah. 338; *State of Mysore v. Vasantha Kumar*, 18 Law Rep. 320; 1969 M.L.J. (Cr.) 575; 1969 Cr. L.J. 1299 (alleged recovery of skull of deceased).

1. *Legal Remembrancer v. Indit Mohan*, I.L.R. 49 Cal. 167; 1922 Cal. 342 at p. 344.

fact: the reason being, that it is only this kind of discovery which proves that the information, in consequence of which the discovery was made, is true and not fabricated. This is well illustrated by the decision of the Supreme Court in *Balbir Singh v. State of Punjab*.² There the murderer had stated that he had buried the earrings of the deceased under a *pipal* tree but he did not say that he was in possession of them. There was, however, evidence that the deceased in fact had worn the earrings, which it was also proved were made by a goldsmith who also gave evidence. Their Lordships held that it was immaterial that the accused had only knowledge of the place of concealment: his statement that he had buried the articles was admissible and the recovery was a circumstance which connected the accused with the crime.

"Discovery" for the purpose of this section need not be the direct causation of this or that state, but should be the direct consequence of this or that information. The discovery should be of a palpable physical fact, and furthermore it should be the finding of something which had been partly or wholly concealed and which might not have been found out, when the accused is taken round by the police, and shows this or that place; there is really no discovery until the place itself or a physical object which had been concealed partially or fully could not have been lighted upon but for the information given by the accused. On the other hand, if it is merely a statement that the accused went to this or that place and got this or that article, then the statement would not be evidence unless made to a Magistrate. When there is no concealment, there is no discovery.³

Nothing is 'discovered' unless the place where the incriminating article is recovered is really a place of concealment which the police could not have discovered without some assistance from the accused.⁴ The indicating of a corpse in an open place and before the accused was arrested is not in any sense a discovery and none as envisaged by this section.⁵

As a corollary it has been ruled that this section will not apply when the discovery is first made and then the accused gives a statement explaining the discovery.⁶ Where the 'discovery' had not been as a result of interrogations of the accused but as a result of search made by Customs Officers, and the recovery list was signed by the accused, it was held that this section did not apply so as to render the memos admissible.⁷

The word "discovered" in this section is used in a peculiar sense. When a man confesses to a police officer that he murdered another person, it might be contended that the fact that he murdered that person was discovered by the statement; but, it is obvious that this is not the meaning of the word 'discovered' in this section. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of that fact no longer

2. A.I.R. 1957 S.C. 216.

3. *State v. Dharma Lal*, 1961 2 Cr. L.J. 238 (M.P.); 1973 Cut.L.R. (Cri.) 415.

4. *Sadhu Singh v. State* 11 R. 1968 1 Punj. 765; 1956 Cut.L.J. 37; 1967 Cr.L.J. 118; A.I.R. 1967 Punj. 14, 15. (concealment of opium). *Gauti v. State* (1972) 2 Sim. L.J. (H.P.) 105; 1972 Cri. L.J.

6.3. Hun. Praj.

5. *State of M.P. v. Gangabai*, 1971 M.P.L.J. 829; 1971 M.P.W.R. 413, 417.

6. *K.L. Bhat v. State* A.I.R. 1957 Orissa 102; 11 L.R. (1951) Cut. 468; *State v. Bhatnagar Chaitin Mohanty*, (1972) 38 Cut.L.J. 754.

7. *Bekat Ram v. State*, A.I.R. 1959 Punj. 287.

rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of that fact. The fact discovered must be such that the Court is capable of arriving at a conclusion as to whether the said fact existed or not by weighing the credibility of the witnesses who depose to the existence of that fact, quite apart from anything that has been stated by the accused person.⁸ The recovery of articles cannot be a 'discovery' under this section, when they are not recovered from any hidden place but when the investigating agency comes by them without any initiative from the accused.⁹

The 'fact discovered' within the Section is not equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this. The information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife. Knives were discovered 10 or 20 years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge and if the knife is proved to have been used in the commission of the offence the fact discovered is very relevant. But, as to the statement the words be added 'with which I stabbed A', those words are inadmissible, since they do not relate to the discovery of the knife in the house of the informant.¹⁰ In a statement of the accused that he had kept the stone on which he ground *ladana* in a corner of the pit in a garage, the part of the statement to the effect that the accused had ground the *ladana* on the stone related to the past user of the stone and did not lead to any discovery, this part was therefore inadmissible but the remaining part was admissible.¹¹ In another case, only the portion of the statement of the accused 'I had pawned the transistor with a servant of a tea stall at Railway Station who sells tea on the platform for Rs. 25', the past history of the transistor was inadmissible under the section.¹² Incriminating statements made to a police officer are not admissible in evidence as they are hit by Sections 25 and 26. Where the accused states that the axe was one with which the murder had been committed, it is not a statement which leads to any discovery within the meaning of this section. Nor is a statement, that the blood-stained shirt and *dhori* belong to the accused, a statement which leads to any discovery within the meaning of this section. Such statements cannot be admitted in evidence. Statements not leading to discovery are inadmissible.¹³

8. **Karam Din v. Emperor**, 1929 Lah. 338 : 115 I.C. 1.

9. **Atm v. State**, A.I.R. 1958 A.P. 293; I.L.R. 1958 A.P. 115; **Maheswari P. Singh v. State**, 1968 A.W.R. (H.C.) 100, 102 (information by accused that stolen property was lying with accused at his place); see also **N. Brahmachari Singh v. Union Territory**, A.I.R. 1966 Manipal 8.

10. **Pulikur K. v. Emperor**, I.R. 74 I.A. 65; A.I.R. 1947 P.C. 67.

11. **Irfan Ali v. State**, 1970 All. Cr. R. 498 : 1970 A.W.R. (H.C.) 679;

1970 Cr. L. J. 603, 612.

12. **Jai Singh v. The State**, 60 P.I.R. (D.) 100, 106.

13. **Pedder v. State of U.P.**, (1963) 2 S.C.R. 481; (1963) 2 S.C.J. 165; I.L.R. (1963) 1 All. 161; A.I.R. 1963 S.C. 1118; 1962 B.I.J.R. 924; 1962 All. L.J. 1087; 1962 A.I.W.R. (H.C.) 876-69; **Pooj. I.R.** 336; (1963) 2 Cr.L.J. 382; **Imul Ahmad v. State**, 67 Pooj. L.R. 149, 151; 1966 A.W.R. (Sup.) 4 (statement of accused 'I have kept concealed' my 'pavjama and banyan',

The statements admitted under the section are statements preceding finding upon search or inquiry.¹⁴ It is not now necessary that the discovery should be by the deponent,¹⁵ if the latter be a police officer investigating a case, he will not be allowed to prove an information received from a person accused of an offence in the custody of a police officer, on the ground that a material fact was thereby discovered by him when that fact was already known to another police officer.¹⁶ When the police succeed in discovering property in consequence of information received from an accused, it is not competent to the police to replace the property in the place whence it is discovered and to ask the other accused to produce the property because there is no further discovery under this section as against the other accused.¹⁷ While statements preceding finding upon search or inquiry are admissible under this section, mere statements, which lead to no physical discovery after they are made, are inadmissible.¹⁸ In the case of statements made, while pointing out the scene of the crime, the general rule is, that, if a prisoner points out or shows the scene of the offence and objects around as connected therewith, and makes contemporaneous statements in reference thereto, his acts may be given in evidence, as amounting to "conduct" relevant under the eighth section *ante*, but the accompanying statements are not admissible under the present section, there being no such "discovery" as is required by it, nor do they fall within the first Explanation to the eighth section, and are therefore wholly excluded,¹⁹ that is, assuming the accompanying statements to amount to confessions, the rule, however, as to such statements when more particularly stated, appears to be that, if such statements are really explanatory of the acts they accompany they may be proved.²⁰ So, where the prisoner made a confession to the police officer before and during his pointing out particular places and particular articles said to have been connected with the murder of which he was charged, West, J. observed: "A confession of murder made to a police constable is not at all confirmed by the prisoner's saying, 'this is the place where I killed the deceased,' and when starting from the pointing to a ditch or a tree, a long narrative of transactions, some of them altogether remote from any connection with the spot indicated, is allowed to be deposed to as a confession by the prisoner, the intent of the Evidence Act is not

Thus the statement that these articles belonged to accused inadmissible: *Harbans Lal v. State*, 1967 Cr.1. J. 62; A.I.R. 1967 Him. Pra. 10, 14 (statement that shirt belonged to murdered person not admissible as it did not relate distinctly to discovery of shirt). *Public Prosecutor v. Hindubai* (1975) 1 An. W.R. 503; 1975 Mad L.J. (Cri.) 283.
 14. See *The Madras Law Journal* March 1895 pp. 80, 85. *R. v. Jora* (1874) 11 Bom H.C.R. 242. *R. v. Rama Birapa*, (1878) 3 B. 12; *R. v. Nana* (1889) 14 B. 260 in all the cases under this section where the statements were held to be admissible the discovery was of articles or other material facts. The section, as thus understood, enacts the same rule as is given in *Taylor, Ev.*, ss. 902, 903; for an example of an admission subsequent to discovery see *R. v. Kamal*, (1872) 17 W. R. Cr. 50; (*Mst.*) *Bhagan v. State of Pepsu*,

1955 Pepsu 33.
 15. Under Sec. 150, Act XXV of 1861, the words were "discovered by him," the single-quoted words have been omitted in the present section.
 16. *Adu v. R.*, (1885) 11 C. 635, 642.
 17. *R. v. Beshya* (1900) 2 Bom. 1 R. 1089.
 18. *R. v. Rama Birapa*, (1878) 3 B. 12, see *The Madras Law Journal*, *supra*, 81.
 19. *The Madras Law Journal*, March (1895) p. 82, *R. v. Jora*, (1874) 11 Bom. H.C.R. 242, 246. *R. v. Rama Birapa*, (1878) 3 B. 12, 16, 17.
 20. *R. v. Jora*, *supra*, 245, 246; *R. v. Rama Birapa*, *supra*, 17, subject, however, to the further proviso that Sec. 8, so far as it admits a statement as included in the word "conduct," cannot admit a statement as evidence which would be shut out by Secs. 25 and 26: *R. v. Nana*, (1889) 14 B. 260, 263.

• FROM ACCUSED MAY BE PROVED

fulfilled but defeated²¹ From the statement "this is the place where I killed the deceased," there is no "discovery" within the meaning of this section, and therefore no guarantee of the truth of the statement; and further, the prosecution had not, in the particular case, shown that any act done by the accused had been so explained by his statements as to make the latter admissible under the first Explanation to the eighth section *ante*.²² Similarly, in the case of statements, accompanying production of articles the general rule is, that, if the prisoner himself produces or delivers articles said to be connected with the offence and contemporaneously makes declaration as regards them, the act of production or delivery itself may be proved as "conduct" under the eighth section *ante*.²³ But, as there is no "discovery", the accompanying statements are not admissible under the present section nor under the first Explanation to the eighth section *ante*.²⁴ But where the accused makes a statement, as to the locality of certain property, and after, and upon such statement, the police accompany him to the locality, where upon arrival, the accused by his own act produces the property, such statement may be admissible as leading to the discovery of the property.²⁵ (v. post). Discovery at an open place, which provides access to everyone, is not 'discovery' within the meaning of this section.¹ But, it has been held in *Murugan, In re*,² that if the property is found to be so hidden away that no ordinary member of the public could know of its existence there, the fact that it was on the information of the particular person and his pointing out unaccompanied by any explanation of innocent knowledge, the incriminating article was discovered and recovered, would lead to the presumption that he was the person who had secreted it there.

21 R. v. Rama Birapa, (1878) 5 B. 12, 16, 17.

22 Tara Singh v. R., 1915 P. R. 11; 1915 Cr. L. J. 545.

23 Rihque Uddin v. Emperor, 1935 Cal. 184; 1 I. L. R. 62 Cal. 572; 125 I. C. 687 (F. B.); Kaljiban v. Emperor, 1936 Cal. 316; 1 I. L. R. 63 Cal. 1063; 163 I. C. 41.

24 R. v. Jora, (1874) 11 Bom. H. C. R. 242; in this case the first prisoner produced a bill-book and knife from the field, and the second prisoner a stick, and each made a certain incriminatory statement which the Court held to be inadmissible both under this section since there was no "discovery," and under Sec. 8, Explanation (1); however it held that the acts of the prisoners could be proved. B. v. Pancham, (1882) 4 A. 198; see R. v. Kamalia, (1886) 10 B. 505, 597; Adu v. R. (1885) 11 C. 635, 640, 661; see also Dhaman v. Emperor, 1937 Sind. 251; 171 I. C. 737; Hirz Gobar v. Emperor, 1919 Bom. 162; 52 I. C. 601; 21 Bom. L. R. 724; Emperor v. Shivputraya, 1930 Bom. 244; 126 I. C. 876; 31 Cr. L. J. 1104; 32 Bom. L. R. 574; Turab v. Emperor, 1935 Oudh. 1; 1 I. L. R. 10 Luck. 281; 152 I. C.

423, Ramani Mohan De v. Emperor, 1933 Cal. 146; 143 I. C. 797; Baghel Singh v. Emperor, 1929 Lah. 794; 121 I. C. 497; (Muz.) Gajrani v. Emperor, 1933 All. 394; 144 I. C. 357; 1933 A. L. J. 1617, Bala Hudder v. Emperor, 1933 Nag. 252; Abdul Rahim v. Emperor, 1945 Lah. 105; 1 I. L. R. 1945 Lah. 290; 220 I. C. 467 (F. B.). As to accompanying statement, see Taylor, Ev., 1903; 3 Russ. Cr. 474.

25. R. v. Nana, (1889) 14 B. 260; Ram Richhapal v. State, 1 I. L. R. 1954 Punj. 876; 1954 Punj. 97; 56 Punj. L. R. 23 (F. B.); Rama Shidappa v. State, 1952 Bom. 299; 1 I. L. R. 1952 Bom. 662; 54 Bom. L. R. 316 (F. B.); Deputy Legal Remembrancer v. Chena Nashya, 2 C. W. N. 257; Amir-Uddin v. Emperor, 1918 Cal. 88; 1 I. L. R. 45 Cal. 557; Manjunathaya v. Emperor, 1914 Mad. 61 (2); 24 I. C. 845; 26 M. L. J. 352; (In re) Sogiamuthu Padavachi, 1926 Mad. 638; 93 I. C. 42, Nawabdin v. Emperor, 1933 Lah. 516; 144 I. C. 12.

1 Shobha Param v. State of M. P., A. I. R. 1959 Madh. Pra. 125; 1958 M. P. L. J. 758.

2. A. I. R. 1958 Mad. 451

In the Full Bench case of *Imperial v. Ramakant Jyoti*,³ where the accused who was charged with the murder of a woman whose corpse was found to be wrapped up in a cot mattress made the following statement while in custody of the police officer at the shop of a witness: "I purchased the mattress from this shop and it was this woman (another witness) that carried the mattress." It was held that the statement was admissible as it directly led to the police officer making the discovery of not merely a shop-keeper and a coolie woman but that one had sold a mattress to the accused and the other had carried it for him from the shop. Following this case, it was held in another case that if a complainant is discovered as a result of a statement made by the accused, that statement is admissible.⁴ Similarly, it has been held, that where, as a result of information given by the accused, another co-accused is found by the police, the statement of the accused, as to the whereabouts of the co-accused, is admissible under this section as evidence against the accused.⁵

Where a fact is irrelevant to the inquiry, the fact, deposited to, if discovered in consequence of the information by the accused, is inadmissible.

Where the accused gave information to the Investigating officer, that they had concealed the pieces of rope with which the dead body was carried, they gave discovery of the ropes and their statement is admissible.⁷

Discoveries of incriminating articles containing human blood may arouse strong suspicion that the accused might be the murderer but mere suspicion, however grave, cannot take the place of legal proof.⁸

The investigation of the police is concluded not when a preliminary charge-sheet is filed but only when the final charge-sheet is filed before the Magistrate. Hence, documents showing the recovery of article after the filing of the preliminary charge-sheet but before the filing of the final charge-sheet which is in fact and is now a report under section 173 (1), Cr. P. C., are admissible in evidence. The Magistrate takes cognizance only when the final charge-sheet is filed.⁹

The fact that the disclosure statement of the accused led to the recovery of the knife (in a case of murder) shows that it was within the exclusive knowledge of the accused that he had buried the knife at the place from which it was recovered.¹⁰

Discovery evidence by itself is subsidiary and cannot sustain a conviction but it can lead considerable corroborative value to the evidence in support

3. 1985 Mad. 128; 11 L.R. 58; Mad. 642; 158 I.C. 764 (F.B.).

4. In re; Pospodol Verkhv, Subba v. 1943 Mad. 419; 207 I.C. 238; (1943) 1 M.L.J. 192.

5. Ismail v. Emperor. 116 Sind. 13; I.L.R. 1945 Kar. 419; 224 I.C. 83.

6. Gokul v. R. 1978 Pat. 22; 11 L.R. 6 Pat. 611; 105 I.C. 683.

7. Pingal Khadia v. State 11 L.R. 1969 Cut. 809; 1969 Cr.L.J. 1255; A. I.R. 1969 Orissa 245, 248.

8. Dandani v. State, 1969 35 Cut.L. T. 301, 304; Bakshish Singh v. State of Punjab 1971 Cr.L.J. 1152; A. I.R. 1971 S.C. 2056; State v. Yousuff Durr 1973 Cr.L.J. 955 (J. & K.); Queen v. State of M.P. 1974 Cr.L.J. 1200 (M.P.).

9. Ramsethi Batchah v. State, 1969 Cr.L.J. 542 (Andh. Pra.).

10. Melkh Raj v. State 1969 Cr.L.J. 94, 97 (Punjab.).

of the prosecution case¹¹. However, statement of accused leading to discovery of stolen property is not subsidiary but main evidence in a charge under Sec 41, I. P. C.¹² In the absence of any rational explanation by accused as to how he acquired knowledge of the existence of bones of deceased at a particular place, inference that the accused committed the murder can be drawn.¹³

The prosecution must establish the connection of the object recovered with the crime,¹⁴ otherwise the discovery is of no consequence¹⁵.

The discovery contemplated by the section is one in consequence of the information supplied by the accused himself. Where the accused stated that the incriminating articles were kept in the room of one of the prosecution witnesses and they were not found there but they were actually recovered on the basis of the information supplied by another prosecution witness, the recovery is not one in consequence of the information received from the accused under the section¹⁶. So also where the person from whom recovery was made said that the accused pledged the article with him but there is no evidence that recovery was the result of any information given by the accused, the recovery cannot be relied upon to infer participation of the accused in the crime.¹⁷ The statement of accused that the article was with 'A' would be admissible if it led to discovery of article at the shop of 'A' but it is not necessary that it should have been found on person of 'A'.¹⁸

If the recovery of a bloodstained *dhoti* from the person of the accused was not put to him in his examination under section 342, Cr. P. C., it could not be used as a circumstance against him.¹⁹

12. Information. The word "information" cannot be used as synonymous with the word "statement". There is no reason why the word "information" should have been used instead of the word "statement" in the

11. **Dinkar Bandhu Deshmukh v. State.** 72 Bom.L.R. 405 : 1970 Mah. L. J. 634 : 1970 Cr. L. J. 1622 : A I R 1970 Bom. 438 : 440. **Bhagwan Dass v. State of Rajasthan.** 1974 Cr. L. J. 1168 : A I R 1974 S.C. 1699 (Eye witnesses receiving injury and weapon recovered at the instance of accused. Conviction for the offence of murder held proper); **Karan Singh v. State of U.P.**, 1972 All. Cr. R. 125 : 1972 All. W.R. (H.C.) 192 (necessity of prosecution to say that article stained with human blood is not fatal to prosecution case); **Chandra Pal Singh v. State.** 1971 All. Cr. R. 469. **State v. Yousoff Dar** 1973 Cr. L. J. 955 : (I & K); **Onkar v. State of M. P.**, 1974 Cr. L. J. 1200 (M.P.); **Shri Ram v. State.** 1973 W.L.N. 401 : 1973 Raj. L.W. 495; 1973 Cr. L. J. 1443 (If weapon not proved to be stained with human blood such corroboration would be lacking)
12. 1973 Mah. Cr. R. 204 (Bom.)
13. **Surchand Ramji Chavan v. State of Mysore.** (1972) 1 Mys. L. J. 297; 1972 Mad. L. J. (Cr.) 196; 1972

- Cr. L. J. 1108.
14. **Chinnaswamy Reddy v. State of A.P.**, (1963) 1 Andh L. T. 111 : 1963 A. W.R. (H.C.) 56 : 1963 (1) Cr. L. J. 8 : (1962) 2 Ker. L. R. 364 : A I R 1962 S.C. 1288, 1293; **Irfan Ali v. State.** 1970 All. Cr. R. 498 : 1970 A. W.R. (H.C.) 679 : 1970 Cr. L. J. 603, 612.
15. **Kalu v. State.** 1973 Kash. L. J. 363 : 1963 J. & K. L. R. 822 : 1974 Cr. L. J. 889. **State of Gujarat v. Adam Fatch Mohammad** (1971) 3 S.C.C. 208; **S. S. Akhade v. State of Maharashtra.** (1971) Cr. L. J. 80 : A I R 1971 Tripura 8.
16. **Bhaskaran Nair v. State of Kerala.** 1969 Ker. L. T. 11 : 1970 M. L. J. (Cr.) 125.
17. **State of H. P. v. Wazir Chand, A. I. R.** 1978 S.C. 315.
18. **State of M. P. v. Murari Lal.** 1973 M.P.L.J. 707 : 1973 M.P.W.R. 461 : 1973 Jab. L. J. 706 : 1973 Cr. L. J. 109 (Madh. Pra.).
19. **Prabhu Sahay Khadia v. State.** 1969 P. L. J. R. 364, 369 : 1969 B. L. J. R. 578.

section, if by "information" statement alone was intended. The word "information" as distinct from the word "statement" connotes two things, namely, a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person. Since "information" also includes the knowledge derived by the person informed from the informant, it is clear that when a person deposes simply to the following effect, namely, that from information received from the accused, he proceeded to do certain things, and discovered certain other things, this statement is by itself relevant and admissible in evidence against the accused. In order to make it irrelevant or inadmissible against the accused, it would not be sufficient merely to put a question to the deponent which tended to show that the information was derived from an oral statement made by the accused, for the fact that there was such an oral statement would not make the statement inadmissible for the reason that the word "information" includes, as already stated, the knowledge derived by the person as well as the means taken to impart that knowledge. Of course it is open to the accused, when such a deposition is made against him, to challenge its veracity, by requiring the deponent to state the exact words and depose to the surrounding circumstances at the time when the alleged information was given. If the deponent fails to prove the exact words, this might affect the weight of his evidence but would not affect its relevancy or its admissibility.²⁰

Whatever statement is attributed to an accused person in police custody, giving information leading to the discovery, must be proved by witnesses like any other fact. The Court should ascertain the words of the accused exactly. The investigating officer should not have written them in his own words.²¹

The actual words used by the accused in the information leading to the discovery and not a paraphrase thereof by third persons must be proved. Then, it will be for the court to decide how much of it is admissible under the section,²² unless the actual words are proved no reliance can be placed on the information and discovery.²³

When a statement containing information under the section which led to discovery is recorded and witnesses are present, nothing in law prevents them from testifying to it and even from attesting it.²⁴

It is only proper for the prosecution to adduce evidence under the section to prove by production of written record so much of the statement as led to discovery of the article. The oral statement of witnesses, without corrobora-

20. *Keram Din v. Emperor*, 1929 Lah 358; 115 I.C. 1.

21. *Bhagirathi v. State of M. P.*, A I R 1959 Madh. Pra. 17; 1958 M P L J 745; *State of Maharashtra v. Pocha Lachama*, 1976 Mah. L. J. 195.

22. *Athappa Goundan*, In re, I L R. 1937 Mad. 495 at p. 728; A I R. 1937 Mad. 618 (F.B.), 630; *Surajbhai Gulambhai v. State of Gujarat*, (1966) 7 Gaj. L. R. 119, 120; 1966 Cr. L. J. 154 (1); *State of M. P. v. Jamuna Das*, 1969 Jab. L. J. (S.N.) 106; *Wahangbum Nainai Singh v. Manipur Administration*, 1968 Cr.

I J. 1237, 1242; see also *Emperor v. Shivputraya*, A. I. R. 1930 Bom. 244.

23. *Bhagirathi Prasad v. State of M. P.*, 1958 M P L J 745; *Dhoom Singh v. State*, A I R. 1957 All. 197; *Wahangbum Nainai Singh v. Manipur Administration*, *supra*; *State of Maharashtra v. Pocha Lachama*, *supra*.

24. *State of Kerala v. K. Chekkotty*, 1960 Ker. L. T. 843; 1967 Cr. L. J. 1552; 1967 M L J. (Cr.) 47; A I R. 1967 Ker. 197, 198; explaining *Karunakaran v. State of Kerala*, 1960 Ker. L. I. 959.

... each of ... may be ... The ... consequence ... of the ... of the ... distinctly ... custody ... dead body, ... of which the ... which the ... and the knowledge of the ... and the in- ... which ... by the ...

... with- ... post- ... vide ... the particular fact.¹¹

... is not of the description in the section.¹²

Where the accused made a statement to the

11. *Paula Nayak v. The State*, I.L.R. 1962 Cut. 955; A.I.R. 1963 Orissa 93; *Pulukuri Kottaya v. Emperor*, A.I.R. 1947 P.C. 67 relied on; *Mohmed Inayatullah v. The State of Maharashtra*, A.I.R. 1976 S.C. 483; 1976 Cr. L. J. 481.
12. *Punja Maya v. State of Gujarat*, I.L.R. 1964 Guj. 954; A.I.R. 1965 Guj. 5, relying on *Prabhoo v. State of U. P.*, A.I.R. 1963 S.C. 1113; *Pulukuri Kottaya v. Emperor*, A.I.R. 1947 P.C. 67; I.L.R. 74 I.A. 65.

13. *Dharna v. The State*, I.L.R. (1966) 15 Raj. 989; 1965 Raj.L.W. 418; 1966 Cr. L. J. 414; A.I.R. 1966 Raj. 74.
14. *Ghazi v. State*, 1966 Cr.L.J. 369; A.I.R. 1966 All. 142, 149.
15. *Puttanna Setty, C. V. v. Balasubramanyan, A. V.* (1969) 17 Law Rep. 803; 1969 M.L.J. (Cr.) 374; (1969) 1 Mys. L. J. 417, 419.
16. *R. v. Jora*, (1874) 11 Bom.H.C.R. 242, 244.

degree methods which take away all its voluntary character,⁷ do or is not a repetition of what had already been stated to the police or already known to the police,⁸ or is a composite statement of several accused where it is impossible to say how much of the statement was made by one and how much by the other.⁹

It depends upon the circumstances of each case whether the discovery was really made in consequence of the information given by the accused.¹⁰ But, there are four possibilities which have to be guarded against in the case of any recovery :

- (1) The complainant might have been persuaded by the police to state in the first information report that property which in fact was not stolen had been stolen and to hand over such property to the police to be used in fabricating recoveries from the accused persons.
- (2) The police might have obtained property similar to the stolen property from the complainant or someone else and used it for the purpose of fabricating the recoveries. In considering this hypothesis regard must necessarily be had to the nature and value of the property recovered.
- (3) The police might have suppressed some of the stolen property recovered from an accused person and utilised it in inventing a recovery from another accused person.
- (4) The property might have been recovered from a third party and used by the police in one of the unproved recoveries.¹¹

The practical test to determine whether or not there is such a connection between the information and the discovery has been stated to be as follows : 'In regard to the extent of the words thereby discovered,' we may derive some assistance from the test applied by the Courts in dealing with proximate and remote causes of damage, namely, whether what followed was the natural and reasonable result of the defendant's act.¹² Only that portion of the information is provable which was the immediate or proximate cause of the discovery of the fact. Anything which is not connected with the fact as its cause, or is connected with it, not as its immediate or direct cause, but as its remote cause, does not come within the scope of the section and should be excluded.¹³ It

7. *Chinnai Prasad, In re*, 1939 M.W.N. 1134; 186 I.C. 484; A.I.R. 1940 M. 19; *Empress v. Pargadin*, 1939 M.W.N. 87; 180 I.C. 529; A.I.R. 1940 M. 12; see however opposite view in *Public Prosecutor v. Pak-kirishwami*, 1929 M.W.N. 785; A.I.R. 1929 M. 846.

8. *Krishna Iyer, In re*, 36 Cr. L. J. 1107; 1935 M.W.N. 82; 157 I.C. 297; A.I.R. 1935 M. 479; *Public Prosecutor v. Subba Reddy*, 1938 M.W.N. 1118; 181 I.C. 596; *Chenna Peddy, In re*, 1940 M.W.N. 86; 1 I.L.R. 1940 M. 254; A.I.R. 1940 M. 710.

9. *Petta Chinnai Gounder v. Emperor*, 1941 M.W.N. 766; 197 I.C. 54; A.I.R. 1941 M. 765; (*In re*) *S. S. S. M. S. S.*, 1942 M.W.N. 877; 201 I.C. 524; A.I.R. 1942 M. 532 (1).

10. *Public Prosecutor v. I. C. Lingiah*, 1953 M.W.N. (Cr.) 282; A.I.R. 1954 Mad. 433, 441.

11. *Uma Kishana v. State of Ajmer*, 1956 Cr.L.J. 1134; A.I.R. 1956 Ajmer 57, 61.

12. *R. v. N. S.*, 1889, 14 B. 26, 27, per *Jardine, J.*

13. *Sukhan v. Emperor*, (1929) 10 Lah. 283.

was found to be covered by the Bombay and Allahabad High Courts¹⁴ that where an article said to be connected with an offence was produced by the party himself after giving information in respect of it, the article could not be said to have been discovered "in consequence of the information". It was said that in stating that the article is discovered by the act of the party and not in consequence of the information. But this view was subsequently dissented from, in, and (so far as the Bombay High Court is concerned) overruled by, a case,¹⁵ in which the facts were as follows: The accused, in the course of the police investigation, was asked by the police where the property was, and replied that he had kept it and would show. He said that he had buried the property in the fields. He then took the police to the spot where the property was concealed and with his own hands disinterred the earthen pot in which it was kept. It was held that the statement of the accused that he had buried the property in the fields was admissible under this section, as it set the police in motion, and led to the discovery of the property, and that a statement is equally admissible whether it is made in such details as to enable the police to discover the property themselves, or whether it be of such a nature as to require the assistance of the accused in discovering the exact spot where the property is concealed. This view has also been adopted by the Calcutta,¹⁶ Madras,¹⁷ Lahore¹⁸ and Punjab,¹⁹ High Courts and has been accepted by the Supreme Court.²⁰ And in a case in the Allahabad High Court, to a certain spot and there found ornaments worn by the girl at the time of her death it was held that evidence of these acts was admissible as conduct within the meaning of Sec. 8, whether such conduct was or was not caused by the inducement of the police.²¹

Statements made whilst producing the material object concerned cannot be received in evidence, as they are not statements in consequence of which a fact is discovered.²⁷ But, where the statement and the discovery are not simultaneous, but after stating that the article concerned was buried at a particular place, the accused takes the police to that place and digs out the article, the statement is admissible.²⁸ Where certain witnesses told the police that the accused had said that he had hidden the jewels of the murdered woman in

14. R. v. Panchan. (1882) 4 A. 198.
[Redacted] R. [Redacted] 1884) 6 A. 507.
[Redacted] [Redacted] J., R. v. Kamahar.
(1886) 10 B. 595, 597.
[Redacted] v. [Redacted] 14 B. 200 fol.
[Redacted] R. v. S. Subba v State,
[Redacted] I.L.R. 1912 Bom.
[Redacted] Cr. I.J. 1219 54 Bom.
L.R. 316 (F.B.).
16. [Redacted] v. Chema, 25
C. 489 2 C.W.N. 217; Amrullah
Ali v. [Redacted], 1918 Cal. 88 :
I.L.R. [Redacted] and see also R.
v. Pagaree, (1873) 19 W.R. Cr. 51
in which case the party himself pro-
duced the property.
17. [Redacted] v. Emperor, 1914
M.L.J. [Redacted] 84, 25 M.L.
J. [Redacted] Annamuthu, 1916 Mad.
[Redacted]
18. Nawab Ali v. [Redacted], 1933 Lah.

- 19 516: 144 I.C. 12.
Rambhadr v. State, 1954 Punj 97;
111 R. 194 Punj 870; 56 P L R
23 (F.B.).
- 20 K. S. S. v. State of U.P. 1973
C.R. A. 108 (1973 S.C.) 1973 S.C.
C. 108 (1973 S.C.) 1973 S.C.
C. 108 (1973 S.C.) 1973 S.C.
- 21 Cr.L.R. (S.C.) 90: 1973 Cr.L.J.
1155 A.I.R. 1973 S.C. 1385
R. v. M. (1973) 31 A. 592, see
also P. v. Chokley, 1973
A.I.R. 1973 All. 710; 170
I.C. 455.
- 22 In re Anoka Lakshmin, 1942
Mad. 237; 199 I.C. 87; 43 Cr. L.
J. 505 1941 M.W.N. 956
- 23 P. v. Prosecutor v. Kandakatta
Nagappa, 1948 Mad. 601; 279
I.C. 102 (1948) 2 M.L.J. 283,
1948 M.W.N. 577.

his or his servant's field, and subsequently the accused took the police to a particular place in the same field and dug up the ground and disclosed the jewels, it was held that the jewels were discovered "in consequence" of information given by the accused and it was held admissible.²⁴ No doubt, it is not necessary that the informant himself should personally recover any property about which he gives information, but when the informant has the land necessarily to recover such property, it must be conceded that the effect of his information has become completely exhausted, and the information is not admissible even if the property is subsequently recovered due to the action of a co-accused.²⁵ Confessional statement of accused not leading to discovery of articles stolen in that case but to other articles is inadmissible.¹

Confessional statement should be read as a whole but it is open to reject a part thereof. (Exculpatory portion of confessional statement was rejected).²

10. **From an accused person in custody.** Section 150 of Act XXV of 1861, amended by Act V of 1890, was re-enacted in the Criminal Justice section of the Evidence Act with slight alterations in language. The only alteration, on which any stress can be laid is the omission of the word "or".³ This shows that the extension of the section is restricted to information from an accused person in custody of the Police, and does not apply to information from an accused person not in custody of the police.⁴ In order to bring a case of discovery within the scope of this section, it is necessary that the party making the statement should be both accused and in custody at such time,⁵ and

(a) a confession obtained by inducement under the circumstances mentioned in the twenty-fourth section; or

(b) a confession made to a police officer,⁶

will not be excluded by the operation of the twenty-seventh section when the person confessing is at the time—

(i) neither accused nor in custody, or

(ii) in custody, but not accused, or

(iii) accused but not in custody,—

notwithstanding any discovery in consequence thereof.

A confession made to any person other than a police officer by a person who was at the time in the latter's custody, but not accused is in-

24. *In re Chundru Pallayya*, 1943 Mad. 111, 28 Cr. L.J. 1743 M.W.N. 111.

25. *In re Sengupta*, 1944 Cal. 104, 44 Cr. L.J. 104, 1944 M.L.J. 44, 1944 I.C. 104, 1944 M.L.J. 44, 1944 M.W.N. 111.

1. *In re Chundru Pallayya*, 1943 Mad. 111, 28 Cr. L.J. 1743 M.W.N. 111.

2. *In re Chundru Pallayya*, 1943 Mad. 111, 28 Cr. L.J. 1743 M.W.N. 111.

3. *In re Chundru Pallayya*, 1943 Mad. 111, 28 Cr. L.J. 1743 M.W.N. 111.

4. *R. v. Babu Lal*, (1884) 6 A. 509.

5. *In re Chundru Pallayya*, 1943 Mad. 111, 28 Cr. L.J. 1743 M.W.N. 111.

6. *In re Chundru Pallayya*, 1943 Mad. 111, 28 Cr. L.J. 1743 M.W.N. 111.

7. *In re Chundru Pallayya*, 1943 Mad. 111, 28 Cr. L.J. 1743 M.W.N. 111.

56; *Jalla v. Emperor*, 1931 Lah. 111, 11 Cr. L.J. 111, 11 Cr. L.J. 111.

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admissible even though it may lead to discovery, unless indeed it was made in the immediate presence of a Magistrate.⁷ But the arrest and custody need not be in respect of the offence under investigation. Thus where a person, arrested for criminal breach of trust in respect of a cycle that he had taken on hire and later sold, confessed that he had also sold another cycle, and as a result of that confession, the cycle was discovered, it was held that such a confession was admissible under this section.⁸

See S. 26 ante, Note 3, "Police custody".

16-A. Police officer. An excise officer exercising powers of entry, search, seizure, arrest and investigation of offences under the Assam Opium Prohibition Act is a "police officer" for the purposes of this section.⁹ Under Orissa Grama Raksha Act a Gram Rakshi is a 'police officer'.¹⁰

See also cases under note 4 to section 25.

17. Custody. 'Custody' does not mean physical custody. When a person not in custody approaches a Police Officer and offers to give information leading to the discovery of a fact having a bearing on the charge which may be made against him, he may appropriately be deemed to be 'in the custody of a police officer' within the meaning of the section.¹¹ When a person states that he has done certain acts, which amount to an offence, he accuses himself of committing the offence, and if he makes the statement to a police officer, as such, he surrenders to the custody of the officer within the meaning of Sec. 46 (1), Cr. P. C. and is then in the custody of a police officer within the meaning of this section.¹² Formal arrest is not necessary; constructive custody is enough.¹³

For the purpose of this section, the word 'custody' does not necessarily mean detention or confinement; submission to custody by word or action under Sec. 46 (1), Cr. P. C. may be taken to amount to custody.¹⁴ The word 'custody' in Sec. 27 of this section does not mean formal custody, but includes

7. See *R. v. Babulal*, 6 All. 509; 1884 A.W.N., 229 (F.B.); *Deonandan v. Emperor*, 1928 Pat. 491; I.L.R. 7 Pat. 411; 111 I.C. 118.

8. *P. v. K.*, 1943 N.I.J. 194; M.L.J. 89; I.L.R. 1943 Mad. 456; 204 I.C. 555; see also *Public Prosecutor v. K.*, 1943 Mad. 661; 209 I.C. 272; (1943) 2 M.L.J. 283.

9. *Public Prosecutor v. A.*, 1972 Cr. L.J. 779; A.I.R. 1972 Gauhati 7.

10. *Sanatan Bindhani v. State*, (1972) 38 Cut. L.T. 428.

11. *State of U.P. v. Deoman Upadhyaya*, (1961) 1 S.C.R. 14; (1960) 2 S.C. A. 1125; (1961) 2 S.C.J. 331; I.L.R. (1960) 2 All. 431; 1960 A.L.T. 733; 1960 A.W.R. (H.C.) 568; (1961) 2 Andh. W.R. (S.C.) 90; (1961) 2 M.L.J. (S.C.) 100; 1961 M.L.J. (Cr.) 554; 1960 Cr. L.J.

1504; A.I.R. 1960 S.C. 1125, 1131; *State of Assam v. V.N. Rajkhowa*, 1975 Cr. L.J. 354 (Gauhati); I.L.R. (1971) 2 Ker. 30.

12. *State of Bihar v. Emperor*, 1933 Pat. 149, 151; I.L.R. 12 Pat. 241; 142 I.C. 474 (S. B.); *Legal Remembrance v. Lalit Mohan*, 1922 Cal. 342; I.L.R. 49 Cal. 167; 62 I.C. 578; *State of Bihar v. Mohanlal Agarwalla*, 1966 B.L.J. P. 183, 137.

13. *Onkar Ganesh v. State*, 1974 M.P. L.J. 429; 1974 Cr. L.J. 1200; *Kanhaiya v. State of Rajasthan*, 1976 Cr.L.J. 162 (Raj.); 1976 W.L.N. 160; 1976 Raj.L.W. 251.

14. *Jalla v. Emperor*, 1931 Lah. 278, 279; 131 I.C. 93; *Maung Law v. Emperor*, 1924 Rang. 173; 77 I.C. 429; I.L.R. 1 Rang. 609; *Legal Remembrance v. Lalit Mohan*, 1922 Cal. 342; I.L.R. 49 Cal. 167.

such state of affairs in which the accused can be said to have come into the hands of a police officer, or can be said to have been under some sort of surveillance or restriction.¹⁵

The section does not insist on the informant being in the custody of the Police Officer 'investigating the offence to which the information relates'. Thus, if the information lead to the discovery of a relevant fact, given to such officer, the same will be admissible under the section.¹⁶

As soon as an accused or suspected person comes into the hands of a police officer, he is in the absence of clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of sections 26 and 27.¹⁷ Where at the time the accused makes a statement, the police arrives on the spot, the custody of the police is commenced.¹⁸

In a Bench decision of the Madras High Court, in (*In re*) *Ramachandra*¹⁹ it was held after a review of the relevant decisions :

" We see no reason at all why the expression 'relating to police custody' occurring in section 27 of the Indian Evidence Act should be rigidly interpreted. After all, what the spirit of the language employed appears to imply is, that, where a person submits himself to the custody of a police officer, with the consciousness that temporarily at least he is in such custody or under such control, whether formally authorised in some manner or otherwise, the information given by him to such officer, leading to the discovery of a relevant fact, may be proved within the scope of the section. To limit the meaning of the expression further, by imposing conditions as to the time of arrest, the existence or absence of a formal magisterial order authorising police custody, or interrogation, etc., does not seem to be justified either by the context, or by any inherent feature of the scheme of sections 25 and 26, to which section 27 clearly constitutes a proviso or exception." See the decision of the Supreme Court in *Ramkishan v. State of Bombay*.²⁰

The term 'custody', used in the section, has to be interpreted within its limits.²¹ The section doubtless applies only when the person is in the custody of the police and stands accused of an offence. The term 'accused' has been

15. (*Mst.*) *Maharani v. Emperor*, 1948 All. 7, 1947 A.L.J. 265; *Chhotey Lal v. State of U.P.*, 1954 All. 687, 1954 A.L.J. 93.

16. *State of Mysore v. Rangiah*, (1965) 2 Mys. J. 1, 135, 1966 M.L.J. (Cr.) 4, 1966 Cr.L.J. 848.

17. *Mangal v. Emperor*, A.I.R. 1924 Rang. 173.

18. *Chief v. Andarab*, *In re* (1867) 3 M.H.C.R. 318.

19. 1960 1 M.L.J. 112, 1960 M.L.J. (Cr.) 127.

20. 1955 S.C.J. 129, 1955 1 S.C.R. 903; A.I.R. 1955 S.C. 104; 55 Bom. L.R. 660, 1955 M.W.N. 100, 1955 All. W.R. 581, 1955 1 M.L.J. (S.C.) 66; 1955 Cr. L.J. 196.

21. See also, *In re* *Manoj Chhabra*, A.I.R. 1957 A.C. 72, 1957 Cr.L.J. 1086; *Ram Singh v. State*, 1958 All. J. 660, A.I.R. 1958 All. 518. *In re* *Krishna Lal*, 1961 M.L.J. 307 at 31.

ever been brought constituted. In consequence it has been held that even during the course of the investigation under S. 154 Criminal Procedure Code, that is to say, from the time of the commission of the offence, whoever are known or have come to the knowledge of the police as offenders or suspected persons, are deemed to be accused persons within the meaning of this section, even though they might have been released under Sec. 167 or S. 170, Criminal Procedure Code. Therefore, a person who is not named in the first information report as culprit but is arrested subsequently is not concerned with the meaning of sections 167 and 169, Criminal Procedure Code, whether he is charged or not. Moreover or not, a statement by him leading to discovery would hence be admissible.²²

18. **Information given by more than one accused.** Where a fact is discovered in consequence of information received from one or several persons charged with an offence, and when others give like information to the Court, it must be treated as discovered from the information of each of them. It would be deposed that a particular fact has been discovered from the information of AB and this will let in so much of the information as relates distinctly to the fact as was discovered.²³ In the case of *R. v. R. (1884) 14 Smith, J.*, observed as follows :

"I have more than once pointed out that it is not a proper course, where two persons are being tried to allow a witness to state 'they said this' or 'they said that' or the 'prisoners then said'. It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused in consequence of which he discovered a certain fact, or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding. In detailing statements of this kind which are alleged to have led to discovery, it is of the essence of them that what each prisoner said should be precisely and separately stated. If the evidence was not clear upon this point, and the witness refused to be more exact, the Judge should have paid no attention to it."

In other cases it was held that where two suspects give information which led to the arrest of another person, it is only the information given by each which can be admitted under this section and that the information given by each should be precisely and separately stated. Once property has been recovered in consequence of information received from a suspected person, it cannot be recovered in consequence of information received from another suspected person. It is only the information that was given by the first person which led to the actual discovery which may be proved under the

22. *Greenivasulu, In re, A. I. R.*, 1958 A. P. 37. See also *State v. Mohd. Hussain, I I. R.*, 1959 Bom. 1244; *A I R.*, 1959 Bom. 534.
23. *R. v. Ramchurn*, (1875) 24 W. R.

Cr. 36.
24. (1884) 6 A. 509 (F.B.) at pp. 549, 550.
25. *Ram Singh v. R.*, 1916 Lah. 433 (2); 34 I.C. 903.

terms of this section¹. If the statement made by the first accused should have resulted in the discovery if it was pursued by merely going to the place where to enable the other accused to make a similar statement in the same place, it cannot be said that the discovery was in consequence not only of the statement of the first accused but also that of the second accused.

When a fact is once discovered in consequence of information received from some source, any further information subsequently received from any other source cannot be said to be the information whereby the fact is discovered. But the mere plurality of informations received before a discovery is not necessarily take any of these informations out of the section. In a suitable case, it is possible to ascribe to more than one person the information which leads to the discovery². Joint or simultaneous statements of the accused persons are not inadmissible in evidence³. "If the prosecution assume a position to establish that the statements of the action which led to the discovery were actually made or took place simultaneously we do not think that evidence in regard to the simultaneous statements or the simultaneous action would be excluded simply by the provisions of Sec. 27. Evidence Act. For there must be some and existing evidence on this point such as will enable the Court to decide and to give specific direction to the jury whether the evidence is admissible against both the accused or against either and not against which". It is immaterial whether the information is given by one person or two persons. What is of importance is that the information should be given in the sense that the accused give a particular part of the information and the other accused give the other part of the information so that each part can be attributed to a particular accused and proved against him. Otherwise no particular part or part statement can be proved under this section. In the instant case two confessional decess were alleged to have been recovered in pursuance of the joint statement and as it was not shown, pleaded by the statement as to which accused's information caused the recovery of the material object, the joint statement could not be proved. If the discovery is made in the case, it is found that the accused knew the whereabouts of the material objects, no more importance could be attached to them.

Simultaneous statements are not 'per se inadmissible' in evidence, and are liable to be considered, if the discovery made in consequence thereof

1. *Budha v. Emperor*, 1922 Lah. 315; 64 I.C. 502; *Kudaon v. Emperor*, 1925 Nag. 407; 91 I.C. 236; *Poshaki v. State*, 1953 All. 526; 1953 A.L.J. 115; *Emperor v. Shivputraya Baslingaya*, 1930 Bom. 244; 126 I.C. 876; 32 Bom L.R. 574; *Adam Khan v. Crown*, 1927 Lah. 739; 101 I.C. 488; (In re) *Sheik Mahaboob*, 1942 Mad. 532 (1); 201 I.C. 524; 1942 M.W.N. 377; *Durlay Nama-sudra v. Emperor*, 1 I.L.R. 59 C. 1040; 138 I.C. 116; 1932 Cal. 297; *Narayan v. State*, 1953 Hyd. 161; 1 I.L.R. 1953 Hyd. 32; see also *Putti v. Emperor*, 1945 O. 235; 219 I.C. 486.
2. *Koli Mala Bipal v. State*, 1954 Kutch 22; 1951 Cr.L.J. 801; see also *Lachhman Singh v. State*, 1952 S.C.

- 167; 1952 S.C.J. 230; 1952 A.L.J. 437; (1952) 2 M.L.J. 100; 1952 Cr.L.J. 863; 1 I.L.R. 1952 Punj. 278.
3. *Naresh Chandra v. Emperor*, 1942 Cal. 503, 603; T.L.R. (1942) 1 Cal. 436; 204 I.C. 111. See also *Ranchod v. State*, A.I.R. 1956 M.B. 262.
4. *State Government of M.P. v. Chotrayal Mohanlal*, 1955 Nag. 71; 1 I.L.R. 1955 Nag. 169; 1955 N.L.J. 239; *Harmal v. State*, 1971 A.L.J. 529; 1971 A.W.R. (H.C.) 327; 1971 Cr.L.J. 1215.
5. *Abdul Kader v. Emperor*, 1946 Cal. 452; 228 I.C. 24; 50 C.W.N. 88.
6. *Ramji Shetty v. State of Kerala*, 1971 Ker.L.T. 244, 246 and 247.

affords a guarantee about the truth of the statements? Relying on the observations of Straught, J., a Bench of the Oudh Chief Court held:

"The use of the word 'a person' in singular, we think, is somewhat significant and we are inclined to the view that the word was used in singular designedly because we cannot conceive the joint statement of a number of persons can be said to be an information received from any particular one of them. When a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, it is impossible to treat the discovery as having been made from the information received from each one of them."⁹

This Section contemplates statements by individual accused and the discovery which may follow such statements. A joint statement of several accused or joint recovery of articles by several persons, is not contemplated. A joint statement followed by a joint recovery is not admissible against either of the accused.¹⁰ But the words 'a person' in Sec. 27, Evidence Act, do not, in any way exclude admission of information from more than one person simultaneously, provided it fulfils the requirements of this section. Section 13 (2), General Clauses Act provides that words in the singular shall include the plural and *vice versa* provided there is nothing repugnant in the subject or context. There is nothing repugnant in the provisions of this Section for acceptance of statement jointly made by more than one person, provided that facts discovered in consequence thereof afford some guarantee about truthfulness of their statements. It will depend on the facts of each case.¹¹ The question came up for consideration, but was left undecided in *Lachman Singh v. The State*¹² where their Lordships of the Supreme Court observed at page 170 of A.I.R. :

It seems to us that if the evidence adduced by the prosecution is found to be open to suspicion, and it appears that the police have deliberately attributed singular confessional statements relating to facts discovered to different accused persons, in order to create evidence against all of them, the case undoubtedly demands a most cautious approach. But as to what should be the rule, when there is clear and unimpeachable evidence as to independent and authentic statements of the nature referred to in Sec. 27, Evidence Act having been made by several accused persons, either simultaneously or otherwise, all that we wish to say is that as at present advised we are inclined to think that some of the cases relied upon by the learned counsel for the appellants have perhaps gone further than is warranted by the language of Sec. 27 and it may be that on a suitable occasion in future those cases may have to be reviewed."

7. *State Government of M.P. v. Choudh. Mohanlal*, I.L.R. 1955 Nag. 169; 1955 N.L.J. 239; 1955 Nag. 71.

8. Quoted in previous paragraph.

9. *Prasad v. Emperor*, 1935 Oudh 285; 1935 F.C. 486.

10. *Mohan v. State*, 1957 R2J L.W. 401; see also *K. Valayan v. State of Kerala*, A.I.R. 1960 Ker. 238; 1960

Ker.L.J. 169.

11. *State Government of M.P. v. Choudh. Mohanlal*, I.L.R. 1955 Nag. 169; 1955 N.L.J. 239; 1955 Nag. 71.

12. 1952 S.C. 167; 1952 S.C.J. 230; 1952 A.I.J. 437; (1952) 2 M.L.J. 186; 65 M.L.W. 479; 1952 Cr.L.J. 863; I.L.R. 1952 Punj. 278.

In *Motilal v. State*,¹³ it was observed :

"No principle in support can be found for the view that the statements of two or more accused leading to the discovery of a relevant fact will be admissible only if they are simultaneously made. The statement nevertheless remains the statement of two or more persons, whether made simultaneously or one after the other, and, if it is admissible against all those who made the statement, it made simultaneously, it is equally admissible if made one after the other, provided always that the statements made by those accused which are to be admitted relate distinctly to the discovery and not re-discovery of the relevant fact."

In *Babu v. State*,¹⁴ it was observed :

"A general statement made by more than one accused persons cannot be said as leading to discovery. It is imperative that before any such statement is held admissible under this section it must be precisely known as to what specific statement was made by a particular accused. The joint statement of two accused on the basis of which dead body was recovered is inadmissible under this section but the fact of recovery as a consequence of digging out the field by the accused persons is relevant under section 8."

When it is uncertain as to who gave what information first and the statements of the accused were not recorded, evidence of discovery cannot be used against any accused.¹⁵

A fact which is discovered once cannot be rediscovered and just as it is difficult to conceive a simultaneous and joint statement by more than one accused, it is equally difficult to conceive a simultaneous and joint discovery of a fact by them.¹⁶

19. "So much of such information..... may be proved." This portion of the section seems to be based on the following statement in Sec. 902 of Taylor's Evidence: "So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, since this part of the statement, for the reasons already given, cannot have been false. The earlier rule in England admitted the facts, but excluded the accompanying statements."¹⁷

Where property is discovered in consequence of an inadmissible confession, so much of the confession as strictly relates to the discovery is admissible, for this portion at least cannot be untrue, but independent statements not qualifying or explaining the fact though made at the same time are inadmissible.

13. A I R. 1959 Pat. 54; I.L.R. 58 Pat. 151.

14. 1972 All W.R. (H.C.) 105; 1972 All. Cr. R. 68; 1972 All.L.J. 291; 1972 Cr.L.J. 815 (A.I.R. 1958 All. 467 held not good law in view of A I.R. 1955 S.C. 104).

15. (1972) 1 Cut L.R. (Cr.) 101.

16. Hemat Rainji v. State, (1975) 16

Guj L.R. 782; 1975 Mah.Cr.R. 74.

17. R. v. Wilcock (1887) 1 Leach 263.

18. R. v. Gould, (1840) 9 C. & P. 364 see Phipson, Ev., 11th Ed., pp. 368-369; Sukhan v. Emperor, 1929 Lah 344; I L.R. 10 Lah, 283; 115 I C. 6; 30 Cr.L.J. 414 (F.B.).

The confirmation of the information admits the part contained and that only. According to Prof. Wigmore "this falls something short of the issue of the case for a confirmation on material points produces in the mind a persuasion of the trustworthiness of the whole. It can hardly be supposed that at certain parts the possible fiction stopped and the truth began, and that by a narrative as evidence the truthful parts are exactly those which a subsequent search, more or less controlled by chance, happened to confirm. Such a difference even is purely artificial, and corresponds to no actual mental processes, either of the confessor or of the hearer. If we are to cease distrusting any part, we should cease distrusting all."¹⁹

But, if all that is required to hit the ban under the two preceding sections be the inclusion in the confession of information relating to an object subsequently discovered, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect.²⁰ The protection given to the accused by these sections should not be dependent on the ingenuity of the police officer or the folly of the prisoner in composing the sentence which conveys the information, hence the limitation in the section. The intention of the Legislature in enacting this Section was that the minimum portion of a confession made to a police officer, or of information given to him should be admitted into evidence, which might reasonably be held to relate distinctly and positively to the fact discovered, and which is necessary to be proved in order aforesaid to explain such discovery.²¹ The words "so much of such information" and "distinctly" are very important. They limit what may be proved against the accused. The whole of the statement of the accused is, therefore, not admissible under the section, but only that portion of it can be proved against him, which has led to the discovery of the fact deposited to, and which relates distinctly to the fact discovered, that is to say, only that portion of the accused's statement can be admitted which was the direct or immediate cause of the discovery of the fact deposited to. Anything which is not directly or clearly connected with or which is not the immediate cause of the discovery is not admissible.²² To be admissible, under this section, the information must not only be such as has caused the discovery of the fact, but must "relate distinctly" to the fact discovered. The word "relate" means to "have reference to" or "to connect" and the word "distinctly" means clearly, unmistakably, definitely or indirectly. To put it in different language the information must be clearly connected with the fact.²³ The word "thereby" in "fact thereby discovered" refers to that portion of the information only which may be held to be the proximate cause of discovery.²⁵

19. Wigmore, § 857.

20. *Pratt v. Kewley v. Emperor*, 1947 P.C. 67.

21. *S. S. Sengupta v. Emperor*, 1931 Pat. 14; 11 F.R. 1; Pat. 15; 181 I.C. 797; 32 Cr.L.J. 792; 12 P.L.T. 18; *Pratt v. Kewley v. Emperor*, 1947 N.2 23; 161 I.C. 8; 37 Cr.L.J. 460; *Naresh Chandra Das v. Emperor*, 1947 Cal. 436; 111 I.C. 111; 75 C.L.J. 104; 1947 A.W.N. 189; *Sukhan v. Emperor*, 1929 Cal. 453; 38 Cr.L.J. 910; 1927 A.I.J. 10; 1937 A.W.R. 216.

22. *Emperor v. Chandra Das*, 1947 All. 197; 500; 111 I.C. 111.

23. *Sukhan v. Emperor*, 1929 Lah. 344; 11 F.R. 1; 181 I.C. 797; 32 Cr.L.J. 792; 12 P.L.T. 18; (F.B.); *Ganau Chandra Kashid v. Emperor*, 1947 Bom. 172; 137 I.C. 174; 33 Cr.L.J. 396; 34 Bom.L.R. 303; *Rama S. Sengupta v. Emperor*, 1947 Bom. 299; 111 I.C. 111; 75 C.L.J. 104; 1947 A.W.N. 189; *Sukhan v. Emperor*, 1929 Cal. 453; 38 Cr.L.J. 910; 1927 A.I.J. 10; 1937 A.W.R. 216.

24. *Pratt v. Kewley v. Emperor*, 1947 P.C. 67.

25. *Naresh Chandra Das v. Emperor*, 1947 Cal. 436; 111 I.C. 111.

A mistake in the construction of the words "as relates distinctly to the fact thereby discovered" may be derived from a consideration of the principle upon which the enactment contained in this section is founded. Statements admissible under this section are so admissible because the discovery rebuts the presumption of falsity arising from the fact of their being made under inducement, or to the police, or to others while in police custody. The discovery proves not that the whole, but that some portion of the information given, is true, namely, so much of the information as had led directly and immediately to, or was the proximate cause of, the discovery; only such portion of the information is guaranteed by the discovery, and hence only such portion of the information is admissible. A prisoner's statement as to his knowledge of the place where a portion of an article is to be found, is confirmed by the discovery of that article, and is thus shown to be true. But any explanation as to how he came by the article, or how it came to be where it is found, is not confirmed by the discovery, and as the presumption of falsity as to these other statements is not rebutted, therefore proof of them is prohibited. Information as to the past use, or the past history, of the object produced is not related to the discovery in the setting in which it is discovered.¹ In the words of West, J.: "It is not all statements connected with the production or finding of property which are admissible; those only which lead immediately to the discovery of property and so far as they lead to such discovery, are properly admissible." Other statements connected with the one thus made evidence, and so immediately are not to be admitted.² The relevancy ofmediate connection appears to be the *ratio decidendi* of the case *R v Paine*,³ in which a wider construction was put on the words "as relates distinctly" so as to admit not only so much of the information as leads directly and immediately to the discovery of the fact, but also the portion which leads indirectly, by way of explanation. (Though Broadhurst, J., in referring to this case in *R v Babu Lal*,⁴ says that no difference is noticeable in the rulings of *R v Paine*,⁵ *supra*; *R v Jora Hiji*,⁶ *supra* and *R v Pancham*,⁷ as to the extent to which statements or confessions of accused persons can be proved by a police officer under this Section, it is, however, submitted that the ruling in *R v Paine*,⁸ *supra*, is not reconcilable with the principles laid down in *R v Jora Hiji*,⁹ *R v Rama*,⁷ *R v Babu Lal*,⁸ *11 Cr. R.*² *R v Commerce*,¹⁰ and *R v Nimal*,¹¹ and is indeed virtually overruled by *11 Cr. R.*¹² referred to in *Legal Remedy Cases v Chema*.¹³ In the last cited case, it was said per Binerjee, J.: "The view I take is in no way inconsistent with that taken by the Court in *Adul v R.* as the part of the affirmation or statement that is here used as evidence against the accused under Sec. 27 relates distinctly to the fact thereby discovered and does not go beyond it." (11 Cr. R.) but "other statements not necessarily and directly connected with the fact discovered are not to be admitted as this would rather be an extension of a statement of the law which is designed to guard prisoners accused of offences against unfair practices on the part of the police." For ins-

1. *Pulukuri Kottaya v. Emperor*, 1947 P. C. 67.
2. *R. v. Jora Hasji*, (1874) 11 Bom. H.C.R. 242, 244.
3. (1875) 19 W.R.Cr. 51.
4. (1884) 6 A. 509 (F.B.) at p. 518.
5. (1882) 4 A. 198.
6. (1874) 11 Bom.H.C.R. 242.
7. (1878) 3 B. 12, 17.

8. (1884) 6 A. 509 (F.B.).
9. (1885) 11 C. 635.
10. (1888) 12 M. 153.
11. (1889) 14 B. 260.
12. *Supra*.
13. (1897) 25 C. 413; see *The Madras Law Journal*, April, 1895, p. 129. *et seq.*

given by the prisoner, which relates to the fact, includes not only the concrete thing discovered by the investigating officer, but also its description as given by the accused including its connection with the crime which is under investigation. But this case was overruled by a Full Bench of the same Court in *State v. Emperor*²⁴. Again a Full Bench of the Madras High Court in *Athappa Goundan v. Emperor*²⁵ held that any information which served to connect the object discovered with the offence charged was admissible under this section on the ground that the fact deposed to, and the fact discovered, obviously must be relevant and the fact or thing discovered can only be relevant, if it is connected with the offence of which the accused is charged; and the confession in the section is a confession of the offence charged, and not of anything else. Holding that this was wrong, their Lordships of the Privy Council observed in *Pudukottai Kottaya v. Emperor*¹: "Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into Sec. 27 something which is not there and for treating in evidence a confession barred by Sec. 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law. In the case before the Privy Council, the statement used by the accused which was challenged was, 'I stabbed Sivayya with a spear. I hid the spear in a yard in my village. I will show you the place.' The Privy Council held that the whole of the statement was inadmissible with the exception of the first part viz. 'I stabbed Sivayya with a spear'. Therefore, their Lordships held that the statements 'I hid the spear in a yard in my village', and 'I will show you the place' were both inadmissible statements. The reason why looking to the judgment of the Privy Council, their Lordships held that the statement 'I hid the spear in a yard in my village' was admissible was that this statement led to the discovery of the fact that the accused had knowledge that the spear was hidden in the yard in the village, and as that was a fact discovered, the statement relating to that discovery was admissible, and the statement relative to the discovery of that knowledge was 'I hid the spear in a yard in my village'. In a Full Bench case of the Bombay High Court² it was observed: 'Apart from the decision of the Privy Council, it is difficult to understand, once it is conceded that the knowledge of the accused may be a fact which can be discovered with the assistance of Sec. 27, how it is possible to argue that the statement relating to the discovery of the accused is not distinctly related to the discovery, and is inadmissible knowledge. The accused may say 'I hid a particular object in a particular place'. The accused may say 'X or Y told me that a particular object was hidden in a particular place and therefore I believe it is there, and I attempted to point the place out'. Either of the two statements is distinctly related to the fact of the knowledge of the accused with respect to the place where a particular object is concealed.

24. 1929 Lah. 344.

25. 1927 Mad. 685. 11 R. 1927 AC 167. 111 F.C. 207. 58 C.L.J. 112. : (1937) 2 M.L.J. 60; 1947 M.W.N. 142. 4 F.W. 112. F.B.

1. A.I.R. 1947 P.C. 67 at p. 71; Sat. 1947 28.

2. Rama Shidappa Thorali v. State, I.L.R. 1947 Bom. 299 (F.B.). L.R. 316; 1952 Bom. 299 (F.B.).

information if the statement distinctly relates to the discovery, the statement will be admissible wholly and the court cannot exercise a part of it because it is of a confidential nature. Where in a burglary case the accused in police custody made a statement to the police that he would show the place where he had hidden the ornaments, namely, the ornaments and that statement led to the discovery of the stolen ornaments, the Supreme Court held that the *whole* of the statement distinctly related to the discovery and was admissible under the section.¹⁴ The words 'whether it amounts to a confession or not' are to be read as 'whatever the word information in the immediately preceding context, not the words so much', and the effect is that, although ordinarily a confession of an accused while in custody would be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be received in though, as a whole, the statement would constitute a confession in which the preceding sections are intended to exclude.¹⁵

21. Admissibility against co-accused: Sees. 27 and 30. In some cases a confession admissible under Sec. 27 is not only evidence against the accused who made it, but that it can also be taken into consideration against the co-accused under Sec. 30.¹⁶ But the Full Bench case of the Madras High Court was overruled by their Lordships of the Privy Council in *Emperor v. Shivabhai*,¹⁷ so far as the Bombay High Court is concerned it has held that a statement by an accused admissible under Sec. 27 is not admissible against his co-accused.¹⁸ Some of the other High Courts have followed the same view.¹⁹ Statements by an accused which do not relate to the fact discovered thereby, but involve other accused are not admissible against the latter.²⁰

- Bom I. R. 600; (1955) 1 M. L. J. (S.C.) 66; 1955 M.W.N. 146; *Hanna v. State*, 1957 Jab L.J. 460; *Murugan, In re*, A.I.R. 1958 M. 451; *Pakhar Singh v. State*, A.I.R. 1958 Punj. 294; *Delhi Administration v. Balakrishnan*, 1972 Cr.L.J. 1; 1972 U. L. (S.C.) 105; 1972 S. C. Cr.R. 144; (1972) 1 S.C.J. 347; 1972 M.L.J. (Cr.) 205; A.I.R. 1972 S.C. 3; *Public Prosecutor v. V. Viswanathachari*, 1972 Cr.L.J. 779; A.I.R. 1972 Gauhati 7 (By the fact discovered in consequence of information, it acquires hall mark of truth).
14. *K. S. Narayan v. State*, A.P., 1963 Andh L.T. 111; 1963 A.W.R. (H.C.) 56; 1963 (1) Cr. L.J. 8; (1962) 2 Ker L.R. 364; A.I.R. 1962 S.C. 1788, 1793; *Dholi v. State*, 32 Cut. L. T. 1085, 1087 (theft of ornaments—ornaments concealed).
15. *R. v. Jora Hasji*, (1874) 11 Bom. H.C.R. 242, 244, and see *R. v. P. K. W. L.*, 1972 B. L. J. 1.
16. *Sankappa Rai v. Emperor*, I.L.R.

- 31 Mad. 127; 18 M.L.J. 66; *Emperor v. Shivabhai* 1926 Bom. 513; 97 I.C. 660; *Periya Swami Moopan v. Emperor*, 1931 Mad. 177; I.L.R. 54 Mad. 73; 129 I.C. 645; *Athappa Goundan v. Emperor*, 1937 Mad. 618; I.L.R. 1937 Mad. 695; 171 I.C. 245 (F.B.); *In re Pullannagari Rami Reddy*, 1941 Mad. 238; 195 I.C. 53; 52 L.W. 420, but it cannot be treated as substantive evidence against the co-accused; (*In re*) *Marappan*, 1947 Mad. 264; I.L.R., 1947 Mad. 433; 228 I.C. 153. 1947 P.C. 67; 74 I.A. 65; I.L.R. 1948 Mad. 1; 230 I.C. 135.
17. *Emperor v. Shivabhai*, 1926 Bom. 513.
18. *Ramhit v. Emperor*, 1922 All. 24; 65 I.C. 849; 23 Cr.L.J. 193; 20 A.L.J. 178; *Satish Chandra v. Emperor*, 1945 Cal. 137; I.L.R. (1944) 2 Cal. 76; 219 I.C. 310; *Babulal v. Emperor*, 1946 Nag. 120; I.L.R. 1945 Nag. 931; 222 I.C. 389.
20. (*In re*) *Abdul Basha Sahib*, 1941 Mad. 1; I.L.R. 1940 Mad. 1028; 193 I.C. 814.

22. Witnesses to recovery memo. It is not required that witnesses to a recovery memo under the section should be witnesses of the locality. Section 100 (old Section 103), Cr. P. C., does not in terms apply to such a recovery; it is confined only to searches made under Chapter VII of the Code of Criminal Procedure.²¹

28. Confession made after removal of impression caused by inducement, threat or promise, relevant. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

s. 24 (Confession caused by inducement), s. 3 (Relevant)
s. 3 ("Court").

Steph. Dig., Art. 22; Roscoe, Cr. Ev., 16th Ed., 45-46; Taylor, Ev., 878; 3 Russ. Cr. 458-463; Phipson, Ev., 11th Ed., 358; Wills, Ev., 3rd Ed., 312; Field, Ev., 6th Edn., 107.

SYNOPSIS

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|--------------------------------------|--|
| 1. General. | Inducement. |
| 2. Principle. | 4. Confession, whether voluntary, is a |
| 3. Confession unaffected by original | question of fact. |

1. General. The law relating to confessions is contained generally in Sections 24 to 30 of this Act and Sections 162 and 164 of the Code of Criminal Procedure. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 27 is in the form of a proviso, and partially lifts the ban imposed by Sections 24, 25 and 26.

If the confession is caused by any inducement, threat or promise, as contemplated by Section 24 of the Act, the whole of the confession is excluded by Section 24.²² But, if such a confession as is referred to in Section 24, is made after the impression caused by any such inducement, threat or promise has in the opinion of the Court, been fully removed, it is relevant and admissible as provided in this Section.

2. Principle. If a confession has been obtained from the prisoner by undue means, any statement made by him under the influence of that confession cannot be admitted as evidence.²³ But a confession falling under this section is deemed to be voluntary, and is relevant, since it is the result of free determination unaffected and uninduced by the original threat or promise.²⁴

"Fully" means thoroughly, completely, entirely, so that no impression created by the inducement or torture be left.²⁵

21. *State v. Mukandilal*, 1967 Cur. L.J. 682; 69 Punj L.R. 935, 939.

22. *Aghnood Nagesta v. State of Bihar*, (1966) 1 S.C.R. 134; (1965) 2 S.C.A. 367; 1966 S.C.D. 202; (1966) 1 S.C.J. 193; (1965) 2 S.C.W.R. 825; 1965, 1 Ardhr. Y. F. 430; 1965 A.W.R. (H.C.) 648; 1965 B.L.J.R. 865; 1966 M.P.L.J. 49; 1966 Mah.L.J. 113; 1966 M.L.J.

(Cr.) 134; 1966 Cr.L.J. 100; A.I.R. 1966 S.C. 119.

23. 3 Russ. Cr. 458.

24. See notes, post and Introduction, ante, as also Sec. 24, ante. Steph. Dig. Art. 22.

25. *Bhagrat v. State of M.P.*, A.I.R. 1969 Madh. Pra. 17; 1958 M.P.L.J. 745.

the accused person for the purpose of obtaining it, or when he was drunk or because it has made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

S. 21 (Proof of admissions against persons making them).
S. 3 ('Evidence.')

S. 3 ("Relevant.")
S. 123 (Criminating answers).

Steph. Dig. Art. 24; Taylor, *Ev.* ss. 881, 882; Roscoe, *Cr. Ev.*, 16th Edn., 47; Plouffe, *Ev.*, 11th Edn., 356; Wills, *Ev.*, 3rd Edn., 314; Phillips and Arnold, *Ev.*, 420, 421; Norton, *Ev.*, 167; Best, *Ev.*, s. 529; Cr. P. C., (Act V of 1898), ss. 163, 313 (Secs. 163 and 316 of Cr. P. C. 1973); Wigmore, *Ev.* s. 823; Joy's *Confessions*; 50.

SYNOPSIS

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|--|---------------------|
| 1. Principle. | 5. Deception. |
| 2. Scope. | 6. Drunkenness. |
| 3. Non-invalidating origins of a confession. | 7. Interrogation. |
| 4. Promise of secrecy. | 8. Want of warning. |

1. Principle. In order that a confession should be invalidated, there must be an inducement operating to influence the mind of the accused either by hope of escape, or through fear of punishment connected with the charge. Such inducement must relate to the charge and reasonably imply that the position of the accused with reference to it will be rendered better or worse according as he does, or does not, confess. If the confession be obtained by any other influence, it will not be invalidated (though its weight may be affected,¹⁴ however much it would have been more proper not to have exerted such influence, and however much the statement itself may become liable to suspicion). The present section states certain noninvalidating origins of a confession. In none of the instances given is there any inducement, relating to the charge, held out to the accused.¹⁵ The circumstances mentioned do not affect the testimonial trustworthiness of the confession. A confession becomes relevant only when it is shown that it was voluntarily made and that it was true.¹⁶

Extrajudicial confessions made on three different occasions successively if found to be voluntary and witnesses proving them not discredited, can be held to be true.¹⁷

2. Scope. The opening words of this section are: "If such a confession". The opening words of the preceding Sec. 28 are: "If such a confession as is referred to in section 24". Grammatically it would appear

¹⁴ *R. v. Spilsbury* (1836) 7 C. & P. 18.
¹⁵ *Best, Ev.*, s. 529.
¹⁶ Norton, *Ev.*, 167; see Sec. 24, ante; *Taylor Ev.*, s. 881; *Best Ev.*, s. 529; see notes to *R. v. Gavin* (1885) 15 Cox, 666, and *R. v. Bracken-*

bury (1893) 17 Cox, 628.
¹⁶ *S. K. Banerjee v. D. Banerji* 77 Cal. W.N. 94; *A. I. R.* 1974 Cal. 61 (S.B.).
¹⁷ *Daskandil v. State*, (1976) 42 C. I. T. 449; 1976 Cr L.J. 2010.

3. **Non-invalidating origins of a confession.** The principle of voluntariness would not be the foundation of excluding the confession and be taken into account unless their cause was such that the accused was likely to have been expected to actually confess.¹¹ The feared exceptions to Human rights to be aware of it is, were the prospects of getting a confession involving an offer of a reward or averting or the elimination of a negative consequence the benefit of a reward or the threat against the drawbacks (pain and even, at first sight, a more serious offence) as weighed at the time against the prospects often of a confession involving a similar reward, such as to have created in any considerable degree a risk that a false confession would be made.¹² Putting voluntariness and reward was the main concern was that there was any too risk of a false confession.¹³ The non-invalidating origins of a confession, which are mentioned in this section are:

- (a) promise of secrecy ;
- (b) deception ;
- (c) drunkenness ;
- (d) interrogation ;
- (e) want of warning.

But there may be a way. So what if the accused has been convicted of a crime relating to himself, or sought to commit a crime, or to say what a person in a position will be receivable in evidence.²²

4. **Promise of secrecy.** This does not make the confession inadmissible, though a confession is then treated in the mind of the trier of fact.

19. 1954 Bom. 285 : I.L.R. 1954 Bom.
484 : 56 Bom.L.R. 115.

21. Wigmore, Ev., S. 824.

R v Sageena, (1867) 7 W. R. Cr. 56: but not what he had been heard to say in his sleep.

A prisoner is his guard.²³ A confession is not excluded because of a breach of contract or of good faith which may thereby be involved.²⁴ It is a misapprehension that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a trial and to public view, no such rule ever prevailed. Confessions are received as evidence, or rejected as inadmissible, under a consideration whether they are or not entitled to credit.²⁵ The true question seems to be does such conduct so render it probable that the prisoner should be thus induced untruly to accuse himself guilty of a crime of which he was innocent?²⁶ Where A, an prisoner, is on a charge of murder, B, a fellow prisoner, said to him, "I will save you if you tell me how you murdered the boy—pray split", and A replied, "Will you be upon your oath not to mention what I tell you," and B went upon his oath that he would not tell, and A then made a statement; it was held that B was not such an inducement to confess as rendered the statement inadmissible.²⁷ Where the accused made a confession to an officer of his regiment, who promised to see that if truth were told, it was held that the confession was admissible.²⁸

5. **Deception.** Obtaining of a confession by deception, if otherwise relevant, does not make it irrelevant. Where a prisoner on trial on a charge of felony asked the turnkey of the jail to put a letter into the post for him, and after his promising to do so, the prisoner gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, handed it to the prosecutor; it was held that the contents of the letter were admissible in evidence against the prisoner as a confession, notwithstanding the manner in which it was obtained.²⁹ In another case, a free man was asked by a police officer to suppose that some of his accomplices were in custody, and he, who had been supposed he made a confession, and it was admitted in evidence.³⁰

6. **Drunkenness.** Whether the prisoner be made drunk for the purpose of getting a confession, or be made drunk by himself, the confession is equally receivable.³¹

7. **Interrogation.** A confession cannot be received in evidence if it has been extorted by questions put to the prisoner, or if it is made in answer to the questions of a prosecutor, both and twenty-sixth sections of the Act of 1834, but the form of the question is immaterial, if provable by the evidence.

23. Wigmore, Ev., S. 823 (a).

24. *R. v. Warickshall*, (1783) 1 Leach 263.

25. Joy on Confessions, 50.

1. *R. v. Shaw*, (1834) 6 C. & P. 372; *R. v. Nabadwip*, (1868) 1 B L R. Cr. 15, 23; and where a witness promised the accused that what the prisoner said should go no further, the confession was received; *R. v. Thomas*, (1837) 7 C. & P. 817.

2. *R. v. Mohammad Baksh*, 4 Cr. L. J. 49; 8 Bom. L. R. 507.

3. *R. v. Derrington*, (1826) 2 C. & P. 418; *R. v. Nabadwip*, supra.

4. *R. v. Burley*, 1 Phillips and Arn. 420; see also *R. v. Ramchurn*, (1873) 20 W. R. Cr. 33 in which the decep-

tion practised consisted of statement made by the police officer to the prisoner that the latter's brother-in-law had given out that he was guilty.

5. *R. v. Spilsbury*, (1836) 7 C. & P. 187 in which case Coleridge, J., said, "This (the fact that prisoner was drunk) is a matter of observation for me upon the weight that ought to attach to this statement when it is considered by the jury." See Best, Ev., s. 529.

6. As to answers given to the police not amounting to a confession of guilt, see *R. v. Nabadwip*, 1868) 1 B L R. Cr. 15, 20.

or even assume the prisoner's guilt? In *Ibrahim v. R.*⁷ Lord Sumner reviewed the earlier authorities, and observed that there was no settled practice with respect to the admissibility of confessions made by persons in response to questions put to them while in custody. His Lordship observed: "The English law is still a little strange as it may seem, since the point is one that constantly occurs in criminal trials. Many Judges in their discretion, exclude such evidence, but they fear that nothing less than the exclusion of all such statements, except after improper questioning of prisoners by removing the inducement to confess, will do it. This consideration does not arise in the present case. Other Judges kinder to the prisoner or more mindful of the balance of decided authorities, would admit such statements, nor would the Court of Criminal Appeal reverse a conviction thereafter obtained, if no substantial miscarriage of justice had occurred."

As to the present cases, Rule 3 of the Judges' Rules, formulated in 1912, provides that persons in custody should not be questioned without the usual caution being administered. The Royal Commission on Police Powers and Procedures in 1929 recommended that rigid instructions should be issued to the police that no questions (with unimportant exceptions) should be put to a prisoner in custody with reference to any crime or offence with which he was charged.⁸ This recommendation was adopted by the Home Secretary in a Police Circular issued with the approval of the Judges in 1930. In a case in the Calcutta High Court it was held that the mere fact that a statement had been elicited by a question did not make it irrelevant as a confession, though the fact that it was so elicited might be material to the question whether such statement was voluntary.⁹ And a confession elicited by the questions put by a Magistrate has been held admissible in England.¹⁰ In India, the law expressly provides for the examination of the accused person by the court.¹¹ When the confessions contained in an answer given by a witness to a question put to him in the witness box, the provisions contained in Sec. 132, *post*, must be borne in mind.

8. Want of warning. A voluntary confession, too, is admissible, though it does not appear that the prisoner was warned, and even though it appears on the contrary that he was not so warned.¹² Section 161 of the Code of Criminal Procedure provides that the Magistrate shall, before recording any statement made to him during the course of an investigation, caution the person making it that he does so, it may be used in evidence against him, and that he is not bound to answer any question which he does not wish to answer. In some cases it has been held, that Sec. 161 does not apply to the present section, and that even if the provisions of Sec. 161 are applicable, they are not intended to apply to confessions, and in other words, amounting to them a confession otherwise admissible.

7. *Taylor Ev.*, s. 881.

8. 1914 P.C. 155; 25 I.C. 678; 18 C. W.N. 705; 1 L.W. 989.

9. *Barindra v. R.*, (1929) 37 C. 467.

10. *R. v. Rogers*, (1834) 7 C. & P. 606; *R. v. Ellis*, 1 Ry. & F. 432; cited in *R. v. N. S.*, 1 L.R. Cr. 15, 25.

11. Cr. P. C. Sec. 312 (old) (S. 313 new).

12. *Taylor Ev.*, ss. 881, 882; *R. v. Nab adwip*, (1868), 1 B.L.R. Cr. 15 the decision in which on this point has been followed by the present section.

an accused person, because he is accused was not wanted that he was not bound to make the confession and that, if he does so, it may be used as evidence against him. In *In re Karadattarao*,¹⁵ it has been held, that though Sec. 29, Evidence Act makes a confession made by an accused person who had not been warned, according to the provisions of Sec. 164 Cr. P. C., admissible in evidence, still the Court must find out how far such a confession can be acted upon. In *Rangappa v. State*,¹⁶ also, it was observed that though mere non-compliance with the provisions of Sec. 164, Cr. P. C., does not render the confession inadmissible, it is immediately appears to the Court to introduce an element of doubt as to whether the confession was voluntary, the Court would not be free to reject a confession as being inadmissible on the ground that it is involuntary. In *Prabhu v. Jayant Singh*,¹⁷ Bennett, J. was inclined to be guided by the direction in the opening words of Sec. 164 (3), Cr. P. C., then new Sec. 164 (2) of Cr. P. C., 1973 was not mandatory, but directory, and that that section and the present section could be read together. Ray, J. was of opinion that the present section should be taken to cover the field of confessions other than those dealt with in its preceding sections, or, in other words, extrajudicial confessions, and taken in this way there is no conflict between the section and Sec. 164, Cr. P. C. But this view has been expressly disapproved from in *Rangappa v. State*.¹⁸ On the other hand, a Full Bench of the Orissa High Court has read that where the requirements of Sec. 164 (3), Cr. P. C., 1973, now Sec. 164 (2) of new Cr. P. C., 1973 have not been substantially complied with, what purports to be a confessional statement can not be treated as a voluntary recorded confession, in which could be made use of under Sec. 29, and there is thus no scope for making the aid either of the present section or of Sec. 164, new Sec. 164, Cr. P. C., to cure the defect.¹⁹ As has been said by Dis. J. in the case last cited. The position, therefore, as I conceive, it is that a judicial confession can be proved only by the record of the Court, and that the record cannot go in against the accused at the trial, unless it is one that is made in substantial compliance with the provisions of Sec. 164, Cr. P. C., including the fulfilment of the recording Magistrate as to the voluntariness of the confession arrived at on a judicial approach. But even then, the record goes in it is, on the accused to make out or for the Court to find the existence of vitiating circumstances mentioned in Sec. 24 in order to exclude it. In a later decision²⁰ the Rajasthan High Court has held that although in view of the specific provisions of Sec. 29 the mere absence of warning would not make the confession recorded under Sec. 164 Criminal Procedure Code inadmissible, the Court has to be satisfied that the accused knew that he was not bound to make the confession and that if he did so, it would be given in evidence against him before he made the confession. Also see the undernoted case.²⁰

13. *Vellamoonji Goundan v. Emperor*, 1932 Mad. 431; I.L.R. 55 Mad. 711; 137 I.C. 863; *Lal Singh v. Emperor*, 1938 All. 625; I.L.R. 1938 All. 875; 178 I.C. 694; *Emperor v. Nanna*, 1941 All. 145; I.L.R. 1941 All. 145; *State v. Rangappa*, 1954 Bom. 285; I.L.R. 1954 Bom. 484; 56 Bom. L.R. 115.
14. 1950 Mad. 579; (1950) 1 M.L.J. 659; 1950 M.W.N. 293

15. 1954 Bom. 285.
16. 1947 Pat. 305; I.L.R. 25 Pat. 612.
17. 1954 B. 285.
18. *Bala Majhi v. State of Orissa*, 1951 Orissa 168; I.L.R. 1951 Cut. 65 (F.B.).
19. *Prabhu v. State*, AIR 1967 Raj. 141; 1957 Raj. L. W. 225.
20. *State of Orissa v. Jayadhar*, 1975 Cut. L.R. (Cri.) 433; I.L.R. (1975) Cut. 1557.

The Criminal Procedure Code²¹ enacts that no police officer or other person shall prevent by any caution or otherwise any person from making in the course of any investigation under Chapter XII any statement which he may be disposed to make of his own free will.

²⁰ *Consideration of proved confession affecting person making it and others jointly under trial for same offence.*—When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

²² *Explanation.*—“Offence”, as used in this section, includes the abetment of, or attempt to commit, the offence.

Illustrations

(a) A and B are jointly tried for the murder of C. It is proved that A said: “B and I murdered C.” The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said: “A and I murdered C.” This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

s. 3 (“Court”).

s. 3 (“Proved”).

Norton, Ev., 169, Cunningham, Ev. 26, 27, 148.

SYNOPSIS

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|---|---|
| 1. Principle. | 13. “Made.” |
| 2. Scope of the Section. | 14. “Proved.” |
| 3. Evidence of accomplice. | 15. “Court.” |
| 4. <i>Section applies to a jointly stated statement of accused.</i> | 16. “May take into consideration.” |
| (a) General. | 17. How the confession can be used? |
| (b) When retracted. | (a) General. |
| 5. <i>Confession of the accused.</i> | (b) To corroborate other evidence. |
| 6. “Trial jointly.” | (c) To corroborate approvers and accomplices. |
| 7. Trial when begins. | (d) Nature and extent of corroboration required. |
| 8. Plea of guilty. | 17-A. Use of statement of an accused against co-accused. |
| (a) General. | 18. Retracted confession. |
| (b) Proper cause when one of the several accused pleads guilty. | 19. “As against such other person as well as against the person who makes such confession.” |
| 9. “For the same offence.” | 20. Conclusion. |
| 10. The Explanation. | |
| 11. “Confessions.” | |
| 12. “Affecting himself and some others”. | |
| 21. Sec. 163 (Act 2 of 1974). | 23. Cf. the Indian Penal Code (Act 45 of 1860), Explanation 4 to S. 108. |
| 22. Ins. by Indian Evidence (Amendment) Act 3 of 1891, S. 4 | |

1. **Principle.** When a person makes a confession, which affects both himself and another, the fact of self-implication takes the place, as it were, of the sanction on an oath, or, is rather supposed to serve as some guarantee for the truth of the confession against the other.²⁴ For, when a person admits his guilt and exposes himself to the pains and penalties provided therefor, there is a guarantee for the truth.²⁵ To amount to such a guarantee, the statement must be a confession on the part of the maker with respect to the offence with which he is charged.²⁶ The guarantee, however, is a very weak one, for, the fact of self-implication is not, in all cases, a guarantee for the truth of a statement, even as against the person making it, much less is it so as against another. Further, a confession may be true so far as it implicates the maker, but may be false and concocted through malice and revenge so far as it affects others. While such a confession deserves ordinarily very little reliance, it is nevertheless impossible for a Judge to ignore it, and he need no longer pretend to do so, the provisions of this section being inserted for the purpose of relieving him from the attempt to perform an intellectual impossibility. In the *undated* case,³ the Court observed: "We have not taken this confession into account against any of the co-accused, inasmuch as Habib certainly did not intend to implicate himself, though he actually did so." It is doubtful whether the Court laid this down as a point of law. But, if it did, the Accused's 'affecting himself' that is (it is submitted), affecting in fact whatever the intention may have been. The fact, however, that the confession was not intended to implicate the maker of it may go to the weight of the evidence.

2. **Scope of the Section.** This section was introduced for the first time in this Act and marks a departure from the Common Law of England. The section applies to confessions, and not to statements which do not admit the guilt of the confessing party. It seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But, a confession of a co-accused is obviously evidence of a very weak type. It does not in fact come within the definition of "evidence" contained in Sec. 3 of the Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. This section, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which

24. *R. v. Burt*, 183, 19 W. R. Cr. 6, per Parke, J. *R. v. Tipton*, 1 A. 646, 648, per Stoughton, J. "The object sought by the rule

is to secure the truth of the confession by the fact of the confession being made in the presence of the accused." *R. v. Nair*, 18 B. 227, 228, per West, J. *Emperor v. Emperor*, 1930 All. 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100. For instances of application of the section see *Radhi*, 1930 All. 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

25. 77 I. C. 139; (In re) *Lilaram*, 1934 M. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100. See also *R. v. Nair*, 18 B. 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300.

301. *Mahadeo v. R.*, 1923 All. 322; 111 R. 45 All. 323, 76 I. C. 132; *Mahadeo v. R.*, 1921 Sind. 129, 84 I. C. 62; *Rambit v. R.*, 1922 All. 70, 111 C. 319.

2. *R. v. Tipton*, 183, 19 W. R. Cr. 6, per West, J.

1. *Bhadravwar v. R.*, 1928 Cal. 416, 19 I. C. 351; *R. v. Ganraj*, (1879) 2 A. 444; the test is "is the statement sufficient by itself to justify the conviction of the maker; if, see remarks on this section in Cunningham's Evidence, 26, 27, 148.

3. *Hayat v. Emperor*, 1922 Lah. 119, 25 I. C. 401.

The Court may not find that the section does not say that the confession is to amount to proof. Clearly, there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighted with the other evidence.⁴

It may be that the confession made by a co-accused is a detailed statement and it may attribute to the other co-accused a major part in the commission of the offence. And it may also be that if the confession be found to be voluntary and that so far as the part played by the accused making the confession himself is concerned, and so it may be, it is unimpeachable, that the confessional statement in regard to the part played by his other co-accused may also be true; and in that sense the making of the confession may raise a serious suspicion against the other co-accused persons. But the trial judge must not be tempted and suspicion, however grave, must not be allowed to take the place of proof. The confession of a co-accused person cannot be treated as corroborative evidence. It can be proved in service only when the Court is satisfied to accept other evidence and thus the necessity of seeking for corroborative support of its confession deductible from the said evidence. In such a case there is no scope for applying the principle of moral conviction or grave suspicion. Where the direct evidence adduced against an accused person supports a conviction and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt.⁵ It is obvious that the confession of an accused cannot be used as a substantive piece of evidence against the co-accused.⁶ In dealing with a joint trial case, where the prosecution relies on the confession of one accused person against the other accused person, the proper approach to the evidence is to consider the other evidence and if the Court is required to find that the confession may sustain the charge proved against the said accused person, the Court should turn to the confession with a view to ascertain the probability of a conviction which it can give to the confession. The presumption that where there is evidence against a co-accused person, it is proved to support his conviction, does not exist. In describing the said section, it may be the expression of some legal principle or a mere statement of law.⁷ In other words, it cannot be taken to mean that a confession is sufficient and essential to other independent evidence still, and for sustaining a conviction if there is

4. *Bhuboni Sahu v. The King*, 1949 P.C. 257; 76 I.A. 147, the observations in which have been cited with approval in *Kashmira Singh v. State of M. P.*, A.I.R. 1952 S.C. 159 and followed in subsequent decisions; see, for instance, *Sudhu Chandra Das v. State*, A.I.R. 1971 Tripura 8, 12 and 13.

5. *Haricharan v. State of Bihar*, (1964) 6 S.C.R. 623; 1964 S.C.D. 956; (1964) 2 S.C.J. 454; (1964) 1 S.C.W.R. 446; 1 I.L.R. 43 Pat. 544; 1964

B.I.J.R. 510; 1964 (2) Cr.L.J. 344; 1964 Cur.L.J. (S.C.) 208; 1964 M.L.J. (Cr.) 535; A.I.R. 1964 S.C. 1184; *State of Rajasthan v. Chhuttanlal*, 1970 Cr.L.J. 1206; 1 I.L.R. (1969) 19 Raj. 747; *Bhulakiram Koiri v. State*, 73 C.W.N. 467; 1970 Cr.L.J. 403.

6. *Public Prosecutor v. Shaik Ibrahim*, A.I.R. 1964 A.P. 518; (1961) 2 Andh.W.R. 43.

7. *Dewan Chand v. The State*, A.I.R. 1965 Orissa 66.

no independent evidence establishing the guilt of the other co-accused, the confessional statement of one of them cannot be used against the others.⁸

The scope of this section was explained by the Supreme Court in *Kashimira Singh v. State of Madhya Pradesh*,⁹ as follows :

"Where there is evidence against the co-accused sufficient, it believed, to support his conviction, then the fact of confession described in Sec. 30 may be thrown into the scale as an additional reason for believing that evidence . . . The proper way to approach a case of this kind is first, to marshal the evidence against the accused, excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of being independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands, even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus induce a conviction, which without the aid of the confession he would not be prepared to accept."

The Court here has taken into consideration evidence which, in some measure, implicates the other co-accused. The facts and circumstances must raise not a mere suspicion but prove beyond doubt the co-accused person's complicity in the crime. Mere suspicion is not enough, and any extraneous information of an accused, involving the other co-accused, cannot be used against them in the absence of other independent evidence. Indeed, the confession of a co-accused is not evidence within the meaning of this Act. It can be considered under this section only after other evidence has been considered and found to be satisfactory.¹¹

The section does not restrict itself to confessions made by a Magistrate nor do the earlier sections apply. Hence there is no bar to its proper application to a statement made by a co-accused containing a confession in answer to a notice under section 173A of the Cr. P. Code, 1973. In such a case, if other evidence is found to be satisfactory, the confession may be used against implicating himself and the accused, for the purpose of confirming the true application of the accused.¹²

3. Evidence of accomplice. An accomplice being a participant in the crime, his testimony is not free from suspicion, and casts doubt as to its truth-

8. *Roshan Lal v. Union of India*, A I. R. 1966 1, P. 1.

9. 1952 S.C.R. 526; 1952 S.C.J. 201; 1952 A.W.R. 64; 1952 Cr.L.J. 839; (1952) 1 M.L.J. 754; 1952 M.W.N. 402; A. I. R. 1952 S. C. 159, 160; *Budu Gouda v. State*, A. I. R. 1965 Orissa 170; 31 Cut.L.T. 401; A I R. 1965 Orissa 170.

10. *Budu Gouda v. State*, 31 Cut.L.T. 401; A I R. 1965 Orissa 170.

11. *Mohan Singh v. State*, A I.R. 1965 Punj. 291; 66 P.L.R. 1230.

12. *Haroon Haji Abdulla v. State of*

Maharashtra, (1968) 2 S.C.R. 641; (1968) 2 S.C.J. 108; 1968 S.C.W.R. 534; (1968) 1 S.C.W.R. 243; 70

Bom.L.R. 540; 1970 M.P.L.J. (S.C.) 537; 1968 M.L.J. (Cr.) 591; 1968 M.L.W. (Cr.) 116; 1968 Cr.L.J. 1017; A.I.R. 1968 S. C. 832, 835. The corresponding provision in the Customs Act, 1962, is in Section 108, the power now being conferred only on a Gazetted Officer of Customs.

13. *State of Bihar v. Pyara Singh*, 1973 B.L.J.R. 696.

**AFFECTING PERSON MAKING IT AND OTHERS JOINTLY
UNDER TRIAL FOR SAME OFFENCE**

fairness. The Court should not accept his testimony unless there are other credible facts in the case or other trustworthy evidence lending assurance that the evidence given by the accomplice is correct, unless there may be no necessity of any corroborative evidence under the circumstances of a particular case. Each case would have to be judged on its own facts. No hard and fast rule can be laid down. It is not to be forgotten that a statement made by an accused person, even if it is corroborated by other evidence¹⁴. The statement made by an accused person is not corroborated by **concurrent statements of any number of accomplices**¹⁵.

If a statement made by an accused person is not a confession, it is not evidence in the Court. It is not a confession if it is not a voluntary statement of a fact which the confessor admits to be true. It is not a confession if it is not a statement of fact within Section 3 of this Act.¹⁶

4. Self exculpatory or inculpatory statement of accused is not a confession.
A self exculpatory statement of an accused cannot be treated as a confession. It can be used only as an admission against the person making it. It can **not be used as evidence at all against the other accused.**¹⁷

Self inculpatory statement of accused persons, however, does not constitute confessions and fall within this section. It however, only a part is inculpatory and the rest exculpatory, it can be relied upon against the accused person against whom it is made.¹⁸

(b) When not a confession. Where the confession does not implicate as author or it is not a confession, it is not a confession. A retraced confession made by an accused who does not implicate him in the offence cannot be **treated as evidence, against the other co-accused.**²⁰

A confession is only a statement taken into consideration insofar as the confession under this section is required, that the confession must implicate the maker.

14. *Laxman Padma v. The State*, 1 I.L.R. 1965 B 648; A.I.R. 1965 B. 195; 67 Bom L.R. 317; see *Bhuboni v. The King*, L.R. 76 I.A. 147; A.I.R. 1949 P.C. 257; *Badri Ram Didwania v. State of Bihar*, 1967 Cr.L.J. 1179; A.I.R. 1967 Pat. 283, 284.
15. *Yaqub Khan Ahmad Khan v. State of M.P.*, 1977 M.P.L.J. 523.
16. *Laxman Padma v. The State*, supra; see also *Hanuman v. State of Bihar*, A.I.R. 1965 S.C. 184; *Kishinira Singh v. State of Madhya Pradesh*, (1952) 3 S.C.R. 520; A.I.R. 1952 S.C. 159; 1952 Cr.L.J. 839; 1952 M.W.N. 402; 1952 A.W.R. (Sup.) 64; (1952) 1 M.L.J. 754.
17. *State v. Manindra Nath*, A.I.R. 1960 C. 183; *Irfan Ali v. State*, 1970 All.Cr.R. 498; 1970 A.W.R. (H.

- C.) 679; 1970 Cr. L.J. 603, 608 (evidence other than confession not sufficient in itself for finding of guilt); *State v. Roop Singh*, 1966 Raj L.W. 382, 391; *Emperor v. Chatterpal Singh*, A.I.R. 1940 Oudh 502; *Baldeo Gwala v. State of Assam*, 1977 Cr. L.J. 1516.
18. *Baldeo Gwala v. State of Assam*, 1977 Cr. L.J. 1516.
19. *P. Krishna Narayana Swami v. Emperor*, A.I.R. 1957 P.C. 8; 1957 Cr.L.J. 481; *State of Punjab*, A.I.R. 1957 S.C. 216; 1957 Cr.L.J. 481.
20. See *Balbir Singh v. State of Punjab*, supra; *Rema Naik v. State*, A.I.R. 1965 Orissa 31; 30 Cut L.J. 1; *State of Ker. v. Mathachan*, 1970 Ker.L.T. 506.

consequently to the same extent as the other accused person against whom it is sought to be taken into consideration.²¹ The position of a retracted confession is *a fortiori* still worse.²²

A confession falling within the section is admissible against the other accused and can be taken into consideration not only against the maker of the confession but also against his co-accused even though it is retracted against him. The amount of credibility to be attached to a retracted confession depends upon the circumstances of each particular case. It must however, be corroborated.²³

5. Construction of the Section. The general rule of English law "and the rule which prevailed in India prior to the passing of this Act" is and was that a confession of an accused person is only evidence against himself and cannot be used against others. This section forms an exception to this rule.¹ It is a very exceptional and indeed an extraordinary provision, by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that it is not stretched one line beyond its necessary intention.² The ground upon which it has been enacted has been stated to be "for the weakness of the human mind, and the dangers and suspected character of the evidence require that this section should be construed strictly, and accordingly such a confession should be confined to the maker of it." It was held that a person who is not a party is not bound to testify, that the prisoners must be legal trial parties, and at

¹ *Empress v. Emperor*, A. I. R. 1939 P. C. 47; *Balbir Singh v. State of Punjab*, A. I. R. 1957 S. C. 216 at p. 223; 1957 Cr. L. J. 481. But see note 12, *post*.

²² *Natar Pal v. The State*, 1959 S. C. Punj. 397; 66 P.L.R. 530.

²³ *Ram Prakash v. The State*, 1959 S.C. 181; 1959 S. C. A. 124; 1959 S.C.J. 181; 1 I.L.R. 1959 Punj. 25; 1959 A.W.R. (S.C.) 152; 1959 Cr. L.J. 90; 1959 M.L.J. (Cr.) 51; A.I.R. 1959 S.C. 1, 9; *In re Balan alias Balusami Mudale*, 1973 Cr.L.J. 1911 (Mad); *State of Assam v. V. U. N. Rajkhowa*, 1975 Cr. L. J. 354.

²⁴ *Roxoe, Cr. Ev.*, 16th Ed., 52; *Taylor, Ev.*, S. 871; *Phipson, Ev.*, 11th Ed. 354; *Powell, Ev.*, 9th Ed. 113, 521.

²⁵ *R. v. Kally*, (1866) 6 W.R. Cr. 84; *R. v. Busiruddi*, (1867) 8 W.R. Cr. 35; *R. v. Durbaroo Dass*, (1870) 13 W. R. Cr. 14; *R. v. Sadhu*, (1874) 21 W.R. Cr. 69, 71; per Phear, J. The provision contained in the section is a new one there being no similar rule either in Act II of 1855, or in the Criminal Procedure Code of 1872.

¹ *Coutts Trotter, C.J.*, of the Madras High Court thought that it was a

most unnecessary section, and was a needless tampering with the wholesome rule of the English Law that a confession is only evidence against the person who makes it. *Lilaram Gaganmull. in re* 1924 Mad. 805; 81 I.C. 817; 25 Cr. L.J. 1041; 20 L.W. 202.

Periyasami Moopan v. Emperor, 1931 Mad. 177; 1 I.L.R. 54 Mad. 75; 129 I.C. 645; 32 Cr.L.J. 448; 59 M.L.J. 471; 1930 M.W.N. 858; 32 M.L.W. 527; followed in *(In re) Malayara Seethu*, 1955 Mys. 27; 1956 Cr.L.J. 372.

³ *Periyasami Moopan v. Emperor*, 1931 Mad. 177; 1 I.L.R. 54 Mad. 75; 129 I.C. 645; 32 Cr.L.J. 448; 59 M.L.J. 471; 1930 M.W.N. 858; 32 L.W. 527; *(In re) Marudamuthu Padayachi*, 1931 Mad. 820; 1 I.L.R. 54 Mad. 788; 134 I.C. 63; 32 Cr.L.J. 1099; 61 M.L.J. 358; 1931 M.W.N. 886; 34 L.W. 162; *Baboo Singh v. Emperor*, 1936 Oudh 156; 159 I.C. 875; 37 Cr.L.J. 163; 1936 O.W.N. 64; *(In re) Malayara Seethu*, 1955 Mys. 27; 1956 Cr. L.J. 372; *R. v. Jaffir*, (1873) 19 W.R. Cr. 57, 64; per Glover, J. *R. v. Mooppan* (1890) 14 Ind. Jur. N. S. 19; see *R. v. Sadhu* (1874) 21 W. R. Cr. 69; *Norton, Ev.* 169.

the same time, that the words "same offence" exclude abettors and attempts, that the term "jointly" is to be interpreted strictly, and that no weight is to be given to the confession as against any person other than the party making it, unless it is corroborated by independent testimony *v. post*. This section must be read together with and subject to the provisions contained in Secs. 24-27, *ante* (*v. post*).

And it was held by the Madras High Court that under Sec. 27 and this section, a confession made by one accused can only be taken into consideration against another accused, when such confession is the immediate cause of the discovery of some fact relevant as against the other accused, and a finding to the contrary is a misdirection, when it is not the immediate cause of such a discovery, is a misdirection.⁴

6. "Tried jointly". It is not sufficient that the co-accused should be tried jointly, in that sense, as he legally may be tried jointly. The section applies only to cases in which the confession is made by a prisoner tried at the same time with the accused person against whom the confession is used. Thus, if the person making the confession was dead, and was never brought to trial, his confession cannot be taken into consideration under this section, as the expression of a confession "before trial" means the confession of a joint trial of two or more accused, but before such a confession had been put on the record, it was known that such a confession could be used against the other accused, where in the case of a joint trial of two accused, the use of one of their confessions is a possibility. There is no mode of a joint trial, the confession of one of the accused taken into consideration against the other at his separate trial.⁵ The confession of an accused can be used under this section only when he is being tried jointly with other prisoners, and not after he has become a convict and removed from the dock.¹⁰

When a person is being tried jointly with another and dies before judgment is pronounced, his confessional statement becomes relevant under this section read with section 32 (3) *post*.¹¹

7. Trial when begins. Under the Cr. P. C. of 1873 the trial began at a case entered by the District Court of Session only after the charge was framed by the court. In the new Cr. P. C. of 1973, and in a recent case when the charge is framed

4. Sankappa v. R., (1908) 31 M. 127; 18 M. L. J. 66.

5. R. v. Jagat, (1894) 22 C. 50, 72, 73. As to what persons may be tried jointly see S. 239, Cr. P. C. 1898 corresponding to Sec. 223 of Act 1973.

6. R. v. Jagat, (1894) 22 C. 50, 72, 73.

7. Dengo Kanderu v. Emperor, 1938 Sind 94; 175 I.C. 99; 39 Cr. L. J. 515; see also Achhay Lal Singh v. Emperor, 1947 Pat. 90; I.L.R. 25 Pat. 347; 228 I.C. 567; 48 Cr.L.J. 242; 27 P.L.T. 298; 1947 P.W.N. 69.

8. R. v. S. S. S. S. v. Emperor, 1937 Pat. 111.

339; 41 C.W.N. 183.

9. Ramudu Iyer v. Emperor, 1923 Mad. 365; 72 I.C. 538; 24 Cr. L. J. 426; 44 M.L.J. 243; 17 L.W. 370.

10. Sheobhajan Ahir v. Emperor, 1921 Pat. 499; 2 P.L.T. 125.

11. Haroon Haji Abdulla v. State of Maharashtra, (1968) 2 S.C.R. 641; 1968 S.C.D. 391; (1968) 2 S.C.J. 534; (1968) 1 S.C.W.R. 243; 70 Bom. L. R. 540; 1968 Cr.L.J. 1017; 1968 M.L.J. (Cr.) 591; 1968 M.L.W. (Cr.) 116; A.I.R. 1968 S. C. 832, 835.

12. Palaniandy Goundan v. Emperor, 1937 Mad. 28; 1 I.C. 74; Cr.L.J.

commenced upon the plea of "guilty". In a standard case, the trial may be said to begin when the case is brought before the Magistrate. The wording of Sec. 241 Cr. P. C. 1898 (now Secs. 220 and 229 of 1973 Code), relating to trials before the High Courts and Courts of Session, indicated that the trial commences when the case is brought before the accused, that is to say when the charge is read out to him and he is asked to plead. A distinction must be drawn between cases which are said to begin at this stage. The word "trial" in Sec. 241 Cr. P. C. 1898 (now Sec. 220 of new Cr. P. C. of 1973), covers the whole of the proceedings in a warrant case, and it should be read in the same sense in the present section. The Legislature contemplated the taking of proceedings and the hearing of evidence at least two or more men jointly, and not merely the concluding stage of the proceedings at the framing of the charge.

The position under the new Cr. P. C., 1973 with respect to commencement of a case exclusively triable by a Court of Session is changed. The Magistrate does not frame a charge in such a case. Under section 228 of new Cr. P. C., the Sessions Judge has the power to transfer the case to the Chief Judicial Magistrate if in his opinion the offence is triable by a Magistrate. The trial in a case exclusively triable by a Sessions Court will, be in a case when under section 228 the Sessions Judge frames charge and calls upon the accused to plead to it.

8. Plea of guilty.—In *Govind v. State*, proceedings and such taking of evidence as may be required to occur in a Sessions Court against a man who pleads guilty at the outset and is convicted, and the distinction, therefore, is more apparent than real. When one of the accused confesses, but wishes to produce evidence in his own defence, and so the Magistrate convicts and sentences him, the evidence of the other can be taken into consideration against the co-accused.¹³

In *Prabhu v. State*, where one of several persons pleads guilty, such person can be held to be tried jointly with the rest so as to let in his confession against the others who have claimed a trial. Three portions arise:

(i) A person pleads guilty at the trial and is thereupon convicted and sentenced. In such cases, he cannot be said to be jointly tried with the other prisoners even though the same case is against those who plead not guilty.¹⁴

13. *Manna v. Emperor*, 9 N.L.R. 42; 19 I.C. 326; 14 Cr. L.J. 230.

14. *Sitao Jholia v. Emperor*, 1943 Nag. 36 at 49; 1 I.L.R. 1943 Nag. 73; 203 I.C. 161; 44 Cr.L.J. 237; 1943 N.L.J. 16.

15. Per Cornish, J., in *Emperor v. John McIver* 1936 Mad. 353 at 357; 162 I.C. 592; 37 Cr.L.J. 637; 70 M.L.J. 635; 1936 M.W.N. 281; 43 L.W. 548.

16. *Sahibdin v. Emperor*, 1922 Lah. 49; 1 I.R. 3 Lah. 115; 23 Cr.L.J. 330.

17. *Fakhruddin v. Emperor*, 1925 Lah. 435; 1 I.R. 6 Lah. 176; see also *Ram Kishan v. Emperor*, 1928 Lah.

180; 111 I.C. 387; 29 Cr.L.J. 835.
18. *R. v. Kalu*, (1874) 11 Bom. H. C. R. 146; *Venkatasami v. R.*, (1883) 7 M. 102; *Weir*, 3rd Ed., 491; *R. v. Chand*, (1890) 14 Ind. Jur. N.S. 17; *R. v. Purbhu*, (1895) 17 A. (1895) A.W.N. 111; it is not quite clear whether in the three last-mentioned cases the prisoners were immediately convicted and sentenced on pleading guilty, but it seems so; *R. v. Chinfa*, (1899) 23 M. 151, 154; *Mohammad Yusuf v. Emperor*, 1931 Cal. 341; 1 I.L.R. 58 Cal. 1214; 131 I.C. 142; 32 Cr.L.J. 667; 35 C.W.N. 490.

on the prisoner's plea of guilty is not accepted by the Court, in such case such prisoner is still being jointly tried with the rest¹⁹ for a criminal trial does not end with a plea of guilty²⁰ in that is incumbent on the Court is to record the plea of guilty and it is not objection on the Court to convict the prisoner on the plea of guilty in conviction on a plea of guilty being discretionary;²¹

when an accused pleads guilty and the Court accepts the plea and directs his removal from the dock and the trial proceeds against the remaining prisoners in such case a confession made by him is not admissible against the other accused under this section.²²

There has, however, been a doubt whether one of these courses has been expressly adopted, that the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends to convict him on the plea of guilty. In such a case it would not be the plea of guilty's confession to be considered as against his co-accused, for that would be in effect to comply with the plea of justice while violating it in substance. The more correct that a prisoner who has pleaded guilty is not convicted, convicted and sentenced, but is kept in the dock with the prisoners who are being tried, until the close of their trial, cannot render his confession admissible for immediate conviction and sentence are that he is a co-accused, a confession by a co-prisoner who has pleaded guilty.²⁴ So where the Judge keeps the prisoner in the dock, unconvicted and unsentenced merely because of the possibility that the evidence entered at the trial might enable the Court to determine whether to pass a sentence of death or imprisonment, the confession made by him is not admissible against his co-accused, for the confession is not made in such circumstances after the plea of guilty, no joint trial.²⁵

In *R. v. Kheoraj*, (1908) 30 A. 540: 5 A.L.J. 505; 8 Cr.L.J. 380; but see first case; *Mahadeo v. R.*, 1923 All. 322; 1 L.R. 45 All. 323; 76 I.C. 1025; 25 Cr.L.J. 305; 21 A.L.J. 111; *Mahammad Yusuf v. Emperor*, 1931 Cal. 341; 131 I.C. 111; *Yusuf v. Emperor*, 1937 Nag. 17; 166 I.C. 582, 587; 38 Cr.L.J. 111; *Yusuf v. Emperor*, and as to English rule on this point see *R. v. Gould*, (1840) 9 C. & P. 364.

19. Confirmation case No. 22 of 1893; cited in *R. v. Pahuji*, (1894) 19 B. 195, 197; *R. v. Chinna*, (1899) 23 M. 151.

20. *R. v. Chinna*, (1899) 23 M. 151, (quoting from *R. v. Lakshminya*, (1899) 22 M. 491.

21. *Shankar v. Emperor*, 1933 All. 718; 93 I.C. 241; 27 Cr.L.J. 449; 24 A.L.J. 718; *R. v. Chinna*, 23 M. 151; 51; *Laxmya Shiddappa v. Emperor*, 1931 Cal. 341; 131 I.C. 111; 1 L.R. 45 All. 323; *Hasan uldin v. Emperor*, 1928 Cal. 775; *Gohrey v. Emperor*, 1943 Oudh 406; 208 I.C. 397; 41 Cr.L.J. 775; 1943 O.W.N. 312.

22. *R. v. Kheoraj*, (1908) 30 A. 540; 5 A.L.J. 505; 8 Cr.L.J. 380; 12 I.C. 87; 16 C.W.N. 49. *R. v. Chinna*, (1899) 23 M. 151, 154; *R. v. Pahuji*, (1894) 19 B. 195; 25.

1b.

23. *R. v. Pahuji*, (1894) 19 B. 195, 197; see *Subrahmanya v. R.*, (1901) 25 M. 61 when an accused person pleads guilty nothing remains to be tried as between him and the co-accused. See *R. v. Kala*, (1874) 11 Bom. H.C.R. 146; *R. v. Ram Saran*, (1886) 6 A.W.N. 259.

accused were tried jointly before the Magistrate and some confessed the crime and implicated the co-accused in statements under Sec. 347 of the Criminal Procedure Code, (Act V of 1885) (Sec. 323 Cr. P. C. 1973) and after their statements had been recorded and the evidence for the prosecution closed, pleaded guilty under Sec. 30 of that Code (Sec. 246 of new Cr. P. C. of 1973), it was held that these statements were admissible under this section.¹

A confession made by a co-accused with B in a dacoity case, is not admissible under this section against B in a proceeding under Sec. 110, Cr. P. C., 1973, though admissible against him as well as against the confessor in the dacoity case,² even if the co-accused be his son.³

b. Proper course when one of the several accused pleads guilty. When one or several persons plead guilty and the plea is accepted, the proper course for the Court to take even if the trial of the other is pending is to sentence him and to allow a person to take a statement from him or remove him from the dock and call him as a witness; but it is not proper to leave him in the dock unconvicted merely to see what the evidence will show or to keep him in the dock whether he be convicted or not, and either to read out his confession made previously, or to allow a person to take an account of what the prisoner has said to him,⁴ or to take a statement which he makes.⁵

But the Court has a discretion to accept the plea or not, and the Court may not act on a plea of guilty, even if it is satisfied that the accused has fully understood the charge and the implications of the plea and no doubt is desirable to have a trial, exercising the discretion given to it under Sec. 229, Cr. P. C., 1973, in favour of the accused. Such cases may be even of rare occurrence. In such cases, the plea remains a plea of guilty and the

1. *R. v. ...*, 1964 Mad. 45; 11 P. 38; 12 L.C. 17; 15 Cr. L.J. 13; per Aylmer, J., distinguishing *R. v. Pahuji*, (1894) 19 B. 10; and *R. v. Pahuji*, (1899) 11 A. 24 in relation to trials before Sessions Courts, and *R. v. Lakshmayya*, (1899) 22 M. 491, as based on them; see also *Fakruddin v. Emperor*, 1923 Lah. 435; 1 L.R. 6 Lah. 176; *Ram Kishan v. Emperor*, 1928 Lah. 880; 111 I.C. 387; 29 Cr. L.J. 835; 1 L.R. (1974) 2 Delhi 706.

2. *Mafizuddin v. R.*, 1921 Cal. 557; 61 I.C. 793; 22 Cr. L.J. 441; 25 C.W.N. 239; (1921) 33 C.L.J. 70 and see *Amirullah v. R.*, 1919 Cal. 10; 11 A. 24; 12 L.C. 17; 15 Cr. L.J. 201; (1917) 22 C.W.N. 408.

3. *Allahadia v. State*, 1959 A. L. J. 340.

4. *R. v. Kalu Patil*, (1874) 11 Bom. H.C.R. 146; *R. v. Chinna Pavu chi*, (1899) 23 M. 151.

5. *Venkatasami v. R.*, (1883) 7 M. 102, 104; *R. v. Pahuji*, (1894) 19 Bom. 195, 197, 198; *R. v. Chinna*, supra; Quære: whether co-accused can be examined as a witness after conviction and before sentence, see

R. v. Annaya, 1901) 3 Bom. L.R. 33. Where two persons are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other. In the matter of *A. David*, (1880) 6 C.L.R. 245, referred to in *Bishnu Banwar v. R.*, (1896) 1 C.W.N. 35.

6. *R. v. Pahuji*, supra, *R. v. Chinna*, (1899) 23 M. 151, 154; but see *R. v. Kalu*, supra; *R. v. Ram Saran*, (1886) 6 A.W.N. 259.

7. *Venkatasami v. R.*, supra, 103.

8. *R. v. Pirbhu*, 17 A. 524; (1895) A. W.N. 111.

9. *... v. ...*, (1899) 8 Bom. L.R. 240; *Laxmya Shiddappa v. Emperor*, 1917 Bom. 220; 40 I.C. 699; 19 Bom. L. R. 356; *Abdul Kader v. Emperor*, 1947 Bom. 345; 229 I.C. 244; 48 Cr. L. J. 329; 49 Bom. L.R. 25; see also *Lahori v. Emperor*, 1925 All. 647; 89 I. C. 260; 23 A.L.J. 587; *Hasaruddin Mohammad v. Emperor*, 1928 Cal. 775; 113 I.C. 582; *Achar Sanghar v. Emperor*, 1934 Sind 204; 153 I.C. 288.

trial proceeds for the purpose of ascertaining the circumstances which had resulted in the death, and to find out whether the accused can, in law, be said to have committed murder¹⁰. If the plea of entrapment is not accepted and the court proceeds with the trial, the accused does not cease to be an accused, and there is a joint trial of all the accused within the meaning of this section. And any confession made by the accused pleading entrapment may be used against the other accused¹¹. The co-accused can challenge the plea of entrapment.

9. "For the same offence". The meaning of this expression is an offence coming under the same legal definition, out of the same transaction¹² or the same substantive offence¹³ or the same specific offence¹⁴. The words "same offence" mean an identical offence and not an offence of the same kind. So, where two persons are jointly tried, one for an offence under Sec. 45, 180, Penal Code, and the other for an offence under Sec. 301 of the Penal Code, they cannot be said to be tried for the same offence, and a confession made by one of them cannot be taken into consideration against the other¹⁵. In a Madras case it was held that persons under trial for a single offence could also be deemed to be charged with and tried for a second offence, if the facts constituted by the particular ingredients of the second offence which could be proved¹⁶. But this has been dissented from in Gujarat¹⁷. Where two persons are charged with an offence under Section 304 of P.C. as a result of a single transaction, but one of them takes a confession under Section 301, the confession of the one person cannot be used against the other with regard to the charge under Sec. 302.

10. The Explanation. Prior to the insertion of the Explanation to this section, the commission of an offence and the commission of its abettment were held to be different offences. Thus it had been held that, in the trial of A for murder, and B for abetting the same, a confession made by A relating to B could not be taken into consideration against B, even if this confession, Art III of 1891 has, however, by the insertion of the Explanation to this section, altered the law in this respect. But this Explanation applies only to cases where one person is charged with an offence and another charged with and tried for abettment of it¹⁸ or attempt to commit it. Where there

10. Per Rajadhyaksha, J., in *Abdul Kader v. Emperor*, 1947 Bom. 345, 359; 229 I.C. 244.

11. *Shah v. Emperor*, 1955 A.L.J. 318, 93 I.C. 241; 24 A.L.J. 318; *R. v. Palua*, I.L.R. 23 All. 53; *R. v. Chinna*, I.L.R. 23 Mad. 151; *R. v. Pappu*, I.L.R. 23 Mad. 151; *R. v. Pappu*, I.L.R. 23 Mad. 151.

12. *Mahadeo v. The King*, 1936 P.C. 42; 1936 I.C. 42; 1936 Bom. L.R. 1101.

13. *R. v. Malappa*, (1890) 14 Ind. Jur. N.S. 19, 20; *R. v. Nur Mohd.*, 1883 S.P. 223; *Blair v. State of Kutch*, 1951 Kutch 74; 52 Cr.L.J. 1173; *Bhagi v. Crown*, 1950 H.P. 35; 51 Cr.L.J. 1004.

14. *Badi v. R.* (infra); see also *Deputy Legal Remembrancer v. Karuna*, (1894) 22 C. 164, 173.

15. *Badi v. R.*, (1884) 7 M. 579; 2 Weir, (1886) 742; *R. v. Malappa*, supra.

16. *Krishna v. Emperor*, 1945 S.C. 65; 49 Cr. L. J. 207; *Gour Chandra v. King-Emperor*, 1929 Cal. 14; 115 I.C. 359.

17. *Mahadeo v. The King*, 1936 P.C. 490; 72 I.C. 497; 14 L.W. 474.

18. 1935 M.P. 34; 1 R. 530; *M.L.J.* 593; 224 I.C. 74; (1945) 2 M.L.J. 479; 1945 M.W.N. 722.

19. *R. v. Nur Mohd.*, (1883) 8 B. 223. *Blair v. R.*, 1851 M. 100; see *R. v. Jaffin*, (1873) 19 W. R. Cr. 57; *Badi v. R.* (supra); *R. v. Amrita*, (1873) 10 Bom. H.C.R. 497, 499.

21. *Deputy Legal Remembrancer v. Karuna*, (1894) 22 C. 164, 173.

is a joint trial, and the charges against each of the accused are of the same kind and nature, and the confessions made by each of them are taken into consideration against the other. But if a joint trial has commenced in which the prisoners are charged under different sections, and afterwards the charge is altered, so that all the prisoners are charged under the same section, then confessions may be admissible against each other. Thus where A and B were being jointly tried before a Court of Session for the first for murder, and the second for abetment of murder, a confession made by A that he himself had committed the murder, if the accusation of B was put in as evidence against A. Subsequently the charge against A was altered to one of abetment of murder, and the Sessions Judge, under the authority of this section, used the confession against both and convicted them. The High Court held that the original and amended charge were nearly related, that the trial might, without any unfairness, be deemed to have been tried on the amended charge from the commencement, and that no objection could be taken by B that his confession was suggested by A, because of the possibility of A's confession being taken when the charge against A was altered. The Sessions Judge was held to have used the confession against B also.²³

Provisions of this section apply to persons charged under Sec. 111 C. P. Code, Sec. 113 C. P. Code, and the same apply equally to persons charged under Sec. 111 P. C. Code, and the same apply equally to persons charged under this section.²⁴

The provisions of Sec. 111 C. P. Code, and Sec. 113 C. P. Code, apply to persons charged under one of them when they were charged in and a case cannot be made against the other. A confession made by an accused being tried for an offence under Sec. 111 P. C. Code cannot be used against another accused, who is being tried under Sec. 113 P. C. Code. Where certain persons were being tried for an offence punishable under Sec. 201 P. C. Code, and one of them was also charged with an offence under Sec. 201 of the Code, it was held that they were all charged jointly for the offence under Sec. 201, and that a confession made by one of them that the offence under that section was committed, could be read against the other accused.²⁵

11. "Confession" As has already been observed this section was introduced by the Criminal Evidence Amendment Act of 1891, and marks a departure from the common law rule, which held that the section applies to confessions which do not admit the guilt of the confessing party. If the accused does not incriminate himself in the case, the statement cannot be said to be a confession.⁴

22. *R. v. Bala* (1880) 5 B. 63; *R. v. Amrita*, (1873) 10 Bom. H.C.R. 497, 499; *Deputy Legal Remembrancer v. Kharai*, 1875 2 C. 164, 73; *Badi v. R.* (1884) 2 Weir, 742; *R. v. Malappa*, (1890) 14 Ind. Jur. N. S. 19.

23. *R. v. Govind*, (1874) 11 Bom. H. C. R. 278.

24. *Sarju v. Emperor*, 1919 All. 220; I.L.R. 41 All. 231; 49 I.C. 654; but see *Richpal Singh v. Emperor*, 1934 All. 927; 152 I.C. 881; 1934 A.L.J. 1170.

25. *Mafizuddin Khan v. Emperor*, 1921 Cal. 557; 61 I.C. 793; 25 C.W.N.

239; see also *Amirullah Pramanik v. Emperor*, 49 I.C. 649; 22 C.W.N. 408.

1. *Moyo Badi v. Emperor*, 1916 Sind 236; 166 I.C. 37.

2. *Mirza Zahid Beg v. Emperor*, 1933 All. 91; 173 I.C. 838; 1937 A.L.J. 1253.

3. *Bhuboni Sahu v. King*, 1949 P.C. 257; 76 I.A. 117; 71 Bom L.R. 973.

4. *Sohar Singh v. State of Bihar*, 1966 B.L.J.R. 861, 866; *Krishna Narain v. State of U. P.*, 1976 All Cr. C. 46; 1976 All L.J. 321; 1976 Cri. L.J. 503.

The word "confession" must be construed as meaning the same in this section as in the twenty-fourth, twenty-fifth and twenty-sixth sections.⁵ The subject of incriminatory statements which fall short of full admissions of guilt has been already dealt with. To use the words of Mr. Justice Straight

"What was intended by Sec. 30 was that where a prisoner, to use a proper phrase, 'makes a clean breast of it' and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But when there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word 'confession' in Sec. 30 cannot be construed as including a mere incriminatory admission which falls short of being an admission of guilt."⁶

It was at one time thought that the word "confession" includes a statement by an accused, "suggesting the inference that he committed the crime but now it is settled law that a confession must either admit in terms the offence, or, at any rate, substantially all the facts which constitute the offence. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed.⁷

A mere admission, from which no inference of guilt follows, is not within this section,⁸ though it implicates others, and is evidence, therefore, only against the maker. Before a statement can be taken into consideration against a fellow prisoner, it must amount to a "confession" on the part of the maker with respect to the offence with which all are charged.⁹ A statement of an accused person, "taken with the other evidence might well seem to establish the case against him. But when the statement is to be used against

5. *R. v. Jagrup*, (1885) 7 A. 646, 648.

6. *R. v. Jagrup*, (1885) 7 All. 646; (1885) 5 A.W.N. 131; *Sheo Ambar v. Emperor*, 1925 Oudh 295; 77 I. C. 439.

7. *Pakala Narayana Swami v. Emperor*, 1939 P.C. 47, 52; 66 I.A. 66; 1 I.L.R. 1939 Kar. 123; 1 I.L.R. 18 Pat. 234; 180 I.C. 1.

8. *Sheo Ambar v. R.*, 1925 Oudh 295; 77 I.C. 439.

9. *R. v. Mohesh*, (1873) 19 W.R. Cr. 16; *R. v. Jaffir*, (1873) 19 W.R. Cr. 57; *R. v. Belat*, (1873) 19 W.R. Cr. 67; *R. v. Anant*, (1875) 10 Bom. H.C.R. 497, 500, 501; *R. v. Kukree*, (1874) 21 W.R. Cr. 48; *R. v. Banwaree*, (1874) 21 W.R. Cr. 53; *R. v. Naga*, (1875) 23 W.R. Cr.

24; *R. v. Keshub*, (1876) 25 W. R. Cr. 8; *R. v. Baijoo*, (1876) 25 W. R. Cr. 43; *R. v. Ganraj*, (1879) 2 A. 444; *R. v. Mulu*, (1880) 2 A. 646; *R. v. Daji*, (1882) 6 B. 288; *Noor v. R.*, (1880) 6 C. 279; *Bishan v. R.*, (1904) 2 All L.J. 53; *Sital v. R.*, 46 C. 700; 54 I.C. 53; A.I.R. 1920 C. 300, cited under Sec. 10 Quaere—As to the correctness of the decision of *R. v. Bakur Khan*, (1873) 5 N.W.P. 213, the statement in which case, it is submitted, did not amount to a confession, see *Ho Mui v. R.*, (1913) 13 C.L.J. 590; *Krishna Narain v. State of U. P.*, 1976 All Cr. C. 46; 1976 All L. J. 321; 1976 Cri.L.J. 503.

may be tendered and tried with him it must be a confession in the strict sense of the term. Its inherent quality must be that of a confession. Where the statement of the prisoner is not a confession, it cannot be used against the other accused.¹⁰ This Court has already had occasion on more than one case to point out that confessions which are made use of under the twentieth section of the Evidence Act in the first place can only be used so far as to make the confessing prisoner guilty of the offence for which he is being tried, and secondly cannot stand higher than the evidence of an accomplice.¹¹ The test which Sec. 30 of the Evidence Act unambiguously applies to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person or persons against whom it is tendered. It has to be a popular and well understood phrase—the confessing prisoner must be brushed and the person or persons he implicates with one and the same brush.”¹²

In order that the statement of one person jointly tried with another for the same offence made in conspiracy against the other, it is necessary that it should go to the very core of the offence charged,¹³ not for which they are charged jointly.¹⁴ The test is to see whether the statement of one prisoner tendered to be used in evidence as against another is sufficient, by itself, to justify the conviction of the person making it, for the offence for which he is being jointly tried with the other person against whom it is tendered.¹⁵ This test is exactly what the notion of the Privy Council, cited above. A statement made under Sec. 124 of Cr. P. C., 1898, is not a confession, such as is dealt with in the Act in respect of relevance or irrelevance. It is a statement which is accepted by the Court, amounts to a waiver on the part of the accused, and is not a confession which may be tendered in evidence.¹⁶ As to a statement made under the same under Sec. 27 is a confession against a co-accused, see notes under Sec. 27, ante.

A statement made under section 144 Cr. P. C., concerning his previous conduct, is not evidence but exculpatory in nature. It is not amount to

10. *R. v. Amrita*, (1873) 10 Bom. H.C. 187; 8 B. C. 187; 10 B. C. 187; 10 B. C. 187.

11. *P. v. N. v. R.*, 1949 A. W. R. Cr. 24 per Phear, J.

12. *R. v. Ganraj*, (1879) 2 A. 444 at p. 445; 2 A. 444 at p. 445; 2 A. 444 at p. 445.

13. *R. v. N. v. R.*, 1949 A. W. R. Cr. 24 per Phear, J.

14. *R. v. N. v. R.*, 1949 A. W. R. Cr. 24 per Phear, J.

15. *R. v. N. v. R.*, 1949 A. W. R. Cr. 24 per Phear, J.

16. *R. v. N. v. R.*, 1949 A. W. R. Cr. 24 per Phear, J.

17. *R. v. N. v. R.*, 1949 A. W. R. Cr. 24 per Phear, J.

18. *R. v. N. v. R.*, 1949 A. W. R. Cr. 24 per Phear, J.

19. *R. v. N. v. R.*, 1949 A. W. R. Cr. 24 per Phear, J.

Janand v. R., 1949 All. 291; 1949 A. W. R. Cr. 24 per Phear, J.

Singh v. Emperor, 1937 Lah. 127; 11 L. R. 17 Lah. 547; 167 I.C. 861.

Shyama Charan v. Emperor, 1934 Pat. 330; 334-151 I.C. 393.

Shyama Charan v. Emperor, 1934 Pat. 330; 334-151 I.C. 393.

Shyama Charan v. Emperor, 1934 Pat. 330; 334-151 I.C. 393.

Shyama Charan v. Emperor, 1934 Pat. 330; 334-151 I.C. 393.

Shyama Charan v. Emperor, 1934 Pat. 330; 334-151 I.C. 393.

Shyama Charan v. Emperor, 1934 Pat. 330; 334-151 I.C. 393.

Shyama Charan v. Emperor, 1934 Pat. 330; 334-151 I.C. 393.

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a confession. What the accused stated against the other accused cannot be used as evidence against them.¹⁷

12. "Affecting himself and some others". From consideration of the principle upon which this kind of evidence is admitted, it is plain that a statement, which entirely exonerates the maker and inculpates his fellow-prisoner, is not within the scope of a confession, as it does not amount to a confession of the maker's own guilt or guilt of the offence for which he and the others are jointly tried. It is, so far as the statement one which affects himself and others but the latter only. Such a statement can afford no guarantee whatever of its own truth, being given without either the sanction of an oath or of that substitute for that sanction which consists in the solemn declaration of the maker. In short, without the application any test of truth whatever.

The section covers the case where the confession indirectly affects a co-accused.¹⁸ There is a divergence of opinion as to the extent to which the confession must affect the maker. In some cases, the rule has been stated to be as "that before a confession of a person jointly tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried".¹⁹ It is this section, however, which is supposed to afford a guarantee for the truth of the statement.

Again, this section must be interpreted to mean that the statement of fact made by the prisoner, which amounts to a confession of guilt on his part, may be taken into consideration, so far, and so far only, as that statement of fact itself extends against the other prisoner who are being tried as well as himself, for the offence which is thus confessed. I think of two illustrations which are given to section 30-N in the view of this. So we must be careful not to apply statements made by R. I. D. before the trial.

17. *Chintamani Das v. State*, 36 Cut. L.T. 823; 1970 Cr L.J. 906; A.I.R. 1970 Orissa 100, 104.

18. *R. v. Keshub*, (1876) 25 W.R. Cr. 8; *R. v. Belat*, (1873) 19 W.R. Cr. 67; *R. v. Banwarre*, (1874) 21 W.R. Cr. 55; *R. v. Ganraj*, (1879) 2 A. 444; *R. v. Mulu*, (1880) 2 A. 646; *R. v. Daji*, (1882) 6 B. 288; *Noor v. R.*, (1883) 10 B. 225; *Dishan v. R.*, (1904) 2 All L. J. 58; see also *R. v. Menezes*, (1875) 19 W.R. Cr. 16; *R. v. Amrita*, (1873) 10 Bom. H.C.R. Cr. 497; *R. v. Khukree*, (1874) 21 W.R. Cr. 48; *R. v. Baijoo*, (1876) 25 W.R. Cr. 47; *Emperor v. Ch. Khan*, 1929 Bom. 296; I.L.R. 55 Bom. 479; 120 I.C. 540; 31 Bom L.R. 545; *State v. Manindra Nath*, A. I. R. 1960 Cal. 185 (but it can be used as an admission against himself).

19. *R. v. Belat*, (1873) 19 W.R. Cr. 67, per Phear, J.; *Krishna Narain v. State of U. P.*, 1976 All Cr. C. 46; 1976 All L.J. 321; 1976 Cri. L.J. 505.

20. *R. v. Shivabhai*, 1926 Bom. 515. I.L.R. 50 Bom. 685. 97 I.C. 660.

21. *R. v. Belat*, (1873) 19 W.R. Cr. 67; 10 B.L.R. 453, per Phear, J., (1873) 19 W.R. Cr. 67; 2 A. 444; *R. v. Mulu*, (1880) 2 A. 646; *R. v. Daji*, (1882) 6 B. 288; *Noor v. R.*, (1883) 10 B. 225; *Jur. N.S.* 175; see *R. v. Mohesh*, (1873) 19 W.R. Cr. 16; *Kunja Sahudhi v. Emperor*, 1929 Pat. 275; I.L.R. 8 Pat. 289; 116 I.C. 770; *State v. Emperor*, (1883) 10 B. 225; 81 I.C. 891; *Sheo Charan v. Emperor*, 1926 Nag. 117; 90 I.C. 385; 21 N.L.R. 88; *Nawab v. Emperor*, 1935 Lah. 35; 154 I.C. 361; *Kunhaman v. State of Kerala*, 1974 Ker. L. J. 328.

mate, against other prisoners than himself further than those same statements amount in themselves to a confession of guilt on his part.²² Neither can the statement of one prisoner be taken as evidence against another prisoner under Sec. 30 of the Evidence Act, unless the parties are admittedly *in pari delicto*, when, that is, the confessing prisoner implicates himself to the full as much as his co-prisoner whom he is criminating.²³ The *ratio decidendi* of the above cases is, that statements which inculcate the maker more than, or equally with, others alone can afford any satisfactory guarantee of their truth.

In one case the Allahabad High Court held that a confession in which the maker thereof assigns to himself a minor or subordinate part in the transaction and the major part to his companion, cannot be used against the latter.²⁴ But, in a subsequent case,²⁵ it has been held that there is nothing in the terms of the section which suggests that a confession is not admissible in evidence against a person who is being tried jointly for the same offence with a man who has made the confession, if the confession in himself is the guilt of the person who makes it and exaggerates the guilt of the other. The section says that the confession must affect them both. It does not say that it must affect them both equally. Similarly, in another case,¹ it has been held, that all that is necessary for a confession to be admissible against a co-accused is that the maker should inculcate himself in all the offences in which he implicates the other co-accused, and it is not necessary that he should ascribe to himself as major a part in the commission of the crime as he ascribes to the other co-accused. The explanation to the section makes it clear that an attempt to commit the offence, and an abetment of the offence are included in the term offence. So, even if the maker implicates himself only in an attempt to commit, or in the abetment of, the offence, or a minor part in the commission of the offence, the admissibility of the confession against the other accused is not affected. The Calcutta High Court held, in one case,² that a retracted confession of an accomplice attributing a major part in the crime to his companion is for all practical purposes of no value at all against a co-accused. But,

22 R. v. Mohesh, 19 W. R. Cr. 16, 23, per Phear, J., Mangal Singh v. Emperor, 1937 Lah. 127; 1 L.R. 17 Lah. 547; 167 I.C. 861. But see for statement before Magistrate under S. 347 (S. 332, now) of the Criminal Procedure Code; Bah Reddi In re 1914 Mad. 45; 1 L.R. 38 Mad. 302; 22 I.C. 157.

23 R. v. Baijoo, (1876) 25 W. R. Cr. 43, per Glover, J., that is only when the confession makes both equally guilty of the offence. The rule is laid down more broadly in R. v. Belat, *supra*, and the cases which follow it. *A fortiori*, a statement which implicates the confessing prisoner more than his co-prisoners would appear to come within this section (see R. v. Belat, *supra* in which Phear, J., seems to have thought admissible a statement by a prisoner which made certain of his fellows accessories before the fact, and not actual actors in the

transaction which constituted the foundation of the charge; Sheo Charan v. Emperor, 1926 Nag. 117; 90 I.C. 385; 21 N. L. R. 88; see however as to this R. v. Nur, (1883) 8 B. 223, 227 in which the confession tended to reduce the guilt of the maker to that of a subordinate agent of another as principal; cf also R. v. Govind, (1874) 11 Bom. H.C.R. 278.

24 Shambhu v. Emperor, 1932 All. 228; 1 L.R. 54 All. 350; 135 I.C. 838; 1932 A.L.J. 162.

25 Mirza Zahid Beg v. Emperor, 1938 All. 91; 173 I.C. 838; 1937 A.L.J. 1253; State v. Mohanlal, A.I.R. 1958 Raj. 338; 1 L.R. (1957) 7 Raj. 944; 1958 Cr. L. J. 1540.

1 Mohammad Sabir v. R., 1950 A. W. R. 238 at p. 243; 1950 A.L.J. 140; see also Ram Bharose v. Rex, 1949 All. 132; 50 Cr.L.J. 144.

2 Emperor v. Kausar Ali, 1944 Cal. 249; 216 I.C. 129.

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in a subsequent case³ the same Court held that a confession, if it is a confession, is admissible in evidence under this section whether the confessing accused ascribes to himself a major or minor part in the crime. Whether it has any value or not is a different matter. Where several accused were charged under Sec. 302 of Penal Code and one of them made a confession of an offence punishable under Sec. 201, the Madras High Court held that the confession could not be taken into account against the other accused with regard to the charge under Sec. 302.⁴ In one case, it was held, that the confession was admissible in respect of the offence under Sec. 201.⁵

The Privy Council⁶ has held that the law does not go so far as to require that the confession should claim for its maker the leading part in the crime.⁷ In some cases it has been held that if there are more offences than one for which certain persons are being tried jointly, and the confessing accused implicates himself and some other accused in one of such offences and does not implicate himself in the other offence, such a confession can be taken into consideration against the other co-accused so far as that offence is concerned for which the confessing accused implicated himself as well as the other co-accused.

It has, however, been held by the Allahabad High Court that where more persons than one are being tried jointly for offences, one of which is major, and the other is minor offence, and those offences are inter-connected, if the person who makes the confession does not incriminate himself so far as the major offence is concerned, it cannot be said that the confession affects him as well as other, and that the confession could not therefore be taken into consideration against the co-accused.⁸ Lastly, no guarantee whatever is afforded by a statement which entirely exonerates the maker, and such a statement is therefore in all cases inadmissible. The Supreme Court has laid down the law in *Bhadr Singh v. State of Punjab*⁹ thus:—“A confessional statement of one accused can be taken into consideration against the other accused, if the conditions laid down in this section are fulfilled.” One of the conditions is that the confession must implicate the maker substantially to the

3. *Devi v. Emperor*, 1946 Cal. 156; I.L.R. (1944) 2 Cal. 312; 225 I.C. 153.

4. (In re) Gangavva, 1946 Mad. 124; I.L.R. 1946 Mad. 593; 224 I.C. 74; (1945) 2 M.L.J. 479; 1945 M. W. N. 722; 58 L.W. 623; see also (In re) Govindu Subbaramayya, 1937 Mad. 321; 169 I.C. 372; 38 Cr. L. J. 753; (1937) 1 M.L.J. 750; 1937 M.W.N. 178; Periyaswami Moopan v. Emperor, 1931 Mad. 177; I.L.R. 54 Mad. 75; 129 I.C. 645; 32 Cr. L.J. 448; 1930 M.W.N. 858.

5. *Said Hasan, Sahib v. Emperor*, 1927 M.W.N. 1233.

6. *Emperor v. Sadasibo Majhi*, 1939 Pat. 35; I.L.R. 18 Pat. 82; 178 I.C. 130; 39 Cr.L.J. 997; 5 B.R. 58; 19 P.L.T. 801; 1938 P.W.N. 754.

7. See *Mirza Zahid Beg v. Emperor*,

1938 A.L.J. 178 I.C. 838; *Mungol Singh v. Emperor*, 1937 Lah. 127; I.L.R. 17 Lah. 547; 167 I.C. 861; 38 Cr.L.J. 472; 38 P.L.R. 1018; *Mian Khan v. Crown*, 1923 Lah. 293; 85 I.C. 836; 26 Cr.L.J. 612; (In re) *Manicka Padayachi*, 1921 Mad. 490; 72 I.C. 497; 14 L.W. 474.

8. *Dr. Jainand v. Rex*, 1949 All. 291; 50 Cr.L.J. 498; 1949 A.L.J. 60; 1949 A.W.R. (H.C.) 13; affirmed in *Mohammad Sabir v. Rex*, 1950 A.W.R. 238; 1950 A.L.J. 140.

9. A.I.R. 1957 S.C. 216; 28 and 24 Sami Kisan v. State, 32 Cut. L.J. 1140, 1148; *State of Kerala v. Mathachan*, 1969 Ker. L. T. 566; *Shiv Kumar v. State of Gujarat*, 11 Guj L.R. 281, 283.

them, they will be taken into consideration against others who are being jointly tried for the same offence.¹⁷ There is nothing in this section which restricts the confession to one recorded before a Magistrate.

In India it is not necessary that the confession to be taken into consideration should have been made in the presence of the co-prisoners against whom it is offered in evidence.¹⁸

14. "Proved." Therefore this section allows a confession to be used against another prisoner if it was made in his absence, yet it requires that such confession should be "proved" as against the prisoner to whose prejudice it is to be used. Therefore, where two accused persons were jointly tried before the Sessions Judge for the offence of murder, and the Judge examined each of the accused in the absence of the other making the latter withdraw from the Court during the examination of the former, though without objection from the presence of the accused persons, it was held that the examination of each accused could be used only against himself and not against his fellow accused.²⁰ Provided a confession is only proved afterwards, it is immaterial whether or not the co-prisoners were present at the time of making it. When a confession is used for the purposes of this section, the person to be affected by it has a right to demand that it be truthfully proved and shown to have been, in all essential respects, taken and recorded as provided by law.²¹ When a confession of one prisoner is taken in the absence of the other prisoners, and the latter have had no opportunity of denying or even of knowing what their fellow prisoner has said, such a confession cannot be said to have been "proved"; it is only after proper proof is given that it may be taken into consideration.²² What is contemplated is formal proof by the prosecution of a confession previously made, and not a statement made in the dock by one accused against the other in a joint trial.²³

There is obviously a difference between proof of a confession and proof of a fact. The definition of the word "proved" given in Sec. 3 relates to proof of a fact, and not to a statement recorded by the Court in the presence of the prisoner making it. The Section speaks of the proof of a confession and not proof of a fact. The word "confession" used here clearly

17. *Govinda v. Emperor*, 1921 Nag. 39; 69 I.C. 257; 17 N.L.R. 115.

18. *Athappa Goundan v. Emperor*, 1937 Mad. 618; 1 I.L.R. 1937 Mad. 595; 171 I.C. 245; 38 Cr.L.J. 1027; (1937) 2 M.L.J. 60; 1937 M.W.N. 442; 46 L.W. 152 (F.B.).

19. H.C. Proceedings, 31st July, 1885. *Weir*, 3rd Ed. 745; *R. v. Lakshman*, (1882) 6 B. 124, 125; see *R. v. Bepin*, (1884) 10 C. 970, 974. Where it was held that in that particular case, the confessions of two of several accused persons, made in the absence of the others, were of no weight against the latter.

20. *R. v. Lakshman*, (1882) 6 B. 124; following *R. v. Chandra Nath*,

(1881) 7 C. 65; in these cases the confessions were objected to not merely because they were made during the absence of the co-prisoners, but because they were not afterwards "proved" in any way nor opportunity given to them to know what had been said against them. *R. v. Chander*, (1875) 24 W.R. Cr. 42 (S.C. 122, Cr. P. C.; 1872, (Sec. 164 Cr. P. C. 1973), i.e. in the manner provided by S.B. 345, 346 Cr. P. C. 1872 (Ss. 315, 281 Cr. P. C. 1973).

21. *R. v. Foster*, *supra*; *R. v. Chandra Nath*, *supra*.

22. *Mancho v. R.*, 1925 All. 322; 1 I.L.R. 45 All. 323; 76 I.C. 1025; 25 Cr.L.J. 305; 21 A.L.J. 179.

means such a confession as is required to be proved at the trial as a part of the prosecution evidence. It cannot, therefore, signify any matter which comes on the record at the end of the prosecution evidence. A statement under Sec. 312 (now Sec. 313), Cr. P. C., comes after the prosecution has put forward the entire evidence, and the accused is asked to state only for the purpose of enabling him to explain any circumstances appearing in the evidence against him. The answers given by the accused can only be "taken into consideration" against him in the same inquiry or trial, although they can be "put in evidence" for or against him in any other inquiry or trial for any other offence, but they cannot be taken into consideration under this section against the other accused.²⁴

According to section 30, a fact is proved if after considering the matter before it the court believes it to exist. If the statement of accused is made before the Court in which he inculpatates himself and the other accused, it is clearly a matter before the Court which it may believe to exist. Therefore such a statement is admissible against the co-accused under section 30. Of course the value to be attached will depend on the facts and circumstances of each case more particularly on the fact whether the co-accused had opportunity to rebut the same.²⁵

The expression "proving a confession" is inapplicable to the procedure where the Judge asks questions and an accused gives explanations under a special section provided for the purpose.¹ A confession recorded according to the provisions of the Criminal Procedure Code is not admissible because it may contravene the instructions of a Criminal Circular. Such a confession may be considered under this section.²

15. "Court". The word "Court" in this Section means not only the Judge, but in a number of cases a Judge with a jury includes both the Judge and the jury.³

16. "May take into consideration". By this section, the Legislature has only bestowed a discretion upon the Court to take into consideration such

24. *Mat. Sumitra v. Emperor*, 1940 Nag. 227; 1940 I.C. 288; 41 C.L.J. 386; 1940 N.L.J. 193; *Mahadeo v. R.*, 1941 A.L.R. 488; 38 76 I.C. 1025; 25 Cr. L.J. 305; 21 A.L.J. 100; *R. v. Ashootosh* (1878) 4 Cal. 483 (F.B.); *Priyaswami Moopan v. Emperor*, 1931 Mad. 177; I.L.R. 54 Mad. 75; 129 I.C. 645; 32 Cr. L.J. 448; 59 M.L.J. 471; 1930 M.W.N. 858; 32 L.W. 527; *Kunwar Sen v. Emperor*, 1926 Oudh Sess. I.L.R. 8 Luck. 286; 141 I.C. 192; 34 Cr.L.J. 124; 9 O.W.N. 1136; *Nirwan v. Emperor*, 1925 Lah. 35; 119 I.C. 188; 31 Cr. L.J. 1137.

¹ Proved means proved before the prosecution case comes to an end.

Malla Mahmadoo v. State, 1952 J. & K. 101; *Abdullah v. Emperor*, 1940 Cal. 250; 188 I.C. 288; 41 Cr.L.J. 563; 44 C.W.N. 396;

but see *Nirmal Chandra De v. Emperor*, 1927 Cal. 265; 100 I.C. 115; 34 C.L.J. 241; 31 C.W.N. 289; *Waseem Gopeel v. Emperor*, 1930 Bom. 354; I.L.R. 54 Bom. 531; 127 I.C. 16; 31 Cr. L.J. 1137; 32 Bom. L.R. 147; *Dial Singh v. Emperor*, 1936 Lah. 337; I.L.R. 16 Lah. 651; 161 I.C. 898; 37 Cr.L.J. 508; 37 P.L.R. 806; *Public Prosecutor v. Begu Ram*, 1973 Cr.L.J. 1761 (A.P.).

² *Mahabho Prasad v. R.*, 1923 A.L.R. 20 I.C. 1025 [dissenting from *R. v. Chinna*, 1890, 23 M. 151].

³ *Goyinda v. R.*, 1921 Nag. 39; 69 I.C. 257; 17 N.L.R. 113.

⁴ *R. v. Ashootosh* (1878) 4 C. 483 (F.B.).

confession⁴. While, under Sec. 21, admissions (which include confessions) are relevant, and may be used against the persons making them. This section merely provides that the Court may take them into consideration against other persons; and this distinction is significant, and shows that, under this section, the Court can only treat a confession as lending assurance to other evidence against a co-accused⁵. The law which prevailed before the passing of this Act required a conviction to be based on evidence excluding from that term the statements of the character mentioned in this section⁶. And in so far as a statement by a witness only is "evidence" according to the definition given of that term when used in this Act, a confession by an accused person, affecting himself and his co-accused, is not "evidence" in that special sense⁷. It does not indeed come within the definition of 'evidence' contained in Sec. 3 of the Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities⁸. The words "may take into consideration", do not mean that the confession is to have the force of sworn evidence⁹. But such a confession is nevertheless evidence in the sense that it is a matter which the Court, before whom it is made, may take into consideration in order to determine whether the issue of guilty is proved or not¹⁰. It can be put in the scale and weighed with other evidence¹¹. The wording, however, of this section (which is an exception) shows that such a confession is merely to be an element in the consideration¹² of all the facts of the case; while allowing it to be so considered,

4. *R. v. Sadhu*, (1874) 21 W.R.Cr. 69-71 per Phoenix J. *Gopalaya v. Emperor*, 1925 Nag. 242; 12 I.C. 673; 31 Cr.L.J. 881; 26 N.L.R. 229 (F.B.); (MacNair, A.J.C. dissenting).
5. *R. v. Lalit*, (1911) 38 C. 559.
6. *v. ante* "construction."
7. Proceedings 24th January, 1878) 7 Mad H.C.R. App. 15 (a conviction founded on such confession alone is a case of "no evidence and bad in law"). *R. v. Kaliyappa*, (1883) Wey. 294; 11 I.C. 494 (although confessional statements may be considered, they cannot be accepted as evidence of any fact necessary to constitute the offence); *R. v. Bayaji*, (1886) 14 Ind. Jur. N.S. 384 (the statement of a co-accused is not technically "evidence" within the definition given in Sec. 3 *v. post*); *R. v. Khandia*, (1890) 15 B. 66 (referred to in *R. v. Nirmal*, (1900) 22 A. 445, 447 (conviction held to be bad as though a confession could be taken into consideration; it was not evidence within the definition given by S. 3, and could not, therefore alone form the basis of a conviction); *R. v. Naga*, (1875) 23 W.R. Cr. 24; *R. v. Chundur*, (1875) 24 W.R., Cr. 42; *R. v. Narain*, mention-

- ed in *R. v. Ashootosh*, (1878) 4 Cal. 483, the Legislature avoids saying that confessions of this sort are "evidence" and may be used as "evidence"; it says merely the Court "may take into consideration" such confessions); *R. v. Dip.*, (1915) 37 A. 247; 28 I.C. 668; A.I.R. 1915 A. 23; 76 I.A. 147; *SC. Das v. State of Meghalaya*, 1971 Cr. L.J. 1232 (Assam).
8. *Phibbs v. Siley v. The King*, (1900) P.C. 257, 260; 76 I.A. 147.
9. *R. v. Nirmal*, (1900) 22 A. 445.
10. In *SC. B. K. R. v. Regd.*, 1914 Mad. 117, 120; 11 L.R. 1944 Mad. 308; 211 I.C. 367; 56 L.W. 737 (F.B.); *R. v. Ashootosh* (1878) 4 C. 483 (F.B.); *R. v. Babar*, (1915) 42 C. 789; 28 I.C. 657; A.I.R. 1915 C. 751 *v. ante* S. 3, see next note.
11. *Phibbs v. Siley v. The King*, *supra*.
12. Proceedings 24th January, 1878) 7 Mad. H. C. R. App. 15. With respect to the words "taken into consideration" see *R. v. Chundur*, (1875) 24 W.R.Cr. 42; *R. v. Naga*, (1875) 23 W.R.Cr. 24. In *R. v. Bayaji*, (1886) 14 Ind. Jur. N. S. 384 (referred to in *R. v. Khandia*, (1890) 15 B. 66) it was held that the words "taken into consideration" in S. 30 of the Evidence Act mean "taken

it does not do away with the necessity of other evidence.¹⁵ For even when regarded as evidence and taken at its highest value, it is of too weak a character to found a conviction upon its sole force and hence consideration should be required in all cases even if, instead of being the statement of a fellow-prisoner, it is the confession of a witness on oath and on examination as a witness it would be subject to the same scrutiny as the evidence of an accomplice which, in a case of confession, is not subject to the same scrutiny.¹⁶ and if the testimony of a witness is received by the Court under the sanction of an oath and a cross-examination and capable of being tested by cross-examination, is yet by its nature such that, as against an accused, it must be received with great caution. It must be the confession of a fellow-prisoner which is only the bare statement of an accomplice, limited to just so much as the confessing person chose to say, and guaranteed by nothing except the peril of perjury which is not great and which it is generally supposed to lessen.¹⁷

It is not a confession as such, because it is not the statement of a person on oath and on examination as a witness, but it is a statement of a fellow-prisoner, and yet Sec. 133 applies only to accomplices, as such, and not confessing co-prisoners whose statements do not stand upon the same but on a lower footing than the testimony of an accomplice.¹⁷ And although the instance of corroboration which is appended to illustration (b) of Sec. 114 is corroboration to be found in

15. "into consideration" for the purpose of arriving at a conclusion of fact, and though a co-accused's statement is not technically evidence within the definition given in S. 3, it may still be used *quantum valeat* for the basis of a reasonable inference, and if a jury thinks it sufficiently supported by a partial, or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connection with the crime imputed to him, they are not precluded by law any more than by reason from a finding of guilty thus sustained." *Giddigadu v. R.*, (1909) 33 M. 46; *Bhuboni Sahu v. The King*, 1949 P.C. 257, 260; 76 I.A. 147. *Bhuboni Sahu v. The King*, 1949 P.C. 257, 260; 76 I.A. 147; *Kashmira Singh v. State of Madhya Pradesh*, 1952 S.C. 159; 1952 S.C.J. 201; (1952) 1 M.L.J. 754; 1952 M.W.N. 402; 1952 Cr.L.J. 839; 1952 All. W.R. (Sup.) 64; *Rameshwar v. State of Rajasthan*, 1952 S.C. 54; 1952 S.C.J. 46; 1952 Cr.L.J. 347; (1952) 1 M.L.J. 440; 1952 M.W.N. 150; 65 L.W. 351; *Thanuvan v. State*, 1955 T.C. 87; 1955 Cr.L.J. 847; *Krishnabharilal v. State*, 1956 M.B. 86; *R. v. Mohesh*, (1873) 19 W.R. Cr. 16, 25; *R. v. Malappa* (1874) 11 Bom. H.C.R. 196, 198; *R. v. Naga*, (1875) 23 W.R. Cr. 24; *R. v. Ashootosh* (1878) 4 C. 483; *R. v. Sabit*, 45 B. 739; A.I.R. 1919 B. 164; 51 I.C. 657; 21 Bom.L.

R. 448; see Ss. 133, 114 post. What corroboration is necessary depends on the facts of each case, *ibid*.
15. *Bhuboni Sahu v. The King*, supra; *Kashmira Singh v. State of M.P.*, supra; *R. v. Sadhu*, (1874) 21 W.R. Cr. 69, 71 per Phear, J. and see *R. v. Naga*, (1875) 23 W.R. Cr. 24; *R. v. Bhawani*, (1878) 1 A. 664; *R. v. Ashootosh*, (1878) 4 C. 483; *R. v. Bepin*, (1884) 10 C. 970; *R. v. Dosa*, (1885) 10 B. 231; *R. v. Krishnabhat*, (1885) 10 B. 319; *R. v. Ram Saran*, (1886) 6 A.W.N. 259; *R. v. Alagappan Bai*, 2 Weir, (1886) 742; *R. v. Babaji*, (1888) 14 Ind. Jur. N.S. 175; *R. v. Ganapahat*, (1889) 14 Ind. Jur. N.S. 20 the corroborative evidence must be more cogent and should be more strictly examined by the Court than when an accomplice gives evidence as a witness; *R. v. Babar*, (1915) 42 C. 789; 28 I.C. 657; A.I.R. 1915 C. 731; *Muthukumaraswami v. R.*, (1912) 35 M. 397 and see post, commentary on Sec. 133.
Sec. 133, post.
R. v. Ashootosh, (1878) 4 C. 483, 494, 496; per Jackson and Ainslie JJ.; *R. v. Babaji* (1888) 14 Ind. Jur. N.S. 175 (confession made by accused persons at a joint trial can not be treated as the evidence of accomplices against one another) *Queen Empress v. Lakshmayya*, (1899) 22 M. 491, 493; *Giddigadu v. Emperor*, (1909) 33 M. 46.

used to fill up the gaps in the prosecution evidence²³. But the Orissa High Court has decided in *Patra v. State*²⁴ that the confession of a co-accused may be used as an adjunct or to fortify the other evidence and that a conviction could be based on such evidence. But such a confession cannot itself be substantive evidence²⁵. In a case of conspiracy where only circumstantial evidence is forthcoming, if broad features are proved by trustworthy circumstantial evidence connecting all the links of a complete chain then on isolated events the confessional statements of the co-accused lending assurance to the conclusions of court can be considered as relevant material.¹

(ii) *To corroborate other evidence.* As regards its use to corroborate other evidence it was observed in *Blubbant Sahay* case². "Then Lordships think that the view which has prevailed in most of the High Courts in India, namely, that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct." Quoting this passage, Sir Trevor Haines, C. J., of the Calcutta High Court observed in a case³. "It seems clear that the view of then Lordships was that a confession of a co-accused can be used to support other evidence. In other words, it can be used to corroborate other evidence. It might assist the Court in coming to the conclusion that the other evidence is true and therefore that an accused is guilty. It is one thing to say that a confession of a co-accused can be used to corroborate the other evidence, but it is entirely a different thing to say that that other evidence can be used to corroborate the confession of the accused. The learned Assistant Sessions Judge directed the jury that the other evidence could be used to corroborate the confession, but the correct direction appears to me to be that the confession may be used to corroborate the other evidence. In short the conviction must be based on the other evidence. The confession can only be used to help to satisfy a Court that the other evidence is true. What the learned Judge has suggested is that if the other evidence suggests to the Court that the confession of the co-accused is true, then a conviction can be based on the confession. That appears to me to be an incorrect statement of the law."⁴ In the light of this, the decision of the Bombay High Court in *Mahant v. State*,⁵ that the confession of an accused may be used as evidence against a co-accused provided it is corroborated in material particulars, is, it is submitted, wrong. "The confessions of the co-accused cannot be used as evidence at all but they can be used only for the limited purpose of 'lending assurance' if there is other evidence which, if believed, would support the conviction of an accused."

(iii) *To corroborate approvers and accomplices.* Then, as regards its use in corroboration of accomplices and approvers. A co-accused who confesses is naturally an accomplice and the danger of using the testimony of one ac-

23. *Pyli Yacob v. State*, 1953 T.C. 466; 1 I.L.R. 1952 T.C. 937; 1954 Cr. L.J. 1670.

24. 1 I.L.R. 1958 Cut. 58.

25. *Ramchandra v. State*, A.I.R. 1957 S.C. 381; 1957 Cr. L.J. 359; *In re Thimma Reddi*, A.I.R. 1957 A.P. 758; *Bhaluka v. State*, A.I.R. 1957 Orissa 172.

1. *Baburao Bap Rao Patil v. State of Maharashtra*, 1971 Cri.L.J. 38; 1971 S.C.C. 432.

2. *Blubbant Sahay v. The King*, A.I.R. 1941 P.C. 25. See also *Pyli Yacob v. The State*, *supra*.

3. *Gunadhar Das v. State*, 1952 Cal. 618; 1953 Cr.L.J. 1343. See also *Pyli Yacob v. State*, A.I.R. 1953 T.C. 466; 1 I.L.R. 1952 T.C. 937; 1954 Cr.L.J. 1670.

4. 1956 Bom. 186.

5. *Bhansa Shaw v. State*, 1950 Orissa 177.

complice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the evidence is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice, is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice, provided the Judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it. The tendency to include the innocent with the guilty is peculiarly prevalent in India, as Judges have noted on innumerable occasions, and it is very difficult for the Court to guard against the danger. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused.^{7a}

The confessions of prisoners are not sufficient corroboration of the testimony of an accomplice, either as the *corpus delicti*, or the identity of the person affected? For the corroboration which is needed of an accomplice's testimony is evidence which is independent of accomplices. But a confession of a prisoner, if given on oath, would only be the evidence of an accomplice, and as a mere confession it is even of less value, and hence it can never afford corroboration of the evidence of an accomplice, the tainted evidence of which is not made more trustworthy by a tainted confession (*vide ante*).

(d) *Nature and extent of corroboration required*—As regards the nature and extent of corroboration required in the case of accomplice evidence when it is not considered safe to dispense with such corroboration, then Lordships of the Supreme Court summarised the law as follows:

"Here, again, the rules are lucidly expounded by Lord Reading in *Rex v. Barker, &c.*⁸ It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear.

"First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent

6. *Kashmira Singh v. State of Madhya Pradesh*, 1962 S.C.R. 726; 1962 S.C.J. 201; 1962 A.W.R. (Supp.) 64; (1952) 1 M.L.J. 754; 1952 M.W.N. 402; 1952 Cr. 1 J. 846; A.I.R. 1952 S.C. 170; 1952 S.R. 333; *Kamat Dhar Roy v. State*, 1966 Cr.L.J. 323 (2) (Cal.), 327; *State v. Roop Singh*, 1 I.L.R. (1966) 16 Raj. 152; 1966 Raj.L.W. 22 at pp. 240, 242; *State of Kerala v. Mathichan*, 1969 Ker. L.T. 566; *Gopinathan v. State of Kerala*, 1963 Cr.1 J. 32.

7. *R. v. Jaffir*, (1873) 19 W.R. Cr. 57; *R. v. Mohesh*, (1873) 19 W.R. Cr.

16, 21, 25; *R. v. Malappa*, (1874) 11 Bom. H.C.R. 196; *R. v. Krishna-bhat*, 1880, 10 B. 3, 9; *R. v. Sadhu*, (1874) 21 W.R. Cr. 69; *R. v. Nagai*, (1875) 23 W.R. Cr. 24; *R. v. Ram Sazan*, (1876) 8 A. 506; *R. v. Baijoo*, (1876) 25 W.R. Cr. 43; *R. v. Budhu*, (1876) 1 B. 475; *R. v. Bepin*, (1884) 10 C. 970; *R. v. Alaguppan*, (1884) Weir. 3rd Ed. 742; *R. v. Choud*, (1888) 14 C. Jur. N.S. 125.

8. (1916) 2 K.B. 658, at pp. 664 to 669.

A Full Bench of the Madras High Court has held that this section entitles the Court to take the confession into consideration in deciding whether it is safe to rely on the approver's evidence so far as it concerns the co-accused.¹⁰

17-A. Use of statement of an accused against co-accused. The statement of an accused recorded under section 342 (new Sec. 313) Cr. P. C., can be regarded as evidence defined in section 3 *ante* and a conviction cannot be based merely on such a statement.¹¹ But relying on the definition of 'proved' in section 3 *ante* it can be used against the accused in aid of the prosecution case. Where such statement is exculpatory it cannot be used against another accused in support of his conviction.¹² Where there is no other item of evidence to connect the first accused with the crime, the statement of the second accused under section 342 (new Sec. 313), Cr. P. C. cannot be pressed into service in assessing the guilt of the first accused for the confession of co-accused can be invoked only to give additional strength or added assurance to other items of evidence led into the case already.¹³ The evidence given by D, co-accused of A, in an earlier dacoity case cannot be used as evidence against A in a later case as A had no opportunity to cross-examine D in the dacoity case nor can the statement of D as co-accused under section 342 (new Sec. 313), Cr. P. C. in the later case be used against A.¹⁴ Statement under Section 342 (new Sec. 313), Cr. P. C. by an accused, incriminating co-accused cannot be used against co-accused.¹⁵

18. Retracted confession. The section makes no distinction between a retracted confession and an unretracted confession. Both are equally admissible and may be taken into consideration against the co-accused.¹⁶ A retracted confession is a weak link against the maker and more so against a co-accused.¹⁷ But the exclusive value of a retracted confession as against the co-accused is considerably less and in many cases it was held that the very

10. In re B. K. P. v. State of Mad. 117; 1 I.L.R. 1944 Mad. 308; 211 I.C. 367; 45 Cr.L.J. 373; (1945) 2 M.L.J. 634; 1945 M.W.N. 795; 56 L.W. 737 (F.B.).

11. Vijendrajit v. State of Bombay, 1953 S.C.A. 247; 1953 S.C.J. 328; 1953 M.W.N. 552; 1953 Cr.L.J. 1097; A.I.R. 1953 S.C. 247.

12. Ramesh v. State of Mad. 1967 Cr.L.J. 357; A.I.R. 1967 Goa 21, (F.B.), 25; Jogendranath v. Emperor, A.I.R. 1934 Cal. 724; see also Mannalal v. State, 1966 Raj.L.W. 460, 465.

13. C.B. v. State of Mad. 1967 Ker. 127; 1967 M.L.J. (Cr.) 901; 1968 Cr.L.J. 347; A.I.R. 1968 Ker. 66, 69; following Haricharan v. State of Bihar, A.I.R. 1964 S.C. 1184.

14. Narayana v. State of Maharashtra, (1968) 2 S.C.R. 88; 1968 S.C.D. 675; (1968) 2 S.C.J. 179; (1967) 2 S.C.W.R. 816; 1968 A.W.R. 110; 1968 Mad.L.J. 172.

15. M.P.I.J. 96; 1968 Cr.L.J. 157; A.I.R. 1968 S.C. 609, 612.

15. Public Prosecutor v. B. Rama Murli, 1973 Cri. L.J. 1761 (A.P.).

16. Gour Chandra Dass v. Emperor, 1929 Cal. 14; 115 I.C. 359; 30 Cr. L.J. 1017; A.I.R. 1968 S.C. 832, 837.

L.J. 475; 32 C.W.N. 1004; Gan-
gappa v. Emperor, 1914 Bom. 395;
38 Bom. 156; 21 I.C. 673; 14 Cr.
L.J. 625; 15 Bom.L.R. 975; Par-
tab Singh v. Emperor, 1925 Lah.
605 (2); I.L.R. 6 Lah. 415; 93
I.C. 978; 27 Cr.L.J. 514; Surjan
Singh v. Emperor, 1932 Lah. 298;
136 I.C. 27; 33 Cr.L.J. 251; Nga
(S.C.) 537; 1968 M.L.J. (Cr.)
591; 1968 M.L.W. (Cr.) 116; 1968
Pyating v. Emperor, 1934 Rang. 30;
148 I.C. 1064; 35 Cr.L.J. 863.

17. In re High Abdullah v. State of
Maharashtra, (1968) 2 S.C.R. 641;
1968 S.C.D. 391; (1968) 2 S.C.J.
534; (1968) 1 S.C.W.R. 243; 70
Bom.L.R. 540; 1970 M.P.L.J.

fullest corroboration was necessary before it could be acted upon¹⁸. But, in view of the decisions of their Lordships of the Privy Council and the Supreme Court cited above, this is no longer good law. It is not legitimate to apply the rules of prudence requiring corroboration which relate to the sworn testimony of an accomplice or approver to the retracted confession of a confessing prisoner, and by means of the application of these rules impliedly make that retracted confession substantive evidence against the persons accused along with the confessing prisoner¹⁹. A retracted confession can be taken into consideration but only in support of other evidence and cannot be made the foundation of a conviction²⁰. The only use to which it can be put is that where there is independent evidence, against the co-accused sufficient, if believed, to support his conviction, the confession may be thrown into the scale as an additional reason for believing that evidence²¹. In other words, the confession can be used to corroborate the other evidence and not vice versa. The conviction must be based on the other evidence corroborated by the confession. It cannot be based on the confession corroborated by the other evidence²².

Even if an inculpatory confession is retracted, corroboration is necessary.²³

19. "As against such other person as well as against the person who makes such confession." The section must be read subject to the provisions contained in those which precede it. Therefore a confession by one of several persons which is inadmissible under Secs. 24-26, and when there is no 'discovery' under Sec. 27, will be inadmissible under this section as against both the maker of it and the person implicated thereby. If it is not inadmissible, under Secs. 24-26 against the maker, it is admissible under this section provided that it satisfies its terms as well against the maker as against the other whom it affects. If, however, it is excluded by Secs. 24-26, but there is discovery under Sec. 27, then so much of the whole, as leads immediately to the discovery is admissible thereunder, against the maker of the confession. As to its admissibility against co-accused, see notes under Sec. 27, ante, under the heading "Admissibility against co-accused." Secs. 27-30."

18. See *Yasin v. R.*, 28 Cal. 689; *Emperor v. Kehra*, 29 All. 445; *Cr. L.J.* 360; (1907) 4 A.L.J. 310; *Sheoratan v. Emperor*, 1934 Oudh 418-151 I.C. 298; 35 Cr. L.J. 1290; 11 O.W.N. 102; *Kishan Singh v. Emperor*, 1934 Cal. 853; 39 C.W.N. 27; *Sheo Nandan Sharma v. Emperor*, 1929 Pat. 212; I.L.R. 8 Pat. 262; 117 I.C. 43; 30 Cr.L.J. 716; (In re) *Peria Cheliah Naidu*, 1942 Mad. 450; 202 I.C. 290; 43 Cr.L.J. 810; 1942 I.M.L.J. 33; 1942 M.W.N. 291; *Bhimappa v. Emperor*, 1945 Bom. 484; 222 I.C. 143; 47 Cr. L.J. 252; 47 Bom.L.R. 648; *Ghulam Mohammad v. Emperor*, 1942 Lah. 271; 203 I.C. 488; 44 Cr.L.J. 77; In re *Balan v. Balusami Mahto*, 1973 Cr. L.J. 1311; *State of Assam v. U. N. Rajkhowa*, 1975 Cri. L.J. 354; *State v. Beda Digal*,

1976 O.J.D. 545.

19. *Baboo Singh v. Emperor*, 1936 O.W.N. 64; 159 I.C. 875; A.I.R. 1936 Oudh 156.

20. *Mohd. Hussain Umar v. K. S. Daspal Singh (defd)*, 1 S.C.R. 130; 1970 S.C. Cr. R. 76; 1970 S.C.D. 2; 2 Bom.L.R. 774; 1970 Cr. L.J. 9; 1970 M.L.J. (Cr.) 68; A.I.R. 1970 S.C. 43, 46.

21. *Ratanlal v. State*, 1955 Punj. 110; 1956 Cr.L.J. 737; *Jogendra Nath v. The State of Assam*, 1977 Cr. L.J. 1309.

22. *Gunadhar Dass v. State*, 1952 Cal. 618.

23. *Pangambar Kalanjeet Singh v. State of Manipur*, 1956 Cr.L.J. 126; A.I.R. 1956 S.C. 9; *Thanganbul v. Government of Manipur*, 1968 Cr. L.J. 514; A.I.R. 1968 Manipur 34, 40.

A person, who is arrested by the police and subsequently turns approver, he is not a co-accused. Hence a statement made by such a person before a Magistrate after his arrest by the police is not admissible in evidence against the other accused.²⁴

20. Conclusion. To sum up, the confession of an accused person, not is permitted to be taken into consideration under this Section against his co-accused, must be of the offence for which the accused are being tried jointly. It means the joint trial must be of the very offence for which they are being tried jointly and cannot be of a minor offence or of any offence connected with that offence or of any other offence disclosed by the evidence. The test is, whether the person making such confession which is sought to be used against a co-accused could legally have been convicted on the basis of the confession of the crime with which he and his co-accused were charged.²⁵ It is not the law, however, that unless the confessing person implicates himself as fully as he implicates his co-accused, the statement will not be admissible. All that is required is that the confessor shall substantially implicate its maker in regard to the crime with which he and his co-accused are charged. The law does not go so far as to require that the confession should claim for its maker the leading part in the crime. What is intended to be hit at is, a confession which does not implicate the author thereof but is merely an explanation exculpating himself from his alleged share of the offence which is not a confession at all. Therefore, a statement which is not self-exculpatory but which does minimise the part of the maker taken in the offence and which ascribes to himself a part much less important and much less effective than that ascribes to others named by him, is none the less a confession and as such is admissible in evidence under this Section.¹

What happens to a confessional statement of a co-accused who dies before the completion of the trial? In *Ram Sarup Singh v. Emperor*,² J was put on his trial along with I. The trial took place for some time and six months before the delivery of the judgment, when the trial had proceeded for more than a year. J died. Before his death his confession had been put on the record. It was held that the confession made by J was admissible in evidence and could be used against I. In *Sat Deo v. Emperor*,³ the confession of a co-accused was held inadmissible under this Section when he died before the completion of the trial.

24. *Doughell v. Government of Manipur*, 1968 Cr.L.J. 514; A. I. R. 1968 Manipur 34, 37.

25. *Babji Singh v. Punjab State*, A. I. R. 1957 S.C. 213; 1957 Cr.L.J. 48; *Unnikrishnan Mooppan v. Emperor*, A. I. R. 1931 Mad. 177; 32 Cr.L.J. 448; 129 I.C. 645; *Dhanapati De v. Emperor*, A. I. R. 1946 Cal. 156; 47 Cr. L. J. 695; 225 I. C. 153; *Emperor v. Bhagwandas*, A. I. R. 1941 Bom. 50; 192 I.C. 671; I. L. R. 1941 B. 27.

1. *Emperor v. Sadasibho*, A. I. R. 1939 Pat. 35; 39 Cr.L.J. 997; I.L.R. 18 Pat. 82; 178 I.C. 130; *Abdul Javed Khan v. Emperor*, A. I. R. 1950 All. 746; 32 Cr.L.J. 152; 128 I.C. 593; *Dhanapati De v. Emperor*, A. I. R. 1946 Cal. 156; 47 Cr.L.J. 695; 125 I.C. 153.

2. A. I. R. 1937 Cal. 39; 38 Cr.L.J. 339; 167 I.C. 162.

3. A. I. R. 1938 Oudh 164; 37 Cr.L.J. 182; 159 I.C. 919.

Taylor, Ev. ss. 817-819, 854-861; Norton, Ev., 151; Phipson, Ev., 11th Edn., 304; Roscoe, N. P. Ev., 62; Powell, Ev., 9th Edn., 422; Best Ev. ss. 520-530.

SYNOPSIS

1. Principle.
2. Evidential value of admissions.
3. Effect of admissions.
4. Burden of proving the contrary
5. Admissions in pleadings.

1. Principle. — Evidence favours the investigation of truth by all expedient methods. The doctrine of estoppel, by which further investigation is precluded, is an exception to the general rule, and being adopted only for the sake of general convenience, and for the prevention of fraud, should not be extended beyond the reasons on which it is founded. Therefore, admissions, whether written or oral, which do not operate by way of estoppel, constitute only *prima facie* and rebuttable evidence against their makers and those claiming under them, as between them and others.¹⁰

2. **Evidential value of admissions.** In cases, where it is proved that a party had certain admissions, it is necessary for him to prove that the admissions were erroneous and did not bind him. Indeed, an admission is the best evidence that an opposite party can rely upon, and, though not conclusive is decisive of the matter, unless successfully withdrawn or proved erroneous.¹¹ If an admission is proved to be wrong, it is not binding on the maker.¹² It has been held that a petitioner, who in a writ petition in the Supreme Court, clearly admits that as regards 20 acres of pasture lands, they are no doubt pasture lands but the same were used by him for the purpose of grazing his cattle, cannot run round in a subsequent writ petition in the High Court and say that the admission was not correct.¹³ An admission of

10 Power by [redacted] to give a receipt
 endorsed on a bill, and generally,
 all paid receipts are only prima
 facie evidence of payment of [redacted]
 in [redacted] [redacted] and
 [redacted] [redacted] the effect of
 operating against him by way of
 [redacted] [redacted] in
 Smith v. Taylor, 1 N R. 210.

11
Nanda Bhawan Rao v. Gopal,
1954 1 S.C.R. 280; 2 S.C.
A. 153; 1960 S.C.J. 263; A. I. R.
1960 S.C. 100; Purna Chandra Das
v. Chandra [1963] 1 All. 1068
Orissa. The learned J. has observed
that properties purchased in the
name of a particular person were joint
family property. Duryan Mohito v.
Bhagabat Bose, 11 F.R. 1967 Cut.
106; 33 Cut.L.T. 688; 1967 Cr. L.
J. 1036; A.I.R. 1967 Orissa 110,
111. Santalungal Merchand v. C.
I.T., Bihar and Orissa, (1969) 35
Cut. L.T. 1039; Ghasiram Majhi

v. Omkar Singh, 11 R. 105; Cut. 87: 34 Cut.L.T. 328; A. I. R. 1968 Cut. 102, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 91

12 Molar v. Sant' Santo, 70 Cal. 2d 101, 104, 448 P.2d 104, 108, 284 A.2d 104, 108 (1972), cert. denied, 406 U.S. 954, 72-1014 (1972), and nature of land (based on the previous knowledge and proved to be wrong).

Khan, Collector of Daman. A I R
1970 Goa 59, 71.

without doubt, shifts the onus on to the person admitting the fact, on the principle that what a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted, the fact admitted must be taken to be established.¹⁴ However, the question of onus loses its efficacy, when it is never objected to and evidence is led by the parties, in which case, the Court has to adjudicate on the materials before it.¹⁵

Admissions are not conclusive, and unless they constitute estoppel, the maker is at liberty to prove that they were mistaken or were untrue.¹⁶ Admissions are mere pieces of evidence, and if the truth of the matter is known to both parties, the principle stated in *Chandra Kuman v. Narpat Singh*,¹⁷ applies.

In order to properly appreciate the effect of admissions, it is necessary to consider the circumstances under which they were made.¹⁸ Thus, the value of an admission contained in a registered deed, formally executed by a party, with an endorsement showing that the executant was fully aware of the contents of the deed and executed it with due deliberation and full understanding, is considerable unless it is explained satisfactorily, and shifts the burden of proving the contrary on to the party which made that admission.¹⁹ So, where a donor makes the statement in a deed of gift that he or she was in possession and put the donee in possession, that is an admission of the donor of the fact of delivery of possession to the donee. The effect of this is only, that the person who contends to the contrary, namely, that no possession was delivered, should establish the contention. The admission is not "rebuttable or conclusive" on the question of delivery of possession.²⁰

Whatever be the stage at which a document containing an admission is secured, the admission can be employed against the maker.²¹

3. Effect of admissions. This section deals with the effect, in respect of conclusiveness, of admissions when proved. "An admission is not conclusive as the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend upon the circumstances under which it is made. It can then be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might be conclusive by way of estoppel."²² Every admission is

14. *Chandra Kuman v. Narpat Singh*, L.R. 34 I.A. 27; I.L.R. 29 A. 184; cited in *Kishori Lal v. Chalti Bai*, 1959 S.C.J. 760; A.I.R. 1959 S.C. 504.

15. *Kishori Lal v. Chalti Bai*, supra; *Fullamoni Devi v. Nattanand S. S.*, 32 Cut.L.T. 876; A. I. R. 1967 Orissa 103, 104 (admission of adoption).

16. *Trinidad Asphalt Co. v. Corvet*, 1896 A.C. 587; cited on in *Kishori Lal v. Chalti Bai*, supra; *Kedar Nath v. State*, 39 Cut.L.T. 774; A.I.R. 1974 Orissa 74.

17. L.R. 34 I.A. 27; I.L.R. 29 A. 184 (P.C.).

18. *Kishori Lal v. Chalti Bai*, supra.
19. *Rhola v. Man Matun*, A.I.R. 1965 A. 258; 1964 A.L.J. 749.

20. *J. L. B. v. Subera Bibi*, I.I.R. (1964) 2 Mad. 540; A.I.R. 1964 Mad. 575; 77 L.W. 212.

21. *Nemmith Appayya v. Jambhori*, (1965) 1 Mys.L.J. 442; A.I.R. 1966 Mys. 154, 159.

22. *Nagubai Ammal v. Shama Rao*, 1956 S.C.R. 451; 1956 S.C.A. 959; 1956 S.C.C. 821; 1956 S.C.J. 655; I.I.R. 1956 Mys. 152; 1956 Andh.L.T. 1029; A.I.R. 1956 S.C. 593; 599; *Srinivas Ramchandra v. Vishnu Nagesh*, (1971) 2 Mys. L. J. 619.

evidence against the person by whom it is made, but it is always for the Court to consider what weight, if any, is to be given to an admission, or any other evidence, it is not conclusive, merely because it is legally admissible.²³ It is only so in certain cases, for instance, where it has been acted upon by the party to whom it was made.²⁴ A statement made by a party is not, *ipso facto*, conclusive against him, though it may be used against him and may be evidence more or less weighty, possibly even conclusive, according to the circumstances of each case, and the result come to by judicial investigation.²⁵ Admissions are not conclusive proof of the matters admitted, though they may operate as estoppels, if the provisions regarding estoppels be turned. They may become foundation of rights coupled with other facts. Short of those facts they do not ripen into estoppels, and unless they reach that position, admissions are nothing more than items of evidence which are not in any sense final. They show at the most a party's inconsistency. Their value or weight is to be judged according to circumstances. They have, as Wigmore says, "no quality of conclusiveness." Though admissions may be proved against the party making them, it is always open to the maker to show that the statements were mistaken or untrue, except in the case in which they operate as estoppels.²⁶ The subject was clearly illustrated in the case of *Heave v. Rogers*,²⁷ in which Bayley, J., observed:

"There is no legal test that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his position; in such a case, the party is estopped from disputing their truth with respect to that person (and those claiming under him) under that transaction, but as to third persons he is not bound. It is a well-established rule of law that estoppels bind only parties and privies, and not strangers."²⁸

23. *Bulley v. Bulley*, (1875) L.R. 9 Ch. 739, 747; *Ayetun v. Ram*, (1869) 12 W.R. 156; *Dolatsinghji v. Khichar*, *Monsur Rukhbat*, 1926 P.C. 140; 63 I.A. 258; 11 I.R. 60; *Bom.* 634; 162 I.C. 17.

24. *Joshi v. Doolar*, 1872 18 W.R. 34; *Talwar v. Chander*, *Dogra Municipality*, (1873) 20 W.R. 223; *Yadav v. Ram*, 1886 11 B. 912. Admissions made by a party in other cases may be taken as evidence against him, but cannot operate *ex cathedra* as an estoppel in case in which his opponents are persons to whom the admission was made, and who are not proved to have heard of it, or to have been in any way misled by it; or to have acted in reliance upon it. *Chunder v. Pearce*, (1866) 5 W.R. 209; see *Oodley v. Ladoo*, (1870) 13 Moo. I.A. 585, 600; 15 W.R. P.C. 16.

25. *Ayetun v. Ram*, *supra*, though written statements may be accepted

from accused as is the practice in Courts, under the Calcutta High Court they cannot take the place of evidence of examination completed by S. 342 of the Criminal Procedure Code. *Amrita v. R.*, 120 Cal. 188; 11 I.R. 12; 937; 27 I.C. 33; 19 C.W.N. 186, dissenting from *R. v. Ansuiya*, 1903 A.W.N.

Begun Singh v. Mahan Singh, 1953 Pimp. 11, *Guram Nahi v. Union of India*, 1973 All L.J. 972.

26. *S. Bhatnagarjee v. Standard Assurance Co., Ltd.*, 1955 Cal. 594; *Narayan v. Krishnan*, 1955 I.C. 120. See S. 115, post and notes thereon. Admissions which have been held to operate or not as estoppels.

27. (1829) 9 B. & C. 577, 586, 587.

28. See *Janan v. Doolar*, (1872) 18 W.R. 347; *Ayetun v. Ram*, (1869) 12 W.R. 156; *Ram v. Pran*, (1870) 13 Moo. I. A. 551; 15 W.R. (P.C.)

The doctrine that a party is always at liberty to prove that his admissions were founded on mistake, unless his opponent has been induced by them to alter his condition, is as applicable to mistakes in respect of legal liability, as to those in respect of matters of facts.⁴ Where the defendant seeks to make use of statements which have been put in evidence, and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate, and to get rid of the effect of the apparent admissions.⁵

A gratuitous admission may be withdrawn unless there is some obligation not to withdraw. Even if an admission was made with a fraudulent purpose, the party making it may show what was the real state of facts.⁶ So, where a trader intended to defraud his creditors delivered his goods to a friend, and made out an invoice to him and a receipt for a fictitious price, it was held open to him, when these documents were put in evidence, in an action brought by him to recover the goods from the pretended purchaser to show that they were untrue.⁷ And a party coming under another, who has made admissions as to a transaction to which that other was a party, is at liberty to allege and prove that the admissions were made with a fraudulent purpose, and was not bound to show the real nature of the transaction.⁸

14; *Soojan v. Achmut.* (1874) 14 L.R. App. 1; 21 W.R. 112; *Smith, P. v. Liddard*, 13 L.R. 112; *Pratt v. G. & S. D. M. Co.* (1874) 21 W.R. 112; *Devi v. Bimola*, (1874) 21 W.R. 422; *Gopal v. Liddard*, 17 M.L.J. 1; A. 585, 599, 600; 15 W.R. (P.C.) 16; *Lutefoonissa v. Goor Surun*, (1872) 18 W.R. 485, 493, 494 (where the defendant seeks to make use of statements which have been put in evidence and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate, and to get rid of the effect of the apparent admissions. See also *U. rufoonessa v. Gridharee*, (1873) 19 W.R. 118, in which the Privy Council held that the fact of a party having admitted the execution of a deed in a former suit did not prevent her from contesting the validity of the transaction evidenced thereby and showing that it was colourable and not real and see generally as to the ordinarily inconclusive character of admission, *Sreenath v. Monmohini*, (1866) 6 W.R. 35; *Gordon v. Bejoy*, (1867) 8 W.R. 291; *Grish v. Issur*, (1869) 12 W.R. 226; *Mohomed v. Mazhur*, 311) 15 W.R. 280; *Komurrodeen v. Monye*, (1871) 16 W.R. 220; *Booth v. Ganeshchander*, (1873) 19

W.R. 356.

5. *Newton v. Liddard*, (1848) 12 Q.B. 227, such a mistaken impression of law will not exclude his testimony, though it will impart its weight as evidence against him: *Newton v. Liddard*, 1848 12 Q.B. 227; *Taylor, Ev.*, s. 819; *Roscoe, N. P. Ev.* 62; 1 *Phillips & Arn.*, 354; see *Gopi v. Chundralee*, (1872) 19 W.R. 13; as to admission involving erroneous conclusions of law. See also *Salah Bin Ahmed v. Abdullah Bin Ewaz*, 1956 Hyd. 43; *Mangin Rai v. Shivanand Lal*, 1923 All. 575; 77 I.C. 875; *Sita Ram v. Pir Baksh*, 1931 Lah. 6; 130 I.C. 406.
6. *Foolbibi v. Goor*, (1872) 18 W.R. 48.
7. *Muhammad Imam Ali v. Hussain Khan*, 26 Cal. 81 at 100; 25 I.A. 161; 2 C.W.N. 737; *Budhu Ram v. Uttam Chand*, 1928 Lah. 726; 109 I.C. 26.
8. *Ram v. Pran*, (1870) 13 Moo. I. A. 551; 15 W.R. (P.C.) 14; *Sreenath Roy v. Bindoo*, (1873) 20 W.R. 112; *Brojendra v. Chairman, Dacca Municipality*, (1873) 20 W.R. 223, 224; *Debia v. Bimola*, (1874) 21 W.R. 422; *S. Bhattacharjee v. Sentinel Assurance Co., Ltd.*, 1955 Cal. 594.
9. *Bowes v. Foster*, (1858) 27 L.J. Ex., 262.
10. *Srinath Roy v. Bindoo*, (1873) 20 W.R. 112.

Admissions are not conclusive and may not, under certain circumstances, be taken even at their face value. The maker can prove that they are mistaken or untrue. They are mere pieces of evidence and their probative value may not be much if the circumstances under which they are made, are by no means favourable. Thus, in *Kishor Lal v. Mt. Chandi Bai*¹¹, the Supreme Court declined to act on the admission made by a widow who had been deserted by her own relations, in an adoption which had plainly been resisted on her by her husband's relations.

But, though a mere admission is not legally conclusive, the circumstances under or in connection with which it was made, on its formal and deliberate character, may entitle it to the greatest weight and may require very strong and other evidence to rebut the inferences which may be drawn from it¹². Although it may be shown that the facts were different from what on a former occasion they were stated to be, and though it may be shown (or it were so) that a former statement is false, strong evidence may, under the particular circumstances, be required to prove that what the parties had deliberately asserted was altogether untrue¹³. It is well established that what a party himself admits to be true may reasonably be presumed to be so¹⁴. In *Chandra Kumar v. Anwar Singh*¹⁵, the Judicial Committee had to deal with the admission made by plaintiffs in some deeds to which the defendant was not a party. Their Lordships observed that the party making the admissions may have evidence to rebut the presumption as there was no estoppel, but, unless such evidence is adduced, the fact admitted must be taken to be established.

It is well settled that the express admissions of a party to the suit or admissions implied from his conduct are evidence and strong evidence—unless he can prove that such admissions were mistaken or were untrue, and he is not estopped or concluded by them, unless another person has been induced by them to alter his conduct¹⁶. Moreover, an admission of a statement of a character may have the effect of shifting the onus of proof¹⁷. There is a consensus of opinion on the point that the onus to show that an admission is erroneous is on the person who wishes to get rid of it. The fact that the admission was involuntary, does not affect its rule, and all that can

11. **A I R**, 1959 S.C. 504; 1959 S. C. J. 560.

12. *Soojan v. Achmut*, 1874 14 B.L.R. 1, 21 W.R. 414; *Shco*, (1875) 24 W.R. 431, 432; *Mohd. v. ...*, 280; the value of an admission depends on the circumstances in which it was made; *Roscoe, N. P. Ev.*, 62; *R. v. Simonsto*, (1843) 1 Q.B. 161; where a statement is made in the face of facts, the admission goes no further than the facts proved; *Bulley v. Bulley*, 11 R. 415, 9 Ch. 249; and generally as to the weight to be attached to admissions *v. ante*.

13. *Soojan v. Achmut*, (1874) 14 B.L.R. App. 3; 21 W.R. 414.

14. *Slatterie v. Pooley*, (1840) 6 M. & W. 664; 10 L.J. Ex. 8.

15. **I R**, 211 A. 220 V. 11 P.C. 1; *Chandra Kumar v. Anwar Singh*, 1951 Orissa 313, 321; *Depuru Vecra*, 1951 Mad. 403; (1950) 2 M. 1; *Ulfat v. Zubaida Khatun*, 1955 All. 361; *Abul M. Khan v. Secretary of State*, 1951 Nag. 82; **I I R**, 1950 Nag. 67; *Shah B. Ahmed v. Abdulah Bin Ewar Ahmadan*, 11 R. 1906 Hyd. 69, 1906 Hyd. 48; *Forbes v. Muir*, (1870) 5 B.L.R. 529, 540, 14 W.R. (P.C.) 28; 13 Moo. I. A. 438.

he said is that, if proved to be erroneous, it can be withdrawn by the person who makes it, and will not operate as estoppel.¹⁸ Where a defendant does not give any evidence in rebuttal, a previous statement which he had made in earlier proceedings can be put in evidence as an admission made by him and would be admissible against him.¹⁹ The legal position under the provisions of Sec. 145 of this Act, no doubt is that evidence in a previous suit does not prove anything, and it ought to be put to the witness, but it is not so in the case of admissions, where the party making the admission is required to explain and rebut the same and unless and until that is satisfactorily done, the fact admitted must be taken to be established. The proposition equally applies to an admission in a signed pleading and under the provision of this Act, an admission or withdrawal made by a party in a prior litigation would be regarded as an admission in a subsequent action though it is capable of rebuttal.²⁰

No exception can be taken to the proposition that 'what a party himself admits to be true may reasonably be presumed to be so', but, before it can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent such as will be conclusive unless explained. The mere fact that the tenor of certain statements made by a person is sufficient to suggest that certain proceedings were fraudulent and collusive in character would not be sufficient without more, to sustain a finding that the proceedings were collusive.²¹

Again, as the weight of an admission depends on the circumstances under which it was made, these circumstances may always be proved to impeach or enhance its credibility. Thus an admission (unless amounting to an estoppel) may be shown by the party against whom it is tendered to be untrue, or to have been made under mistake of law or fact, or to have been uttered in ignorance, levity or an abnormal condition of mind. On the other hand the weight of the admission increases with the knowledge and deliberation of the speaker, or the solemnity of the occasion in which it was made.

In other words, an admission can only be a binding estoppel if it amounts to an estoppel. In such case it is always open to a party to explain the admission made by him. Thus he can show that the admission was made under mistake of law or fact, or under circumstances which make it clear that it has been a prejudice to the opposite party, on account of the admission having been acted upon, or on account of any representation made by the admitting party, it does not

18. Per Teja Singh, C.J., in *Lal Singh v. Guru Granth Sahib*, 1951 Pepsu 101 at 105.

19. (Mst.) Bibi Khatun Ayesha v. Moolchand Hasan Khan, 1942 Pat. 230, 231; I.L.R. 20 Pat. 855; 200 I.C. 546.

20. *Lal Singh v. Guru Granth Sahib*, 1951 Pepsu 101 at 103; *Mst. Ulfat v. Zubair Khatoon*, 195 All. 961 but see *Firm Malik Des Raj Faqir Chand v. Firm Parelal Aya Ram*,

1946 Lah. 65; 223 I.C. 579 (F.B.).
21. *Nagubai Ammal v. Shama Rao*, 1956 S.C.R. 451; 1956 S.C.A. 959; 1956 S.C.C. 321; 1956 S.C.J. 60; I.L.R. 1956 Mys 152; 1956 Andh. L.T. 1029; A.I.R., 1956 S.C. 593, 600.

22. *Phipson*, Ev. 11th Ed. 306; *Best*, Ev. 4th ed. 529, 530; *Taylor*, Ev. 1st ed. 854-861; N.P., Ev. 62.

bind the party unless it amounts to and operates as an estoppel²³. Where each party makes admissions detrimental to himself, the mutual admissions cancel each other with the result that the question for consideration may have to be decided on the material on record irrespective of such alleged admissions.²⁴

An admission cannot confer a title on a person but can only shift the burden on to the party making the admission to prove a want of title in persons in whose favour the admission is made.²⁵

Oral admissions as to the contents of a document, namely, stage carriage permit, are not relevant unless the party proposing to prove them show that he is entitled to give secondary evidence of the contents thereof under Section 92 *post*.¹

The court cannot ignore the provisions of this section and assume that what ever was written in the form of admissions by the respondent wife was conclusive proof of the happenings mentioned therein between wife and husband.²

As to admissions made "without prejudice" and admissions obtained under compulsion, *v. ante*, Sec. 23.

4. Burden of proving the contrary rests on person making the admission. An admission of a fact in a deed amounts to an admission both of the fact and of the validity of the act, and shifts the burden of proving the contrary to the party which made that admission. It is true, that the value of an admission depends upon the circumstances in which it is made. But, as held in *Narayan Bhagwant Rao v. Gopal*,³ an admission is the best evidence that an opposite party can rely upon, and though not conclusive is decisive of the matter, unless successfully withdrawn or proved erroneous. But the value of an admission depends upon the circumstances in which it is made. Where the admission is made in a registered deed, formally executed by the party with an endorsement showing that the executant was fully aware of the contents of the deed executed with due deliberation and fully understanding it, the value of the admission is considerable, unless it is explained satisfactorily.⁴

The basic rule of law is that the burden rests upon him who makes an admission to show that the admission was erroneous not merely by an assertion on oath but by such evidence as he could have led reasonably and properly.⁵

23. See *Dharam Singh v. Jugal Kishore*, I.L.R. (1953) 1 A. 225; A.I.R. 1953 S.C. 111; 1952 A.I.L.J. 824; 1953 A.W.N. 870; C.L.J. 206; *Nagubai v. Shama Rao*, (1956) S.C.R. 451; A.I.R. 1956 S.C. 593; *Kishori Lal v. Chalti Bai*, 1959 S.C.J. 560; A.I.R. 1959 S.C. 504; See also 1973 P.L.J. 214.

24. *Kedar Nath v. Prabod Rao*, 1960 1 S.C.R. 861; A.I.R. 1960 S.C. 213; 1960 B.L.J.R. 260.

25. *Abul A. Kader v. Secretary of State*, 1951 Nag. 327, 336; I.L.R. 1950 Nag. 633.

1. *Shantilal Shiv Kumar v. T.A. Tribunal, Rajasthan*, I.L.R. (1965) 16

Raj. 682; 1967 R.J. 138; A.I.R. 1967 Raj. 138, 141.

2. *Dr. Narayn Chandra v. My. Satcha*, I.L.R. 1960 Bom. 569; 1969 Mah L.J. 798; A.I.R. 1970 Bom. 312, 319 a case under sections 13 (1) (iii) and 10 of the Hindu Marriage Act, 1955.

3. (1960) 1 S.C.R. 775; (1960) 2 S.C. 113; 1960 S.C.J. 223; A.I.R. 1960 S.C. 100.

4. *Soorathasinga v. Kanakasinga, I.* L.R. 43 M. 867; A.I.R. 1920 M. 648.

5. *Union of India v. Maqsood Ahmed*, I.L.R. 1963 B. 158; A.I.R. 1963 B. 310; 64 Rom.L.R. 683.

If an admission relied upon by the plaintiff is in a document alleged to be fraudulent and it could not be explained by the maker of the document in consequence of the great delay in filing the suit during which the maker of the admission died, the question of shifting the burden becomes immaterial in an appellate court where the whole evidence has been led before the trial court.⁶

It would be incorrect to say that value should not be attached to admission made against a person to his own interests because it was made with a view to avoid prosecution.⁷ For the effect of admission made collusively, parties being jointly interested see the undernoted case.⁸

5. Admissions in pleadings. Under Order XII, Rule 6,⁹ any party may, at any stage of the suit, move the Court for judgment upon admissions of a fact made in the pleadings or otherwise. Admissions in pleadings are either actual or constructive. Any actual admission consists of facts expressly admitted either in pleadings or in answer to interrogatories.¹⁰ Constructive admissions are those which are inferred or implied from pleadings in consequence of the form of pleading adopted.¹¹ They usually arise where a defendant has not specifically dealt with some allegation of fact made in the plaint of which he does not admit the truth¹² or denies an allegation of fact evasively.¹³ Under Order VIII, Rule 5, C. P. C.: "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability."

The Calcutta and Lahore High Courts have held that this Rule is limited in its application to cases where there is in fact a pleading of the defendant before the Court, and that where the defendant does not file a written statement, the Court cannot except in suits on negotiable instruments governed by the provisions of Order XXXVII, Rule 2, dispense with evidence either on the principle of admission by non-traverse under Order VIII, Rule 5, or on the ground that a verified plaint is itself legal evidence.¹⁴ But the Bombay High Court has dissented from this view. According to it, every allegation of fact in the plaint must be taken as admitted unless denied or stated to be not admitted in the pleading of the defendant. Hence if there is no pleading of the defendant, there can be no denial or non-admission on his part and he is bound by all the allegations in the plaint.¹⁵

6. *Covinda v. Chimabai*, 13 Law Rep-681; A.I.R. 1968 Mys. 309 following *Kishori Lal v. Chalti Bai*, 1959 (Sup.) 1 S.C.R. 693; 1959 S.C.J. 560; A.I.R. 1959 S.C. 504.

7. *Veerbasavaradhya v. Devotees of Lingadagudi Mutt*, A.I.R. 1973 Mysore 280.

8. *Lalji Padhom v. Rishi Patra* (1972) 38 Cut.L.T. 110.

9. Code of Civil Procedure, Act V of 1908.

10. Order XI, Rule 22.

11. Order VIII, Rules 3, 4 and 5.

12. Order VIII, Rule 3.

13. Order VIII, Rule 4.

14. *J. B. Ross & Co. v. C. R. Scriven*, 1917 Cal. 269 (2), 1 L.R. 43 Cal. 1001; 34 I.C. 285; *Narindar Singh v. C.M. King*, 1928 Lah. 769.

15. *Shreeam v. Shreeam*, 1986 Bom. 285, 286; 1 L.R. 60 Bom. 788; 164 I.C. 189.

The admission in the plaint of a suit, permitted to be withdrawn with liberty to sue afresh, is binding in the subsequent suit unless rebutted.¹⁶

Admissions on which a judgment may be given may be made otherwise than in pleadings, as on a notice under Order XII, Rule 1 of the Code. Again under Order X, Rule 1, C. P. C., the Court has, at the first hearing of the suit, to ascertain from each party, or his pleader, whether he admits or denies such allegations of fact as are made in the plaint or written statement, if any, of the opposite party, and record such admissions and denials under Rule 2 of the same Order, the Court may examine any party. The present section applies to admission made on a previous occasion and produced as admission in a case and not to admission of fact made in a suit which ought to be treated as conclusive for the purposes of the suit.¹⁷ Where it is shown that an admission was made by mistake, the party may be allowed to amend his pleadings under Order VI, Rule 17. The effect of admissions by pleadings is that facts admitted need not be proved unless the Court in its discretion requires them to be proved, **otherwise than by such admissions.**¹⁸

The rule with reference to a signed pleading is stated by Taylor in para. 727 in his book on Evidence. In para. 821, there is no doubt a passage to this effect:

"With respect to admissions by pleadings the law at present seems to be that statements which are contained in any pleading, though binding on the party making them for all the purposes of the cause, ought not to be regarded in any subsequent action as admissions."

This statement must be understood in the light of the context and the subject-matter with which Taylor was dealing in his book. Taylor was there dealing with admissions which are conclusive and it was with reference to them that the said proposition was enunciated. Therefore, admissions in that passage mean conclusive admissions. The reference to the cases on which the proposition is based makes this clear.

So far as the Indian law is concerned, there can be no doubt that under the provisions of this Act an admission contained in a plaint or written statement, or in an affidavit or in a sworn deposition given by a party in a prior litigation would be regarded as an admission in a subsequent action, though it is capable of rebuttal.¹⁹ Admissions in applications for amendment of pleadings are relevant under section 11 and would constitute good evidence against the party making them, even though they may not operate as estoppels.²⁰ The admission would not be conclusive in the subsequent suit.

16. *Mohammed Seraj v. Adibat Rahiman*, 72 C.W.N. 867; A.I.R. 1968 Cal. 550, 553.

17. *Abdul Aziz v. Mst. Mariyam Bibi* 1926 All. 710; 97 I.C. 176; 25 A.L.J. 48.

18. S. 58, post.

19. *Sarvabhatta Thottupolli Chendikamba v. Kanala Indrakant Viswanatha-*

maya 1939 Mad. 440, 449; (1939) 1 M.L.J. 227; 49 L.W. 273; *Deb Prosanna v. Hari Kison*, 1937 Cal. 131; 131 C. 327; 41 C.W.N. 1089; see also *Lal Singh v. Gnu Granth Sahib*, 1951 Pepsu 101; (Mst.) *Ulfat v. Zubaida Khatoon*, 1955 All. 361. *Jwari Singh v. Prem Singh*, A.I.R. 1972 Delhi 221.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground, and to make an admission, but that admission is not binding in any other suit, and certainly not for all time²¹ The same rule applies to admissions made in summary proceedings.²² It is permissible to a tribunal to accept part and reject the rest of any witness's testimony but an admission in pleading cannot be so dissected and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all.²³

21. *Ramabai Shrinwas v. Government of Bombay*, 1941 Bom. 144, 145; 1941 C. 431; 43 Bom L.R. 232; see also *Ms. Dal v. Lachman Singh*, 1936 Lah. 256; 225 I. C. 329.

22. *Ramrup Rai v. Firm Mahadeo Lal*, 1940 Pat. 653; I.L.R. 19 Pat. 494;

191 I.C. 542; but see *Gordhan Das v. Husna*, 1927 All. 659, 108 I.C. 34.

23. *Motabbey Mulla v. Eshabbey v. Mulji Husaina*, I.L.R. 39 Bom. 399; 29 I.C. 223.

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